Those who've come across the seas

Detention of unauthorised arrivals

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... For those who've come across the seas

We've boundless plains to share ...

[Advance Australia Fair]

Humans Rights and
Equal Opportunity Commission

11 May 1998

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I present *Those who've come across the seas*, the report of the Commission's inquiry into the detention of unauthorised arrivals in Australia.

Yours sincerely

Chris Sidoti
Human Rights Commissioner

Human Rights and Equal Opportunity Commission
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Abbreviations

ACS	Australasian Correctional Services Pty Ltd
AFP	Australian Federal Police
APS	Australian Protective Service
Authority	Migration Agents Registration Authority
Body of Principles	*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* 1988
CEDAW	*Convention on the Elimination of All Forms of Discrimination Against Women* 1979
Commission	Human Rights and Equal Opportunity Commission
Complainant numbering	PH - Port Hedland; V - Villawood; P - Perth; M - Maribyrnong
Council	Refugee Council of Australia
CROC	*Convention on the Rights of the Child* 1989
Department	Department of Immigration and Multicultural Affairs
DIMA	Department of Immigration and Multicultural Affairs
ExComm	Executive Committee of the High Commissioner [for Refugees] Programme
ExComm Conclusion 44	Conclusion on 'Detention of Refugees and Asylum Seekers' 1986
General Comment	General Comment by the UN Human Rights Committee
HREOC Act	*Human Rights and Equal Opportunity Commission Act 1986* (Cth)
ICCPR	*International Covenant on Civil and Political Rights* 1966
ICESCR	*International Covenant on Economic, Social and Cultural Rights* 1966
IDC	Immigration Detention Centre
Migration Act	*Migration Act 1958* (Cth)
Migration Regulations	*Migration Regulations 1994* (Cth)
MSI	Migration Series Instruction
Protocol	*Protocol Relating to the Status of Refugees* 1967
RACS	Refugee Advice and Casework Service (Victoria)
Refugee Convention	*Convention Relating to the Status of Refugees* 1951
Refugee Protocol	*Protocol Relating to the Status of Refugees* 1967
Religion Declaration	*Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* 1981
Sex Discrimination Act	*Sex Discrimination Act 1984* (Cth)
Standard Minimum Rules	*UN Standard Minimum Rules for the Treatment of Prisoners* 1957
STARRTS	Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (NSW)
TIS	Translating and Interpreting Service
Torture Convention	*Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* 1984
UN Doc.	United Nations Document (followed by a serial number)
UNHCR	United Nations High Commissioner for Refugees
UNHCR Guidelines	*Guidelines on Detention of Asylum Seekers* 1985

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Executive summary

Introduction

This report addresses the human rights dimensions of two issues. The first is Australia's policy of holding in detention most people who arrive without a visa pending a determination of their refugee status and admission to or removal from Australia. The second is the conditions, services and treatment for detainees at three of the four immigration detention centres, Port Hedland, Villawood and Perth, with a focus on Port Hedland where the majority of unauthorised arrivals, particularly boat arrivals, are held.

Mandatory detention

The policy of mandatory detention of most unauthorised arrivals breaches international human rights standards which permit detention *only* where necessary and which require that the individual be able to challenge the lawfulness of his or her detention in the courts. Children and other vulnerable people should be detained *only* in exceptional circumstances (Recommendations 3.1-4, 16.2). These standards are incorporated into Australian law.

Prolonged detention

The policy of mandatory detention leads to prolonged detention in many cases. Many of the conditions of detention described in this report would be acceptable over a short term. They become unacceptable, however, when detention is prolonged. In those circumstances they violate Australia's human rights commitments.

Education and vocational training, welfare services, recreation facilities, provision for religious and cultural observance and access to specialist medical services would not be required or would not be required at a high standard during short-term detention. Human rights law, however, requires that, when detention extends for several weeks or months as at present and for several years as still occurs too frequently, an appropriate standard of services be provided.

Assessment of overall conditions and services

The conditions of detention are inadequate and in violation of human rights when people, especially children and other vulnerable people are detained for prolonged periods. Australia is obliged to promote the well-being of children. Detention is permissible only when it is necessary.

Insufficient resources are provided for education services in the detention centres (Recommendations 11.1-8). In general there is inadequate recognition of the common experience of detainees of traumatic events and even torture (Recommendations 10.2, 10.10-16).

Access to legal assistance and advice is critical to the individual's assertion of his or her human rights including the right to apply for release from detention. Australia effectively denies the right of access to and protection of the law by failing to inform detainees of their rights (Recommendation 14.1; see also Recommendations 14.2-7).

Security measures within the detention centres have sometimes exceeded what is necessary to prevent escapes and to maintain order. Improved communication and reduced periods of detention will go some way to reducing the frustrations of detainees (Recommendations 6.1-17, 8.1, 9.4-5, 15.1-3).

The conditions, services and treatment of detainees vary markedly among the centres. Significantly enhanced external monitoring of the detention centres is needed to ensure compliance with human rights commitments (Recommendations 15.4-5).

Conditions and services at Port Hedland

Most boat arrivals are held at the Port Hedland detention centre which is remote and difficult to access. Conditions at Port Hedland are adequate on the whole during periods when the detainee population is within capacity (Recommendations 5.12-15, 10.6). However, the conditions have violated human rights standards when numbers at the centre have been high.

The segregated detention of new arrivals at Port Hedland sometimes exceeds what human rights law considers justified both in terms of its duration and in terms of its features, some of which resemble incommunicado detention (Recommendations 7.1-6).

Conditions and services at Villawood Stage One

Villawood Stage One is a medium-security facility in Sydney. It is used to accommodate people whose behaviour becomes difficult to manage, who develop a medical condition requiring observation or who are awaiting removal from Australia. Relatively few boat arrivals are detained at Villawood.

Although Stage One is designed for short-term accommodation, people have been held there in excess of seven months. Dormitory accommodation, restrictions on movement, very limited recreational facilities and education opportunities and overcrowding make Stage One unsuitable for more than short-term detention (Recommendations 5.1-6). In these circumstances detention in Villawood Stage One violates human rights.

Conditions and services at Villawood Stage Two

People are detained at Villawood for periods ranging from 24 hours to more than four years. Accommodation in Stage Two is in small flats and the buildings are surrounded by large areas of open space. Recreation, education and medical services and facilities should be improved (Recommendations 10.1, 10.7, 11.1, 12.1, 12.4).

Conditions and services at Perth

The Perth immigration detention centre is a medium-security facility located at Perth Airport. It is designed, like a police lock-up, for overnight and other very short-term detention pending deportation. In August 1997, however, one-quarter of the detainees had been held there in excess of six months. The dormitory accommodation and consequent loss of privacy, surveillance cameras throughout, inadequate natural lighting and ventilation, the absence of welfare officers and on-site interpreters, the very limited recreational opportunities and absence of external recreation facilities (only a small open-air exercise yard enclosed by a 20 foot brick wall is available), restrictions on movement, and very limited educational services make detention at Perth for longer than seven days inhuman and degrading and a serious violation of human rights (Recommendations 5.7-11, 12.3).

Recommendations

Recommendations on the use of detention

R3.1 In accordance with international human rights law the right to liberty should be recognised as a fundamental human right. No-one should be subjected to arbitrary detention. The detention of asylum seekers should be a last resort for use only on exceptional grounds. Alternatives to detention, such as release subject to residency and reporting obligations or guarantor requirements, must be applied first unless there is convincing evidence that alternatives would not be effective or would be inappropriate having regard to the individual circumstances of the particular person. A detailed model for conditional release is set out in Chapter 16.

R3.2 The grounds on which asylum seekers may be detained should be clearly prescribed in the Migration Act and be in conformity with international human rights law. Where detention of asylum seekers is necessary it must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the following legitimate aims

- to verify identity
- to determine the elements on which the claim to refugee status or asylum is based
- to deal with refugees or asylum seekers who have destroyed their travel and/or identification documents to mislead the authorities of the state in which they intend to claim asylum and
- to protect national security or public order.

The detention of asylum seekers for any other purpose is contrary to the principles of international protection and should not be permitted under Australian law.

R3.3 Detention is especially undesirable for vulnerable people such as single women, children, unaccompanied minors and those with special medical or psychological needs. In relation to children article 37(b) of CROC states that the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Children and other vulnerable people should be detained, even as permitted by R3.2, only in exceptional circumstances. For children, the best interests of the individual child should be the paramount consideration.

R3.4 Detention should be subject to effective independent review. Review bodies should be empowered to take into consideration the individual circumstances of the non-citizen including the reasonableness and appropriateness of detaining him or her. Review bodies should be empowered to order a person's release from detention. The lawfulness of detention should be subject to judicial review. Migration Act sections 183, 196(3) and 72(3) so far as they provide that the Minister's discretion is personal and non-compellable should be repealed.

Recommendations on the physical conditions at Villawood immigration detention centre

R5.1 The Department should cease using Stage One at Villawood for the long-term detention of unauthorised arrivals.

R5.2 Women and children should not be held in Stage One for any period of time.

R5.3 Stage One should be used only for the short term detention of men awaiting transfer to either Stage Two or an immigration detention centre other than Perth. These detainees should be transferred as soon as possible and in any event before the expiry of seven days' detention.

R5.4 The decision to detain a person in Stage One should be reviewed every 48 hours.

R5.5 The number of adult detainees held in Stage One should be reduced to no more than 25 to avoid overcrowding.

R5.6 The Department should fund the refurbishment of Stage One and

* afford detainees access to sleeping quarters at all times, as recommended by the Human Rights Commission in 1983
* provide sufficient chairs to allow all detainees a place to sit in the recreational areas
* open the grassed areas to detainees from 6.00am to 9.00pm each day
* install adequate shade provision in outside recreational areas so that they can be used in the summer months
* make provisions for greater privacy for detainees sleeping in dormitories, perhaps including the construction of private separate rooms to sleep no more than four detainees.

Recommendations on the physical conditions at Perth immigration detention centre

R5.7 The Perth Immigration Detention Centre should be used only for the short-term detention of people awaiting transfer to an immigration detention centre other than Stage One at Villawood. The Department should cease using this centre for the long-term detention of unauthorised arrivals. Adult detainees should not be held in the Perth centre for more than seven days.

R5.8 The decision to detain a person in the Perth centre should be reviewed every 48 hours.

R5.9 As at present, children and families should not be detained in the Perth Immigration Detention Centre.

R5.10 Female detainees should not be held at the Perth Immigration Detention Centre for any period of time due to the gender imbalance in detainee numbers and the nature of the conditions for female detainees.

R5.11 The Department should refurbish the Perth Immigration Detention Centre and

* provide sufficient chairs and tables to allow all detainees a place to sit in the recreation areas
* install adequate shade provision in open-air recreational areas so that they can be used in the summer months
* examine the availability of outdoor recreational facilities, such as park land, near the Perth centre and make arrangements for the regular use of these areas by detainees
* make provisions for greater privacy for detainees sleeping in dormitories, perhaps including the construction of separate rooms to sleep no more than four detainees.

Recommendations on the physical conditions at Port Hedland immigration detention centre

R5.12 All the gates between the main compound and the administration area should generally be left open, allowing detainees to move freely around centre.

R5.13 There should be an independent review, perhaps conducted by the Australian Federal Police, into whether the system of internal fencing is still required at the centre. The review should give consideration to, firstly, the security objectives achieved by the fences and, secondly, whether the restrictions placed on detainees' freedom of movement are justified by these security objectives.

R5.14 Detainees should be provided with access to the beach at least once a week. A pilot program should be begun to allow long-term detainees and families to have unsupervised access to the beach on a regular basis.

R5.15 Increased shade should be provided in the outside areas, creating more spaces that detainees can use during the day.

Recommendations on security measures

R6.1 As part of its duty of care to detainees in immigration detention the Department should ensure that security practices at all centres do not conflict with the guidelines for security practices and procedures set out in the Station Instructions.

R6.2 The Department should treat seriously all allegations that a detainee has been assaulted. When the allegation involves an alleged assault on a child detainee an independent investigation should be initiated immediately. At a minimum this investigation should include obtaining a statement of the event from the child, identifying the custodial officers involved, identifying and interviewing detainee and custodial officer witnesses and obtaining a full medical assessment of the child and photographic documentation of the injury.

R6.3 The Department and the detention service provider should implement appropriate measures to improve the education and training of all custodial staff deployed, especially staff on temporary transfer from other correctional facilities.

R6.4 All local procedures on room searches should be amended to prohibit searches between the hours of 6.00pm and 9.00am except in a situation of emergency. The Department in conjunction with the detention service provider should review the reason for and the manner in which room searches are conducted, so that they are appropriate to administrative detention.

R6.5 The local procedures of the detention service provider should include clear guidelines on the nature and degree of disruptive behaviour that warrants the use of chemical restraint, handcuffing and transfer to prison.

R6.6 The local procedures of the detention service provider should be amended to state explicitly that under no circumstances are detainees to be shackled.

R6.7 As part of its duty of care to detainees in immigration detention the Department should ensure that the use of observation rooms at Port Hedland does not conflict with the guidelines for the use of observation rooms set out in the local procedures of the detention service provider.

R6.8 Migration Regulation 5.35 relating to the force feeding of a detainee should be repealed.

R6.9 The Department and the detention service provider should review current procedures and practices for managing hunger strikes. The Migration Series Instructions should include provisions

for the supervision and treatment of hunger strikers in detention that draw upon appropriate medical and psychological expertise. They should be implemented in local procedures. They should include a section on the treatment of children directly or indirectly affected by hunger strikes. They should also include strategies for preventing hunger strikes and, in the event that they do take place, strategies for resolving them at an early stage.

R6.10 The custodial officers' training should include a component on the management of hunger strikes.

R6.11 The Department should repeal the Villawood policy of transferring all people who are unsuccessful at the Refugee Review Tribunal to Stage One. Decisions to transfer detainees to Stage One should be made on a case by case basis and consider whether a particular detainee is likely to escape and the effects Stage One may have on his or her welfare and mental health.

R6.12 The Department should amend Migration Series Instruction 157 to provide that detainees can only be transferred to a State prison or police lockup if they are either charged with or convicted of a criminal offence that would result in them serving a custodial sentence.

R6.13 If Migration Series Instruction 157 is not amended along these lines, the Department should develop clear guidelines on the degree and nature of disruptive behaviour that would warrant a transfer to a State prison or police lockup. This should be incorporated into Migration Series Instruction 157.

R6.14 The Department in conjunction with the detention service provider should develop strategies and practices for the management of difficult behaviours within immigration detention centres. Expert advice should be sought in the development of this strategy.

R6.15 The detention service provider should make greater use of professional counsellors and social workers to help address problems experienced by detainees and difficult behaviour.

R6.16 Custodial officers' training should include a component on managing difficult behaviours, conflict resolution skills and managing people who are distressed.

R6.17 The Department should not deport people who are witnesses to alleged criminal assaults until police investigations and, where relevant, prosecutions have been completed.

Recommendations on segregation within detention

R7.1 The Department should develop a formal policy for inclusion in the Migration Series Instructions on the segregation of newly

arrived asylum seekers covering limitations on the maximum time detainees can be segregated, the purpose of segregation and the conditions of segregation. The Station Instructions should prohibit explicitly conditions that are features incommunicado detention. They should state specifically the right of detainees to make telephone contact with members of the Australian community including lawyers and require that any officer should facilitate such contact where it is requested.

R7.2 Detainees should not be held in separate detention for more than a period of 21 days.

R7.3 Detainees should not be locked inside their rooms or the accommodation blocks for any period during the initial segregation. Arrangements should be made for them to access the recreational facilities in the main compound.

R7.4 The Department should develop an effective method for auditing the local procedures and practices of the detention service provider to identify any inconsistencies between departmental and local policy, and between departmental policy and local practice on the segregation of detainees for the purpose of undertaking initial health, identity and risk assessments.

R7.5 In the initial induction session the reason for, and the conditions of, the initial segregation should be explained clearly to detainees. Detainees should be told how long the segregation will last. This session should also outline the method of surveillance that will be used and the reason for it.

R7.6 During the period of initial segregation, an independent person should visit the centre on the second day and once every 48 hours after this. If the independent person does not speak the same language as the segregated detainees, an appropriate interpreter should accompany him or her on the visit. The role of this person should be clearly explained to detainees in the induction session. Detainees must have unrestricted access to this person and be able to speak to him or her in private.

Recommendation on the provision of information

R8.1 Each centre should provide a comprehensive information handbook to detainees upon admission. This handbook should advise detainees of all the services available to them, the centre rules and their rights and entitlements while in detention. Each handbook should be kept up to date and translated into the main community languages spoken by detainees in the centre.

Recommendations on interpretation and translation services

R9.1 Information handbooks at each of the detention centres should

include a description of the Translating and Interpreting Service and advice about its availability including the circumstances in which and the means by which the service can be provided.

R9.2 Detainees should be told explicitly by the custodial officers or departmental officers that they will be provided with translation assistance where necessary to meet any requirement to put requests in writing.

R9.3 The detention service provider (currently Australasian Correctional Services) should ensure that at the Port Hedland centre on-site interpreters are available seven days a week for at least 16 hours a day. At the other centres the Department and the detention service provider should examine the feasibility of employing on-site interpreters. If this is not possible, due to the diversity of the languages spoken by detainees, the Department and the detention service provider should establish a list of TIS interpreters covering the main language groups in each centre. Ideally, these interpreters will live or work near the centre. These interpreters should be on call and able to attend the centre at short notice.

R9.4 The detention service provider's local instructions should require officers attending a dispute involving a detainee who cannot speak or understand English to obtain the assistance of an interpreter.

R9.5 The Migration Series Instructions should require all formal written communications to a detainee in relation to his or her immigration status to be translated into the first language of the detainee. This issue appears to be addressed by Immigration Detention Standard 2.4 which states that where a detainee has a non-English speaking background, written information should be provided in a language the detainee can understand.

Recommendations on medical services

R10.1 The Department should adopt a standard for the provision of medical services in all immigration detention centres for inclusion in the Migration Series Instructions. The local procedures of the detention service provider should adopt and implement the standard. It is noted that the Immigration Detention Standards address health care needs.

R10.2 The medical service standard adopted by the Department should provide that all immigration detention centres employ on-site medical officers, at least one of whom should have mental health qualifications.

R10.3 Information handbooks in major community languages provided to detainees and induction sessions should clearly outline

the medical services available to them and the standard of service they can expect. Information should also be provided about how to access medical services outside the hours on-site staff are in attendance.

R10.4 On-site medical staff at immigration detention centres should be required by local procedures to consider arranging a second or independent medical opinion where there is a likelihood that the denial of such an opinion would in itself create undue and sustained mental distress.

R10.5 When a detainee tells a medical officer that he or she has been assaulted by a custodial officer or another detainee a photograph should be taken of the injury and detailed records taken on the nature of the injury sustained, when and how it occurred and the nature of the treatment provided. Medical examination and, if necessary, care should be provided immediately after the injury is brought to the attention of custodial or departmental staff.

R10.6 At the Port Hedland Immigration Detention Centre internal fencing between the main compound and the administration area should be removed or the gate kept open so that this physical restriction to access to medical advice is removed. Alternatively the medical office should be sited within the main compound.

R10.7 At the Villawood Immigration Detention Centre a clinic should be run by a female doctor at least weekly.

R10.8 On-site medical staff should receive training in cultural issues relating to the provision of health care to the major ethnic and cultural groups in the detention centre.

R10.9 Where there is a large group of detainees from a particular ethnic and cultural background, the detention service provider should look at employing a medical officer from this background who speaks the first language of this group.

R10.10 The initial health screening of detainees should include a psychiatric assessment.

R10.11 Detainees identified as a suicide risk or a victim of torture or trauma should have access to appropriate specialist care.

R10.12 Protocols should be developed between the Department and State health care agencies to allow custodial and departmental staff to obtain urgent psychiatric assessment and care for immigration detainees. For example, in NSW this may include developing a protocol with the NSW Department of Health and a Community Mental Health Team. The Commonwealth will need to ensure adequate funding to the State health agencies to implement this recommendation.

R10.13 Detainees who present with depression, have attempted self-harm or manifest psychiatric disturbances in aggressive

behaviour that is considered a risk to themselves or others should not be transferred to State prisons or police lock-ups before they have had a psychiatric assessment.

R10.14 Custodial and departmental officers at the immigration detention centres should be provided with training in how to recognise and manage mentally disturbed behaviour and obtain appropriate medical and specialist care.

R10.15 The Department should seek legal advice on the lawfulness of chemically restraining detainees.

R10.16 Providing that there is a legal basis for this practice, the Department should only chemically restrain a detainee in an emergency situation where it is required to save the person's life or to prevent him or her from causing serious harm to him or herself or others. Following the use of this form of emergency psychiatric treatment, the detainee should be referred for a formal psychiatric assessment by a psychiatrist to determine whether the detainee can be cared for appropriately in an immigration detention centre and to develop a plan for the management of any further instances of disturbed behaviour.

Recommendations on education and training

R11.1 The Department should develop a formal standard on the provision of education in immigration detention centres for inclusion in the Migration Series Instructions, Immigration Detention Standards and the local procedures of the detention service provider. Any contractual arrangement with a service provider responsible for the provision of education should require that the standard be met and provide adequate resourcing.

R11.2 Education services in immigration detention centres should be better resourced so that staff to student ratios are at least comparable to English as a Second Language or special needs classes.

R11.3 The elementary education provided at immigration detention centres, for children detained for more than four weeks, should include lessons in children's first language where possible and classes of cultural relevance to children. Elementary education should be compulsory for children.

R11.4 The Department, State government education agencies and local schools should develop a protocol for access by children in detention to classes at local schools to mitigate the effects of institutionalisation. The Department could conduct a pilot scheme to refine the protocol between the State and federal government agencies and develop criteria for deciding in what circumstances children should be able to attend local schools.

R11.5 If it is not possible for a child to enrol at the local school, a protocol should be developed to allow children in this situation to participate in a limited range of classes, such as music and sport.

R11.6 Where it is impractical or for other reasons not possible to develop a protocol for the attendance of detainee children at local schools, the standard of elementary education should be equivalent to that offered children who attend English as a Second Language or special needs classes.

R11.7 Some form of vocational training appropriate to the Australian labour market should be made available to longer term detainees, paying attention to the needs and interests of both men and women. The Department should liaise with the State government technical and further education agencies to develop a protocol for the delivery of classes either on site or through detainees attending educational institutions.

R11.8 In the absence of formal vocational skills training, the educational resources at immigration detention centres should be upgraded to include a wider range of recreational and instructional texts.

Recommendations on recreation

R12.1 The Department should develop guidelines in the Migration Series Instructions, Immigration Detention Standards and the detention service provider's local procedures for the provision of a guaranteed level of recreation activities with specific reference to the provision of opportunities to participate in excursions. The Immigration Detention Standard 4.4 goes part of the way towards addressing this recommendation. It provides that all detainees shall have access to education, recreation and leisure programs and facilities which provide them with an opportunity to utilise their time in detention in a constructive and beneficial manner. However, it does not supply details of the types of programs that should be provided or how frequently detainees should have access to them.

R12.2 The level, quality and range of recreation activities and facilities should not be determined primarily by the staff to detainee ratio. The funding of centres should be sufficient to ensure staff to detainee ratios and other resources sufficient to enable the provision, coordination and supervision of recreation activities.

R12.3 As a matter of priority, recreational facilities at the Perth centre should be significantly upgraded by the Department and the new service provider. At a minimum

* a library should be established, including recreational and educational texts
* a video player should be purchased
* appropriate shade should be constructed in the exercise yard
* a range of magazines and newspapers should be purchased on a regular basis
* excursions should be arranged on a regular basis.

R12.4 Recreational facilities at Villawood, and in Stage One in particular, should be upgraded by the Department and the new service provider. Repairs to equipment should be undertaken as a matter of priority. In Stage One a library should be established, appropriate shade constructed in the exercise yard and arrangements made for detainees in Stage One to use the recreational facilities and outdoor areas in Stage Two. Excursions should also be arranged on a regular basis.

Recommendations on religion and culture

R13.1 The Migration Series Instructions, Immigration Detention Standards and the local procedures of the detention service provider should require the provision of reasonable opportunity and facilities for detainees to practise their faith and to receive visits associated with that practice. Immigration Detention Standard 4.2 states that detainees have access to spiritual, religious and cultural activities of significance to them.

R13.2 The Migration Series Instructions, Immigration Detention Standards and the local procedures of the detention service provider should define 'reasonable facilities to practise' as including the provision of private areas, modification of menus or meal times and the provision of low risk household items such as water jugs where their use is required to observe religious or cultural belief.

R13.3 The Migration Series Instructions and the Station Instructions should require centre managements to accommodate detainees, to the extent possible and where this is desired by detainees, with others of the same or sympathetic religious or cultural background.

R13.4 ACS officers should be required to receive cross-cultural training relevant to the ethnic, cultural and religious backgrounds of the detainees held or likely to be held at the centre where they are deployed.

Recommendations on the provision of legal advice

R14.1 The Migration Act should be amended to require that, where a person is in immigration detention under the Act, the person responsible for the detention shall advise him or her of the right to have access to legal assistance and at the request of the person in immigration detention afford him or her all reasonable facilities for receiving legal advice in relation to his or her immigration detention no more than 72 hours after the request is made.

R14.2 The Migration Series Instructions and all local procedures of the detention service provider should require that, where a person is in immigration detention under the Act, the person responsible for the detention shall advise him or her of the right to have access to legal assistance and at the request of the person in immigration detention afford him or her all reasonable facilities for receiving legal advice in relation to his or her immigration detention.

R14.3 The Department's Migration Services Instructions and all local procedures of the detention service provider should specify a period of time not exceeding 72 hours within which all requests for legal advice must be responded to and who is responsible for handling requests. A departmental officer on site would be the preferable person with this responsibility.

R14.4 The Department should fund the provision of independent on-site legal assistance at the Port Hedland centre. This should include the provision of a regular legal advice bureau to give legal advice to detainees. All detainees should have access to this service.

R14.5 When legal assistance is appointed by the Department for protection visa applicants, detainees should be given written information about the level of service they should expect from their legal adviser and what they can do if they are dissatisfied with the service they receive.

R14.6 The Department should survey asylum seekers in the immigration detention centres and those recently granted entry to Australia to determine their level of satisfaction with their legal advisers.

R14.7 The Department should review tendering arrangements to ensure that the terms of the agreement, funding and performance standards will deliver legal assistance of a consistent nature and of a high quality.

Recommendations on accountability

R15.1 The Department should establish an Immigration Detention Centre Advisory Committee at each centre, consisting of representatives from custodial and departmental staff, detainees from the major ethnic and cultural backgrounds in the centre, representatives from the local community, community-based service providers and legal representatives and representatives of government and non-government sectors. The role of each Committee should be to monitor the conditions and services provided within the centre, including health care, torture and trauma counselling, education, interpreting services, access to legal advice, complaint handling, recreational and pastoral care and general welfare.

R15.2 Each immigration detention centre should develop a process for detainees to make complaints about the conditions of detention, provision of services and security issues. Detainees should be advised of this process in writing during their induction into the centre. All complaints should be treated seriously and responded to in a fair and timely manner. The complaints process must comply with the requirements of Standard Minimum Rules 35 and 36.

R15.3 A case manager should be appointed to each detainee with responsibility for overall management of the detainee's dealings with the Department, including in seeking prompt resolution of requests, inquiries and complaints.

R15.4 The Department should agree to independent monitoring of departmental and local policy and practice in relation to the detention of asylum seekers. Independent monitoring should be modelled on the official visitors programs operating in most correctional systems in Australia. Official visitors should visit immigration detention centres twice a month and receive and deal with complaints either at the local level or through making appropriate referrals and examine the conditions of detention. After each visit, official visitors should prepare a report on any complaints and inquiries and the actions taken to resolve them to the Secretary of the Department and the Minister for Immigration and Multicultural Affairs. Official visitors should have direct access to the Secretary and the Minister. All detainees must be able to make requests of and complaints to the visitors and be able to speak to them in private.

R15.5 The Commonwealth Ombudsman and the Human Rights and Equal Opportunity Commission should undertake regular inspections of and interviews at all immigration detention centres.

Recommendation on appropriate portfolios

R16.1 The refugee determination process and responsibility for immigration detention should be transferred from the immigration portfolio to that of the Attorney-General and Minister for Justice respectively.

Recommendation on an alternative model

R16.2 The Commonwealth should adopt the model alternative to detention of unauthorised arrivals outlined in Chapter 16.

Part 1

Background to the Inquiry

1 Background to the Inquiry

1.1 Introduction

This report is about the detention of people who come to Australia by boat or plane without authority.

'Boat people' are those who come to Australia by sea without authority. They may come for many reasons. Some come simply to seek better economic conditions. Some may be queue jumpers. Many seek protection from persecution. Technically they are all unlawful non-citizens. Even though the number of people involved is relatively small, Australia's treatment of them raises significant and fundamental human rights issues.

The nature of unlawful non-citizens coming to Australia changed significantly in 1997. Increasing numbers are now arriving by air, exceeding the number arriving by sea. The legal and human rights issues for all unlawful non-citizens are generally the same whether arriving by plane or boat. One significant difference is that in general it is harder for boat people to gain access to legal advice and make applications for refugee status.

Between 1 July 1996 and 31 May 1997, 9,559 protection visa applications were lodged with the Department.[1] Sixty-eight (0.7 per cent) of these applications were made by boat people.[2]

Between 1 November 1989 and 9 September 1997, 2,913 people arrived by boat and 75 children of these people were born in detention in Australia, a total of 2,988 people. Of this number, 2,289 (77 per cent) have left Australia to return home or to travel to other countries and 569 (19 per cent) have been granted approval to remain in Australia. As at 9 September, the remaining 130 people (4 per cent) were awaiting either decisions on their status or repatriation to their country of origin.[3] Almost all of these men, women and children were or are detained in one of the four specialised immigration detention centres operated by the Department of Immigration and Multicultural Affairs (the Department).

1 Department of Immigration and Multicultural Affairs, *Request for tender for the provision of immigration advice, application assistance and training in migration procedure*, RFT No. 97/02/001, page 13.

2 Department of Immigration and Multicultural Affairs, Statistics on boat person arrivals, 1990-91 to 1997-98. The Australian National Audit Office reported in 1998 that '[o]f nearly 60,000 protection visa applications recorded on [the Department's] protection visa computer system since 1989-90, fewer than 1,000 were from boat people. The vast majority of applicants enter Australian lawfully on another visa and apply for a protection visa after arrival': *The Management of Boat People* Auditor-General Report No. 32, Canberra, 1998, page 75.

Boat arrivals represent fewer than 0.01 per cent of all arrivals in Australia: Australian National Audit Office, *op cit*, page 8.

3 A full account of boat arrivals since 1989 is provided in Appendix 1 which details information from Department of Immigration and Multicultural Affairs, Fact Sheet No. 81, *Boat Arrivals since 1989*, September 1997.

Table 1.1	Immigration detention centres in Australia			
Immigration detention centre	Location	Year established	People held on 31 December 1997	Capacity
Villawood	Sydney, NSW	1976	196	272
Maribyrnong	Melbourne, VIC	1966	57	70
Perth	Perth Airport, WA	1981	22	42
Port Hedland	Port Hedland, WA	1991	68	700

Source: Data supplied by Director, Compliance and Enforcement Section, Department of Immigration and Multicultural Affairs, in a facsimile dated 13 February 1998, page 5.

Most boat people are held at the Port Hedland centre. Most people at the other immigration detention centres are not boat people. On 31 December 1997 there were 46 boat people detained at the Port Hedland centre.[4] This very large decrease from 30 June 1997, when there were 301 detainees at Port Hedland, is primarily due to the repatriation to China of 92 people from a number of boat groups on 14 July 1997 and 135 people from the boat 'Telopea'.[5] This boat arrived in Australian territory on 13 June 1997 and all occupants had been removed by 9 September. There has also been a decrease in the number of unauthorised arrivals coming to Australia by boat.

The following table shows the average length of stay in detention at each of the centres over the five years from 1992-93 to 1996-97.

Table 1.2	Average length of stay				
Immigration detention centre	1992-93 (days)	1993-94 (days)	1994-95 (days)	1995-96 (days)	1996-97 (days)
Villawood	26.4	22.7	18.31	28.73	39.94
Maribyrnong	23.8	18.5	24.55	34.57	46.07
Perth	23.6	17.4	25.22	33.97	32.33
Port Hedland	na	na	164.26	123.86	137.38

Source: Data supplied by Director, Compliance and Enforcement Section, Department of Immigration and Multicultural Affairs, in a facsimile dated 13 February 1998.

4 The remaining 22 were air arrivals.

5 The Department gives a code name to each boat arriving in Australian territory carrying people without valid travel documents. Throughout this report boat groups are referred to by these code names. Appendix 1 lists the boats which have arrived since 1989 giving details of their date and place of arrival, number and ethnicity of passengers and number removed from Australia, if any.

1.2 Complaints to the Commission

Since November 1990 the Human Rights and Equal Opportunity Commission (the Commission) has received 58 complaints against the Department from or on behalf of people in immigration detention centres, alleging infringements of human rights under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the HREOC Act). Of these complaints, 29 relate to the detention of boat people in Australia. The majority of these complaints allege that people in immigration detention centres are being treated in ways which breach their human rights.

Complaints have been lodged by people in immigration detention centres and by individuals and refugee organisations on behalf of large groups of detainees. Over the past two years the number of complaints received relating to the detention of boat people has increased significantly, no doubt due in part to visits to the centres by Commission staff. The main issues raised in these complaints are

- the length and the indefinite nature of the period of detention and the effects that this has on detainees' physical and mental health
- people not being told of their right to request access to legal advice when they are taken into detention
- delays in people receiving responses to requests for legal assistance to make applications to stay in Australia
- people being held in isolation from other parts of the immigration detention centre and the world outside
- the use of force to control disturbances and restrain people
- the general conditions of detention, such as food, medical services, education, recreation facilities, the level of security, privacy, sleeping arrangements and accommodation of detainees of different religions.

Statistical profile of complaints received

Since 1989 the Commission has received 58 complaints concerning people in immigration detention and of these 29 (50 per cent) have related to the detention of boat people. The following table shows the number of complaints received each year since then concerning people in immigration detention in general and boat people in particular.

Table 1.3	Complaints received	
Year	Immigration detention	Boat people
1989	–	–
1990	1	–
1991	–	–
1992	3	2
1993	4	–
1994	2	1
1995	3	2
1996	13	8
1997	32	16
Total	58	29

The table shows a large increase in the number of complaints received since the start of 1996. In 1996 there were four times the number of complaints received from or on behalf of boat people as in 1995. In 1997 there were twice the number of complaints from boat people as in 1996. These increases in complaints may be due to;

- Changes in departmental policy and practice. For example, the Port Hedland Immigration Detention Centre ceased advising new arrivals that they can obtain legal assistance and only provides it at the request of the detainee; the Perth Immigration Detention Centre changed from primarily short-term detention to long-term detention; there has been an increase in the use of the medium security section at the Villawood Immigration Detention Centre.
- The lack of clear and effective complaints procedures within the detention centres and difficulties in obtaining access to legal and other forms of assistance which have made it hard for detainees to resolve grievances at the local level.
- Changes in management practices during this time and a tightening of security.
- On-site legal advice being removed from the Port Hedland centre.
- Detainees now coming from countries and social/cultural groups with more awareness of their rights and how to pursue them.
- Detainees being more aware of the existence of the Commission and its role and functions, partly due to the Commission's visits in 1996 and 1997.

Fourteen of the complaints have been made by individuals or organisations outside the centres on behalf of individuals and groups in detention. Forty-four complaints have been made by people in immigration detention, 15 of them on behalf of groups of detainees. Because of complaints on behalf of large groups of detainees, the figures in Table 1.3 do not reflect the number of people covered by complaints to the Commission. For example, in 1992 the Commission

received one complaint concerning 110 Cambodians in detention at Villawood. The Commission has also received complaints on behalf of people arriving on the boats 'Teal', 'Wombat', 'Labrador', 'Grevillea', 'Lambertia' and 'Melaleuca', a total of 165 detainees. In 1997 the Commission received a complaint from a detainee at Villawood on behalf of all the detainees in the centre.

Of the 23 complaints concerning detainees at Port Hedland, 18 were made by detainees and five by individuals and organisations on behalf of people there. The complaints in the 'other' category are two concerning people in State prisons received in 1993, one concerning a person at Sydney Airport and one lodged by the Refugee Council of Australia relating to practices and conditions in a number of detention centres in Australia.

Table 1.4	Sources of complaints received
Centre	Complaints received
Villawood	22
Port Hedland	23
Perth	6
Maribyrnong	3
Other	4

All the complaints from Perth were received in 1996 or 1997. All but two of the complaints concerning the Port Hedland centre have been received since 1 January 1996. Complaints about the treatment of detainees at Port Hedland have increased by 1,000 per cent over the past two years. Prior to 1996 the Commission received one or two complaints from Villawood each year. However, in 1997 the Commission experienced a noticeable increase of complaints from the Villawood. In that year 14 complaints were received.

Individuals who have made complaints to the Commission are representative of the ethnic and national origin of the boat people who have come to Australia. The ethnic and national origins of complainants have changed over time and mirror the changes in the countries from which people depart to seek asylum in Australia. In the early 1990s the majority of boat people came from the Kompong Som region of Cambodia.

In 1991 boats started to arrive in Australia from the southern provinces of China. Since this time boats have continued to come from China. Some arrivals have been Sino-Vietnamese, others Chinese. Since the second half of 1996 boat groups have started coming to Australia from Iraq, Afghanistan, Algeria and other African countries.

The Commission has received 17 complaints from or on behalf of people who arrived by boat from the People's Republic of China. A total of five complaints have been received from asylum seekers from Iraq, all of which were lodged in 1997. Three complaints have been received about the detention of people from Cambodia, all of which were received before 1996.

Finalisation of complaints received since 1 January 1996

Forty-five complaints have been received by the Commission since 1 January 1996. Of these, 27 have been finalised and 15 are currently being investigated or finalised. Procedures for reporting to the federal Attorney-General have been initiated in three matters.

Formal investigations have been undertaken in 24 complaints. Preliminary inquires have been conducted into 13 complaints. Eight matters have been finalised without approaching the Department for information.

Complaints have been finalised because the subject matter of the complaint has been resolved or for one of the reasons provided for by section 20(2) of the HREOC Act.

Table 1.5 Finalisation of complaints

Reason	Number of complaints
The complainant considers the matter resolved and does not wish to pursue the complaint	6
The complainant, or his or her representative, has advised the Commission that he or she does not want to continue with the complaint	4
The Commission has lost contact with the complainant, generally due to deportation	3
The Commission is of the opinion that the act or practice complained of does not constitute a breach of human rights	4
The Commission is of the opinion that the subject matter of the complaint has been adequately dealt with or some other more appropriate remedy is available	5
The Commission is of the opinion that the subject matter of the complaint has been adequately dealt with, or could be more effectively dealt with by another statutory authority	3
The Commission is of the opinion that the complaint lacks substance	2

Five complaints were discontinued on the basis that the issues raised in the complaint would be addressed in this report. In six of the ten matters where the Commission was advised that the complainant did not want to pursue the matter, one reason for this decision was that the broader issues raised would be covered in this report.

1.3 Conduct of the Inquiry

The Commission decided to conduct an Inquiry into the detention of unauthorised arrivals because of

- the number of human rights issues consistently raised in complaints to the Commission by immigration detainees who arrived by boat or their advocates
- the seriousness of the alleged breaches of the human rights of men, women and children who have been deprived of their liberty and to whom the Commonwealth has a duty of care
- the Commission's concern that sections of the *Migration Act 1958* (Cth) (the Migration Act) may be in breach of Australia's human rights obligations, leading to the examination of this enactment pursuant to section 11(1)(e) of the HREOC Act
- the increase in the number of complaints received by the Commission and investigated under section 11(1)(f) of the HREOC Act
- the public interest in this issue both within Australia and internationally.

Terms of reference

The terms of reference of the Inquiry are

1. To examine provisions of the *Migration Act 1958* (Cth) relating to the detention of unauthorised arrivals, specific acts and practices of the Department and the conditions under which they are detained to determine whether they are consistent with Australia's human rights obligations under the HREOC Act.
2. To determine in relation to individual complaints whether there has been an act or practice which constitutes a breach of human rights under the HREOC Act.
3. To make recommendations to ensure that the human rights of detainees are not infringed, in particular, that they are not deprived of their liberty for unnecessarily long periods of time and that those who are held in detention are treated in a fair and humane manner which respects human rights and human dignity.

The Commission's functions

The Commission has specific legislative functions and responsibilities for the protection and promotion of human rights under the HREOC Act. Part II Divisions 2 and 3 of the Act confers functions on the Commission in relation to human rights. In particular, the Commission can

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

This report has been prepared exercising all these functions. In addition, the Commission is obliged to perform all of its functions in accordance with the principles set out in section 10A of the HREOC Act, namely with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

Complaint handling functions

Section 11(1)(f) of the HREOC Act empowers the Commission to inquire into acts or practices of the Commonwealth that may be inconsistent with or contrary to the rights set out in the human rights instruments scheduled to or declared under the Act. The Human Rights Commissioner performs these functions on behalf of the Commission (section 8(6)).

The Commission attempts to resolve these complaints through the process of conciliation. Where conciliation is not successful or not appropriate and the Commission is of the opinion that an act or practice constitutes a breach of human rights, the Commission is required to provide the parties to the complaint with an opportunity to make written or oral submissions in relation to the complaint (section 27).

If, after the inquiry, the Commission finds a breach of human rights, it must serve a notice on the person doing the act or engaging in the practice setting out the findings and the reasons for those findings. The Commission may make recommendations for preventing a repetition of the act or practice, the payment of compensation or any other action or remedy to reduce the loss or damage suffered as a result of the breach of a person's human rights (section 29(2)).

If the Commission finds a breach of human rights it must report on the matter to the Commonwealth Attorney-General (section 27). The Commission is to include in the report to the Attorney-General particulars of any recommendations made in the notice and details of any actions that the person is taking as a result of the findings and recommendations of the Commission (section 29). The Attorney-General must table the report in both Houses of Federal Parliament in accordance with section 46 of the Act.

Investigation of complaints

When the Commission receives a complaint alleging a breach of human rights under the HREOC Act, the Human Rights Commissioner decides whether to accept the complaint. If the complaint is accepted the Commissioner commences an inquiry by allocating the complaint to an Investigation/Conciliation Officer to conduct an investigation and attempt to conciliate complaints of substance.

The Investigation/Conciliation Officer then plans the investigation, identifying the information that the Commission needs and the most effective means of gathering it. Throughout the course of an investigation, the information received is analysed and the most appropriate way of handling the matter is determined. This may include obtaining further information from the parties to the complaint, declining the complaint for one of the reasons set out in section 20(2) of the Act, attempting to resolve the matter through the process of conciliation or initiating procedures to report on the matter to the Attorney-General.

The Commission's investigations into complaints from boat people in detention have included

- conducting preliminary inquiries to clarify whether the complaint raises a breach of human rights under the Act, whether the person has sought another remedy to address the concerns and/or whether there is a more appropriate remedy available
- notifying the Department of the complaint and seeking a formal response to the allegations, usually including details of the relevant legislation, policies and procedures and copies of relevant documents and records
- conducting visits to immigration detention centres to interview complainants and relevant members of staff and to inspect the conditions of detention.

Act or practice or legislation

Where the alleged breach of human rights arises from the automatic operation of legislation, rather than a discretionary act or practice by a decision-maker, the Commission cannot deal with the issue as an individual complaint. In these circumstances the Commission may examine the legislation itself to determine whether it is inconsistent with any human rights and report to the Minister on the result of the examination (section 11(1)(e)).

Chapter 2 of this report examines the sections of the Migration Act which are relevant to the detention of boat people. As detention of unauthorised arrivals is required by law in most cases, it is not an act or practice of the Commonwealth. Therefore, the issue can only be dealt with through the examination of the relevant provisions of the Migration Act, not the investigation of individual complaints. The conditions in which persons are detained, however, are acts and practices of the Commonwealth and can be the subject of complaint and inquiry (section 11(1)(f)).

Conduct of this Inquiry

The HREOC Act gives the Commission the authority to inquire into acts and practices of the Commonwealth that may be inconsistent with human rights and to examine Commonwealth legislation. This report brings together the information gathered through

- an examination of the Migration Act and associated regulations pursuant to section 11(1)(e) of the HREOC Act
- an examination of departmental procedures and practices both nationally and within individual detention centres pursuant to section 11(1)(e), (f), (g), (j) and (k) of the HREOC Act
- investigation of individual complaints pursuant to section 11(1)(f) of the HREOC Act in accordance with the procedures developed by the Commission, which can include conducting preliminary inquiries, seeking formal responses from the Department of Immigration and Multicultural Affairs to the allegations and obtaining copies of relevant documents, legislation and procedures, and obtaining further information from either party to the complaint and other witnesses
- site inspections of immigration detention centres
- a review of the literature, reports and submissions relating to this issue
- analysis and synthesis of all the information gathered in site inspections, investigation of complaints and examination of relevant legislation, policy and instructions.

Site inspections

Representatives of the Commission, including the then President, Sir Ronald Wilson, the Human Rights Commissioner, Mr Chris Sidoti, and staff assisting the Commissioner, conducted a number of visits to immigration detention centres. The visits allowed the Commission to observe the daily running of the centres, to inspect the facilities and services available to detainees and the conditions of detention and to conduct detailed interviews with departmental and Australian Protective Service (APS) staff,[6] detainees and individuals from the community.[7]

From 15 to 21 January 1996 site inspections were conducted in Western Australia at the Port Hedland Immigration Detention Centre, the temporary Curtin Detention Centre and the detention facility at Willie Creek for Indonesians found fishing in Australian waters. Site inspections were conducted at the Villawood Immigration Detention Centre in Sydney on 14 February 1996, 29 August 1996, 6 March 1997 and from 13 to 15 October 1997. On 13 March 1996 a site inspection was undertaken of the Maribyrnong Immigration Detention Centre in Melbourne.

A follow-up inspection of the Port Hedland Immigration Detention Centre was conducted from 27 May to 2 June 1997. The site inspection looked at existing facilities and those under construction and investigated changes since the Commission's previous visit. Commission officers conducted interviews with the Centre Manager, senior APS officers, welfare and medical staff and more than 25 detainees who had either made complaints to the Commission or requested to speak to officers of the Commission during the visit. Interviews were structured around a comprehensive set of questions developed by the Commission prior to the visit. Detailed notes were taken of each interview and a typed record of interview was prepared.

The Commission appreciates greatly the cooperation and assistance of the Department and APS staff throughout the course of this Inquiry.

6 Until the end of 1997 the APS was responsible for the staffing and operations of the immigration detention centres. The relationship between the Department and the APS, and details about recent changes to the arrangements, are dealt with below.

7 Earlier visits to remote immigration detention centres include a site inspection by the Secretary of the Commission of the camp located at the Darwin River in August 1990. At the time the camp had been the subject of most complaints but conditions at the other camps had also featured in representations to the Commission. In August 1991, the Acting Secretary of the Commission conducted another site inspection of the Darwin camp. In December 1991 the Acting Secretary visited the Port Hedland centre. A report on these visits was prepared for the then Minister.

Cnsultations with government

Before and during this Inquiry and in the handling of individual complaints from immigration detainees the Commission has raised its concerns with both the former Labor Government and the current Coalition Government, with the Department and with numerous parliamentary committees. A number of specific issues have been resolved. However, the Commission's principal concern that alternatives to detention be developed and implemented remains.

In March 1997 the Commission gave the Minister for Immigration and Multicultural Affairs (the Minister) the first draft of its advice on the human rights dimension of the law and policy of mandatory detention of boat people. It invited a response from the Minister. In August 1997 the Commission gave the Attorney-General, the Minister and the Department a copy of the Commission's draft full report on the detention of boat people. It invited a formal response and comment.

The Commission and the Department met in October 1997 to discuss aspects of the draft report. In November 1997 discussions between the Commission and the Department over complaints to the Commission and the conditions of detention were continuing. The Commission was hopeful of reaching a mutually acceptable resolution of many of these matters. In view of those discussions, the Commission decided to report at that stage only on the domestic and international legal framework relevant to the detention of asylum seekers. The Commission's Preliminary Report on the Detention of Boat People was submitted to the Attorney-General late in 1997 and tabled in Parliament on 1 April 1998.

The Commission and the Department again met in November 1997 to discuss the material contained in Part 2 of this report relating to the conditions of detention. On 5 January 1998 a revised draft of Part 2 was provided to the Department. The Commission again invited a formal response and comment. In January 1998 a further meeting took place between the Commission and the Department. The final draft of the full report was provided to the Department, the Minister for Immigration and Multicultural Affairs and the Attorney-General for comment in February 1998.

Major findings

The major finding of the Inquiry is that the mandatory detention for extended periods of almost all unlawful non-citizens who arrive by boat breaches Australia's human rights obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The Commission has found that human rights under these international instruments are violated by

- the conditions of detention
- detainees' restricted access to services, including legal advice and representation

- the practice and effects of long-term detention
- restricted access to judicial review of detention.

In this report the Commission recommends that the Government and the Department develop and implement alternatives to detention of unauthorised arrivals and that the Parliament amend the Migration Act accordingly. It also makes a series of specific recommendations concerning conditions in the detention centres and the need to ensure that individuals deprived of their liberty are treated in a humane manner that respects human dignity.

Structure of the report

The report is presented in six parts. Part 1 sets out the background to the Inquiry outlining the complaints received and the role of the Commission (this chapter) and examines Australian law governing the policy of mandatory detention of unauthorised arrivals and the process of refugee status determination (Chapter 2). Part 2 details relevant international human rights law (Chapter 3). Part 3 analyses the conditions under which people are detained (Chapters 4 - 7). Part 4 evaluates the quality of the services provided to detainees (Chapters 8 - 14). Part 5 describes the human costs of detention and addresses accountability measures (Chapter 15). Part 6 details an alternative to the current regime of mandatory detention (Chapter 16).

2 Unauthorised arrivals

2.1 Migration legislation

Australia's migration laws have three principal constitutional bases. The Constitution empowers the Parliament to make laws for the peace, order and good government of Australia with respect to immigration and emigration,[1] nationality and aliens [2] and external affairs.[3] As these powers have been interpreted by the High Court, they provide the foundation for legislation controlling the treatment of non-citizens by Australia involving their admission, stay, detention and removal.

Legislative control of entry into and exit from Australia is achieved through the *Migration Act 1958* (Cth), section 4 of which states

> The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

The Migration Act, together with the *Migration Regulations 1994* (Cth), contains detailed rules about the criteria that must be met by non-citizens wishing to enter or remain in Australia, whether temporarily or permanently. It also confers sweeping powers of enforcement on the Minister for Immigration and Multicultural Affairs and his Department. Non-citizens found to be in breach of the legislation are liable to be arrested, detained and removed from Australia. As has long been the case, non-citizens are treated differently depending on whether their initial arrival in Australia has or has not been sanctioned by the grant of a visa.

1992 amendments

Before 1994, the provisions dealing with unauthorised arrivals were extremely complex. Non-citizens arriving in the country without a valid visa or other authority to enter were subject initially to 'turn-around' provisions. They were detained for expedited removal and deemed not to have 'entered' Australia at all.[4] This was so even though the removal process during which they were held in detention often extended over months and even years. These detainees were afforded none of the procedural safeguards given to non-citizens who became unlawful after formal, lawful, entry into the country.[5]

1 Chapter V, Section 51(xxvii).

2 Chapter V, Section 51(xix).

3 Chapter V, Section (xxix).

4 Former Migration Act sections 88 and 89.

5 See former Migration Act sections 92 and 93.

The Migration Act was amended in May 1992 to provide that a non-citizen arriving in Australia by boat who met the definition of 'designated person'[6] was required to be kept in immigration detention until he or she either left Australia or was given a visa.[7] The phrase 'designated person' included a child born in Australia to a designated person. These changes added to the already bewildering array of terms used to describe different types of unlawful non-citizens and heightened the differential treatment of unauthorised arrivals as compared with those who had been 'immigration cleared'.[8]

They also reduced into statutory form the long-standing government policy that a border applicant would be kept in detention while any request for a visa was processed. Unlike non-citizens who had lawfully entered Australia, designated persons were not eligible for release upon payment of a surety or other bond. Although their custody was limited nominally to 273 days, this period could be extended far beyond nine months because of the Department's ability to suspend counting during any period while tribunal or court proceedings were on foot.[9]

Lawful and unlawful non-citizens

The need to simplify the language and concepts governing immigration detention in the Migration Act was apparent by the end of 1992. The *Migration Reform Act 1992* (Cth) introduced some fundamental changes, the last of which came into force on 1 September 1994. It removed the legal distinction between unauthorised arrivals and illegal entrants, replacing the complexity with a simple binomial scheme founded in a universal requirement that non-citizens entering Australia must hold a visa, whether actual or deemed. The distinction is now between 'lawful non-citizens' and 'unlawful non-citizens'. Section 13 of the Migration Act now states

6 Under section 177 'designated person' means a non-citizen who arrived in Australia by boat between 19 November 1989 and 1 September 1994, who did not present a visa and who is a person to whom the Department has given a designation.

7 Migration Act sections 176 and 178.

8 Unauthorised arrivals were referred to as 'prohibited entrants' and 'unprocessed persons': Migration Act sections 54B, 88 and 89. Persons who lost their legal status after entry were known as 'illegal entrants': section 92. For a description of the earlier laws see M Crock 'A Legal Perspective on the Evolution of Mandatory Detention' in M Crock (ed) *Protection or Punishment: The Detention of Asylum Seekers in Australia*, Federation Press, Sydney, 1993, Chapter 5; Joint Standing Committee on Migration *Asylum, Border Control and Detention*, Australian Government Publishing Service, Canberra, 1994, pages 49 and following.

9 See Migration Act section 182. For a case in which a group of detainees succeeded in a claim that they had been held unlawfully for longer than the specified 273 days, see *Tang Jia Xin (No 1)* (1993) 116 ALR 329; *Tang Jia Xin (No 2)* (1993) 116 ALR 349 (order for release); *Tang Jia Xin* (1993) 47 FCR 176 (Full Federal Court); and *Tang Jia Xin* (1994) 69 ALJR 8 (High Court). Both appeals by the Department failed. The group was successful in claiming damages for wrongful detention: see *Tang Jia Xin v Bolkus* (unreported, Federal Court, Justice Wilcox, 11 April 1996) and Minister Ruddock's answer to a question from the Member for Oxley, Ms Hanson, *Weekly Hansard,* House of Representatives, 18 November 1996, page 6943.

> A non-citizen in the migration zone who holds a visa that is in effect is a lawful non-citizen.

All persons who have no visa are now known as 'unlawful non-citizens'.[10]

2.2 Immigration detention

Detention of all unlawful non-citizens

The complexity of the detention regimes was removed by simply mandating the detention of all unlawful non-citizens. The focus instead turns on who is eligible for release from detention. Section 189 of the Migration Act states

> (1) If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.
>
> (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
> (a) is seeking to enter the migration zone; and
> (b) would, if in the migration zone, be an unlawful non-citizen; the officer must detain the person.

Section 196 of the Migration Act requires that, once detained, unlawful non-citizens must be kept in detention unless otherwise authorised.

> An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is
>
> (a) removed from Australia under section 198 or 199 [removal provisions]; or
> (b) deported under section 200 [Minister may order deportation]; or
> (c) granted a visa.

The Migration Act authorises the establishment of immigration detention centres and the making of regulations for the operation of detention centres, including the conduct and supervision of detainees and the powers of persons performing functions in connection with the supervision of detainees.[11]

10 Migration Act section 14 states that 'a non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen'. The migration zone is the area consisting of the States, the Territories and Australian resource and sea installations.

11 Migration Act section 273.

The High Court of Australia considered the detention of unauthorised arrivals in 1993 in *Lim's Case*. The plaintiffs were two groups of Cambodian boat people who had arrived in Australia in 1989 and 1990 and who were held in detention at Port Hedland. They claimed that the detention provisions in the Migration Act were beyond the legislative power of the Commonwealth.[12]

The Court was unanimous in finding that the 'aliens power', Section 51(xix) of the Constitution, permits Parliament to confer power on the executive to detain an alien in custody for the purposes of receiving, investigating and determining an application for an entry permit and, after determination, for the purposes of admitting or deporting him or her.[13]

Bridging visas introduce flexibility

A major inquiry into the detention scheme finally concluded that it was necessary to inject some flexibility into the law.[14] The need for such flexibility is borne out by the trenchant criticisms of the May 1992 provisions by the UN Human Rights Committee in 1997 in a case brought before it by one of the unsuccessful plaintiffs in *Lim's Case*.[15]

Under the present system, some unlawful non-citizens are able to qualify for release from detention while their status is being determined. Whether an individual is actually detained depends on his or her eligibility for a bridging visa. The bridging visa gives temporary lawful status to non-citizens released from detention pending consideration of their applications to remain in Australia.[16] Bridging visas remain in force until a substantive visa is granted or until 28 days after notification that such a visa has been refused. Where an appeal is lodged, the visas continue to operate until 28 days after notification of the review decision.

12 *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 110 ALR 97.

13 Id, per Chief Justice Mason at page 100; Justices Brennan, Deane and Dawson at pages 117-118; Justice Toohey at page 128; Justice Gaudron at pages 137-138; Justice McHugh at pages 143-144.

14 Joint Standing Committee on Migration *Asylum, Border Control and Detention*, Australian Government Publishing Service, Canberra, 1994.

15 See *A v Australia* 30 April 1997, UN Doc. CCPR/C/59/D/560/1993.

16 Migration Act section 73. For a discussion of the laws governing unlawful status and enforcement, see M Crock *Immigration and Refugee Law in Australia*, Federation Press, Sydney, 1998, Chapters 9 and 10.

There are five classes of bridging visas, entitlement to which varies according to a non-citizen's status prior to applying for a substantive visa. The class of bridging visa most relevant to unauthorised arrivals, including boat people, is the 'general' class, bridging visa E.[17] These are available to unlawful non-citizens who are either making acceptable arrangements to depart Australia or who have an unresolved application for a substantive visa. The range of non-citizens eligible for these visas is governed by the definition of 'eligible non-citizen' in section 72 of the Migration Act and Migration Regulation 2.20.

Non-citizens eligible for bridging visa

There are three types of 'eligible non-citizen'. The first is a person who has been formally 'immigration cleared'. Unauthorised arrivals, by definition, do not fall into this category. The second type is a person in a 'prescribed class' and the third is a person in respect of whom the Minister has made this determination.[18]

Prescribed class

Migration Regulation 2.20 lists the prescribed classes of unlawful non-citizens eligible to be released from detention on a bridging visa. The classes include

- people detained under the law as it was before 1 September 1994 [19]
- minors, provided, first, that the State or Territory child welfare authority has certified release from detention is in the child's best interests and, second, that the Minister for Immigration is satisfied
  - (a) that arrangements have been made for the child's care and welfare
  - (b) those arrangements are in the child's best interests and
  - (c) release would not prejudice the rights and interests of the child's parents or guardian[20]

17 Migration Regulations Schedule 2 clauses 050 (general) and 051 (protection visa applicant). Applicants granted a bridging visa E ordinarily have no authority to work. Permission to work requires a further application and is granted only where a person can demonstrate a compelling need to work as defined by Migration Regulation 1.08.

The other bridging visa classes are A and B for non-citizens who apply for change of status during the currency of a valid visa (Migration Regulations, Schedule 2, clauses 010 and 020); C for unlawful non-citizens who come forward of their own accord and seek to regularise their status (clause 030); and D, which can be grouped together as true bail authorities that allow the release of persons pending voluntary departure (clauses 040, 041 and 042).

18 Migration Act section 72. A person who is refused a bridging visa is barred from making a new application for a bridging visa for 30 days: section 74.

19 Migration Regulation 2.20(2) and (3).

20 Migration Regulation 2.20(5). See also Regulation 2.20(7).

- a spouse of an Australian citizen or permanent resident or eligible New Zealand citizen or a member of that person's family unit [21]
- elderly people, that is those 75 years and over [22]
- people with special needs, as determined by a medical officer appointed by the Department, based either on health or previous experience of torture or trauma; the test is whether the person can be properly cared for in a detention environment.[23]

Minister's determination

A person who does not fit one of the prescribed classes may apply to the Minister to make a determination in his or her favour. This power to make a determination is stipulated to be exercisable *only* by the Minister.[24] The Minister may make a determination that an unlawful non-citizen in detention is eligible for release on a bridging visa if

- the person has made a valid application for a protection visa (ie based on refugee status)
- the person has been in detention for more than six months since the visa application was made
- the Minister has not yet made a primary decision (that is, the conclusion of the first stage of the formal refugee determination process) in relation to the visa application and
- the Minister thinks release would be in the public interest.[25]

Comments

It should be noted that these classes are very limited in practice. For example, only two children arriving as boat people or born in detention have been released of a possible total of 581 since bridging visas were introduced on 1 September 1994. Where it is thought to be in the child's best interests to stay with his or her parents, release will be denied.

21 Migration Regulation 2.20(4).

22 Migration Regulation 2.20(8).

23 Migration Regulation 2.20(9).

24 Migration Act section 72(3).

25 Migration Act section 72(2).

The release of people on the ground that they are elderly is rare since few people of 75 or more travel to Australia by boat or otherwise without authority. Even in the case of people affected by past torture or trauma, the presumption is in favour of continued detention. Finally, cases in which a primary decision has not been made within six months of application are increasingly rare. It should be noted that the Minister has no discretion to release people, other than in the prescribed classes, where the primary decision was made (in the negative) within six months but the applicant has instituted an appeal.

Challenging detention and the Minister's discretion

One of the most controversial aspects of the regime established in May 1992 was the provision made ousting any court review of the detention of a 'designated person'. The present section 183 of the Migration Act provides that 'No court may order the release of a designated person'. This aspect of the May 1992 provisions has been subject to a constitutional challenge. In *Lim's Case*,[26] the High Court held that this provision must be read down so as to permit oversight by a court of the legality of detention. Although section 183 remains in the Migration Act, the effect of the decision in *Lim's Case* is that it is of little effect. However, under the Act the courts cannot determine that a boat person should receive a protection visa. The Act has reduced the grounds of review so that the courts are limited for the most part to simply checking that the terms of the legislation have been correctly interpreted and applied.[27]

> They can merely find that an administrative decision was taken other than according to the law, and order that it be redetermined in a lawful manner.[28]

The refusal of a bridging visa is reviewable by the Immigration Review Tribunal, but the tribunal must make a ruling on bridging visa appeals within seven days of hearing the appeal.[29] The constraints of the Migration Act and Regulations make such appeals futile where the appellant cannot meet the definition of 'eligible non-citizen'. Under section 196(3), the courts are forbidden to order the release of a person who has not made a valid application for a visa. The validity of section 196(3) has not been directly tested. However, the reasoning in *Lim's Case* suggests it too may be invalid.[30]

26 (1992) 176 CLR 1.

27 Migration Act Part 8. For a discussion of the effect of this Part, see M Crock 'Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?' (1996) Volume 18 *Sydney Law Review* page 267.

28 Australian National Audit Office *The Management of Boat People* auditor-General Report No. 32, Canberra, 1998, pages 93-94.

29 Migration Act section 367 and Migration Regulation 4.26.

30 The Australian National Audit Office tentatively came to this conclusion in its report, *op cit*, pages 29-30.

The custody of detainees under these provisions is therefore not subject to periodic or independent review of any kind. Rather, release is dependent on the exercise of the Minister's discretion.

2.3 Refugee status determination

Australia has committed itself to provide protection to those who apply for refugee status within Australia and who are recognised as refugees in accordance with the international definition in the 1951 Convention Relating to the Status of Refugees (the Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees.[31]

For the purposes of the Refugee Convention refugees are persons who are outside their country of nationality or their usual country of residence and unable or unwilling to return to or to seek the protection of that country because of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.[32] This definition has been incorporated in Australian law in section 36 of the Migration Act. Australia has a legal obligation to extend protection to people who arrive in Australia and then seek recognition as refugees if they meet this definition.[33]

Access to Australia's refugee determination processes

At international law, Australia has assumed obligations to ensure that persons within its territory who meet the definition of refugee are not sent back or refouled to a place where they face persecution for a Convention reason. In recent years a number of changes have been made to the Act that test the reach of these obligations by preventing some groups of people from making refugee claims in Australia.

First, on 15 November 1994 the Migration Act was amended so that a non-citizen covered by the 'Comprehensive Plan of Action' cannot have access to Australia's protection, except in exceptional circumstances.[34]

31 The Refugee Convention was adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened pursuant to General Assembly Resolution 429(v) of 14 December 1950. Australia ratified the Convention on 22 January 1954: *Australian Treaty Series* (1954) No. 5; *United Nations Treaty Series* Volume 189 page 137.

The Optional Protocol came into force on 4 October 1967. Australia ratified the Protocol on 13 December 1973: *Australian Treaty Series* (1973) No. 37; *United Nations Treaty Series* Volume 606 page 267.

32 Article 1A(2) as amended by the Protocol.

33 Refugee claims are made as part of an application for a clause 866 protection visa. See Migration Regulations, Schedule 2, clause 866. The procedures for determining refugee claims are described in M Crock (1998), *op cit*, Chapter 7.

34 Migration Act sections 91A-G. The Comprehensive Plan of Act is a multinational agreement under which countries in the South-East Asian region have agreed to give temporary refuge to Vietnamese asylum-seekers on the condition that, within an agreed time, Western nations would resettle those found to be refugees and others would be returned to Vietnam: see J C Hathaway 'Labeling the Boat People: The failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indo-Chinese Refugees' (1993) Volume 15 *Human Rights Quarterly* page 686.

This amendment meant that Vietnamese boat people who had come to Australia from the holding camp at Galang in Indonesia were no longer able to apply for protection visas in Australia and instead were removed to Indonesia. They had fled to Australia because of moves to empty the Galang camp and repatriate the inmates to Vietnam. One hundred and two Vietnamese people in this situation have been removed from Australia.

Second, a migration regulation which came into effect on 27 January 1995 declared China to be a safe third country for Vietnamese nationals of Chinese ethnicity (Sino-Vietnamese).[35] The people covered by these provisions had been resettled in China in the late 1970s and early 1980s under what was the largest re-settlement plan ever undertaken by the United Nations High Commissioner for Refugees. From 27 January 1995, former residents of Vietnam who resided in China before coming to Australia could no longer apply for protection visas in Australia. More than 878 Sino-Vietnamese people who arrived after October 1994 have been returned to China. Prior to these amendments many Sino-Vietnamese people were granted protection in Australia. For example, the 51 Sino-Vietnamese people who arrived in June 1994 on the 'Unicorn' were all granted refugee status. Their experience contrasts sharply with that of the 65 Sino-Vietnamese people who arrived in January 1995 on the 'Lorikeet', all of whom were deported.

Formal refugee determination process

The determination of refugee claims by people already lawfully in Australia is a two-stage process. The first stage involves assessment of the applicant's claims by an officer of the Department, in accordance with the definition in Australian and international law. Where further information or clarification is required, the officer might seek an interview with the applicant, using an interpreter where necessary. Submissions from migration agents or solicitors can also form part of the material to be assessed.

A claim for refugee protection is assessed using available and relevant information concerning the human rights situation in the applicant's home country. Applicants are given opportunities to comment on adverse information which will be taken into account when considering a claim. A delegate of the Minister for Immigration and Multicultural Affairs will then make the decision on the application for a protection visa.

In the second stage, applicants not accepted by the Minister's delegate may appeal to the Refugee Review Tribunal. This Tribunal is an independent body established under the Migration Act with the power to determine refugee claims.[36] It makes decisions on the papers and may provide an opportunity for applicants to appear before it. As part of its decision making process the Tribunal may affirm or set aside a decision made by the Department in relation to the grant of protection visas.

35 See Migration Regulation 2.12B.

36 See Migration Act Part 7.

People refused refugee protection can appeal to the Federal Court for judicial review where there is a perceived error of law. The Federal Court has the power either to uphold the refusal or to direct that the application be re-assessed. The grounds on which tribunal decisions can be challenged are limited by the terms of Part 8 of the Migration Act (see above).

Initial screening of unauthorised arrivals

For unauthorised arrivals, including boat people, an additional preliminary interview is conducted by an Immigration Taskforce when they are first placed into detention at an immigration detention centre. This process may result in effective denial of access to the formal refugee detention process.

At the preliminary interview boat people and other unauthorised arrivals are asked to identify themselves, present any identifying documents and explain how they arrived in Australia's migration zone and by what route. They are asked why they came to Australia and whether there is anything they wish to advise the authorities about their country of origin. They are *not* asked specifically whether they are applying for refugee status or whether they wish to see a lawyer.

The information provided to the authorities at this stage is crucial in determining the Department's view of whether the person is in fact seeking to engage Australia's protection obligations. If the person does not ask for legal advice, a legal adviser will not be provided and the person will not be advised of the statutory entitlement to obtain legal advice.

Although the initial screening interview is tape-recorded, the senior officer in Canberra works from a summary prepared by the interviewer. Based on this summary, the senior officer determines whether the person has *prima facie* engaged Australia's protection obligations. Of the four interview summaries compared by the Audit Office with the taped records, one was found not to include what may have been relevant information.[37] Of 113 interview summaries examined by the Audit Office, the Department assessed the interviewee was *not* engaging Australia's protection obligations in all but one case.[38]

If the Department decides that a boat person is not seeking to engage Australia's protection obligations, assistance will not be provided in lodging an application for a protection visa. Unauthorised arrivals who do not apply for a protection visa, or other visa, are unlawful non-citizens who must be removed from Australia as soon as practicable. Those assessed as *prima facie* engaging Australia's protection obligations will be appointed a migration agent (discussed in Chapter 14) to assist in applying for a protection visa.

37 Australian National Audit Office, *op cit*, page 66.

38 Id, pages 66-67.

This policy has been in place at the Port Hedland immigration detention centre since the second half of 1994. New arrivals have not been told of any rights they may have to make applications to stay in Australia or to receive independent legal advice. Solicitors are no longer appointed automatically to assist people to determine if they are entitled to make applications and, if so, to provide the necessary assistance. If, in the initial interview, a detainee says words that would suggest that he or she has a well-founded fear of persecution and could therefore be invoking Australia's protection obligations, assistance will be provided to help the detainee apply for a protection visa. If a detainee does not say words that indicate a wish to engage Australia's protection obligations, he or she will not be provided with legal assistance or an opportunity to apply to stay in Australia, unless the detainee is aware or becomes aware of these rights and makes the appropriate request. These procedures are consistent with the Department's interpretation of the obligations placed on its officers by sections 193(2) and 256 of the Migration Act.[39]

If no-one in a boat group says words that could engage Australia's protection obligations, the whole group is returned to the home country within a few weeks of arrival. In 1996, the people from most boats from China were removed from Australia without obtaining independent legal advice or applying to stay in Australia.[40] As at 30 September 1997 people from two of the three boats of Chinese nationals who arrived in 1997 had been deported. Of the third boat, 135 of a total of 139 people were removed.

Many boat people may consider that they are escaping oppression in their home country and coming to Australia to seek a new life, but most will not be aware of their right to apply for asylum. Most do not understand the strict technical requirements of the Refugee Convention and may not state the grounds of their claim for asylum in their initial interviews with departmental staff. This may be due to ignorance or confusion upon arrival or because experiences in the home country inhibit them speaking freely to officials or giving an accurate account of what has happened to them. Under current procedures the consequence of not adequately articulating a claim for asylum is a prompt return to the country of origin.

39 Migration Act section 193(2) nullifies a requirement on any officer to provide access to legal advice in relation to visas to a range of persons identified by the Act including boat people. Section 256 provides

> Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

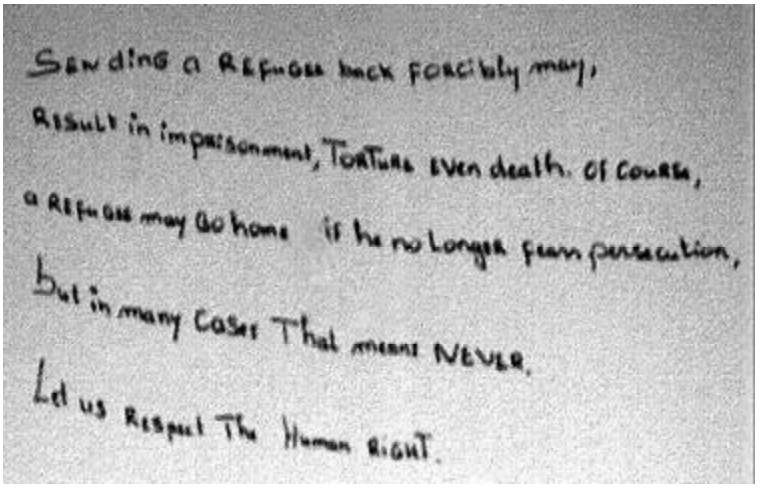
The combined effect of sections 256 and 193(2) is that detainees who arrive unlawfully by boat have the right to legal advice if they request it but not the right to be advised of their right to legal advice. There is no statutory prohibition on advising boat people of their right to legal advice but equally no obligation to tell them.

40 On the other hand, some people from two boats, 'Teal' and 'Grevillea', for example, requested legal assistance and have applied to stay in Australia.

The experiences of the members of the 'Cockatoo' group raise the question whether the current procedures for processing newly arrived boat people at Port Hedland result in deportation of people who may meet the definition of a refugee. The 'Cockatoo' arrived in Australia in November 1994. In January 1995 arrangements were made to return the 84 members to China. At this time last minute legal proceedings were lodged and members of the group received legal assistance. Applications for protection visas were made. Thirty-six people from the 'Cockatoo' who would have been returned to China were granted entry to Australia, 32 as refugees.

The Department advised the Commission that the refugee determination process, including the initial screening of unauthorised arrivals, is not an adversarial one and that there is no requirement for asylum seekers to use particular words to engage Australia's protection obligations.

> The Commonwealth has international Convention obligations on which these processes deliver. There is no need for any boat arrival to use particular words or phrases, or understand any issues or terminology of refugee law, in order to be identified through the screening processes as possibly needing protection. Individuals need only give their factual account.[41]



Written on the wall of the men's dormitory, Perth detention centre, May 1997. (It reads: Sending a refugee back forcibly may, result in imprisonment, torture or even death. Of course, a refugee may go home if he no longer fears prosecution, but in many cases that means never. Let us respect the Human Right.)

41 Facsimile from Director, Compliance and Enforcement Section, Department of Immigration and Multicultural Affairs, dated 13 February 1998, page 2.

African men failing to make a prima facia case

The case of five North African men investigated by the Commission, however, indicates that a high threshold is indeed imposed by the Department.[42] The five, from a country where gross violations of human rights are widespread, complained to the Commission about the initial processing of their immigration status and the length of time they had to wait for responses to their requests to apply for refugee status and legal assistance.

Documents provided by the Department record that within a few days of being taken into detention at Port Hedland each of the complainants was interviewed by departmental officers to determine whether he sought to engage Australia's protection obligations under the Refugee Convention. The information obtained in each of the interviews was considered by officers of the Department and it was determined that in each case the complainant was not prima facie engaging Australia's protection obligations. Following this assessment, procedures were initiated to obtain travel documents for each of the complainants and return them to their country of origin.

The complainants were not aware of the Department's assessment that they were not seeking to engage Australia's protection obligations or that arrangements were being made to return them to their country of origin. Instead, they thought that the Department was still considering their cases.

In the course of the inquiries into this complaint the Department provided the Commission with the record of initial interview for each complainant. These documents record that the complainants said they came to Australia as it has human rights or is a safe country and that they did not want to return to their country of origin as they would be killed, suffer serious injury or experience harassment from a named political group opposed to the government. One record of interview records that in response to the question 'Why did you come to Australia?', this complainant said

> In Australia there is human rights, safety and democracy. I came here to seek protection from Australia. It is known that Australia has no political problems, no racism.

In response to the question 'Do you have any reasons for not wishing to return to your country of nationality?', the complainant is recorded to have said

> If I go back I will die or literally I will be gone. Things are getting worse [in my country], especially in my case because my father had his throat cut out ... I do not know whether the police or terrorists who killed him.

42 Evidence, Complainants PH8-12, statement dated 1 June 1997.

The Commission's examination of these records of interview establishes that each of the complainants was expressing a clear desire to seek protection from Australia. In this case, the threshold that the Department required the complainants to reach before even being considered as making a claim to refugee status was much too high. Commonsense would suggest that, if a person has come to Australia from North Africa by plane and then boat and upon arrival advises immigration officials that he or she will be killed, harassed or suffer serious injury if returned, the person has come to Australia to seek protection.

It is difficult to determine whether someone has a well-founded fear of persecution for a reason recognised by the Refugee Convention. The question is one which should be decided through the formal application process. In this case, however, it appears that the initial interview operated as an informal process of determining whether the complainants were refugees under the Refugee Convention.

Following the initial interviews the complainants wrote four letters to the Department expressing a desire to seek asylum. Two of these letters also requested legal assistance to become refugees. The complainants also met with the Port Hedland centre manager on at least four occasions before they received any effective assistance. One of the complainants was provided with an opportunity to apply for a protection visa five months after he first wrote to the Department, expressing an interest in seeking asylum. The Department made arrangements for the other four complainants to apply for a protection visa seven weeks after they first wrote stating that they were seeking refuge in Australia. They were provided with legal assistance about one month after they first wrote to the Department to request it.

In the week beginning 19 May 1997 the complainants lodged applications for protection visas and Application Assistance (described in Chapter 14) was appointed by the Department. One complainant was granted refugee status at the primary stage. The remaining complainants were granted refugee status and protection visas by the Refugee Review Tribunal.

The failure to recognise the complainants' desires to engage Australia's protection obligation and the delays in responding to their requests to apply for refugee status and receive legal assistance prolonged their period of detention for a period of around five months in the case of the complainant who arrived in December 1996 and three months for the four complainants who arrived in February 1997.

If the complainants had not expressed persistently their desire to seek asylum, they would have been returned to their country. If the complainants had been returned this would have breached article 33 of the Refugee Convention, as the Commonwealth would have returned refugees to a country where their lives and freedom were at risk. This action could also have amounted to a breach of the ICCPR article 7, as the Commonwealth would have been responsible for exposing the complainants to the risk of cruel, inhuman or degrading treatment on

return to their country.

This complaint raises serious concerns about the initial screening process used by the Department at Port Hedland. In this case the threshold that the complainants were required to reach to be considered to be engaging Australia's protection obligations was much too high. It is difficult to imagine what else they could have said to be assessed as seeking protection from Australia and to be admitted into the formal refugee determination process.

This case also highlights the difficulties detainees at Port Hedland face in gaining access to the formal refugee determination process if the Department's assessment of the initial interview is that the person is not seeking protection from Australia. First, a detainee may be removed before he or she is aware that the Department has decided that protection is not being sought and that there will be no opportunity to make an application for refugee status. Second, if following the initial interview a person makes an oral or written request to apply for refugee status and/or legal assistance, it may take a number of weeks or in some cases months before this request is responded to and the person gains access to the refugee determination process.

The following assessments have been made of the risks inherent in the preliminary screening procedure. The Australian National Audit Office warns

> [t]here is a risk ... that the screening process will be perceived as a de facto refugee determination system which lacks the important features of the actual refugee determination system such as the provision of assistance to the applicant and the availability of administrative and judicial review.[43]

M Crock and P Mathew are less circumspect when they state

> Given that refugee status determination may involve life and death considerations, the obligation of *non-refoulement* requires a high level of procedural fairness in order for a State to claim that it has fulfilled the obligation in good faith. The Australian government appears to assume that unauthorised arrivals are not owed the minimum standards required by UNHCR until the asylum-seeker satisfies an officer from the Department of Immigration that she intends to apply for refugee status, or that she has a claim to refugee status ... Certainly, Australia's compliance with the obligation of *non-refoulement* may be in jeopardy as matters are left to the unfettered and unreviewable discretion etionofimmigration officials.[44]

43 Australian National Audit Office, *op cit*, page 72.

44 'Immigration and Human Rights in Australia' in D Kinley (ed) *Human Rights in Australia: A Practical Guide*, Federation Press, Sydney, 1998 (forthcoming).

2.4 Boat people granted entry into Australia since 1989

Table 2.1 shows the large decline over time in the proportion of boatpeople granted entry into Australia. From 1989 to the end of 1993 more than 50 per cent of applicants were granted refugee status or entry on humanitarian or other grounds. Since 1994 fewer than 10 per cent have been granted entry to reside permanently in Australia. If Sino-Vietnamese boat people are excluded the rate of acceptance of refugees since 1994 is around 10 per cent.

Table 2.1	Boat people granted entry into Australia since 1989[45]			
Year	Arrivals (a)	Granted entry (b)	Proportion granted entry	Ethnicity of people granted entry
1989	27	21	78%	Chinese, Vietnamese, Cambodian
1990	216	87	40%	Chinese, Vietnamese, Cambodian
1991	230	163	71%	Vietnamese, Cambodian, Chinese
1992	221	31	14%	Sino-Vietnamese, Chinese, Romanian
1993	86	63	73%	Sino-Vietnamese, Chinese, Turkish
1994	977	131	13%	Bangladeshi, Chinese, Sino-Vietnamese
1995	242	12	5%	Sino-Vietnamese (1), Afghani, Kurdish
1996	661	50	8%	Iraqi
1997 (c)	328	8	2%	Iraqi

(a) The total number of arrivals includes babies born in detention to boat people who arrived during that year.

(b) Total granted entry includes all the people who arrived by boat in that year who have been granted refugee status or granted entry to live in Australia on humanitarian or other grounds.

(c) Year to 9 September.

The reasons for this decline are complex and are mainly related to the changes noted above to the Migration Act and departmental policy and practices since July 1994. The decline may also reflect a decrease in the number of boat arrivals who meet the definition of a refugee in the Refugee Convention.

45 These figures do not include the small number of people granted refugee status who had not yet been released into the community.

The Department listed the following as affecting the rate at which boat arrivals are accepted into Australia.

- changing nationality/cultural/ethnic composition of the boat arrivals over time
- significant improvements in the quality and detail of country information available to decision-makers in the early 1990s
- changes in country situations in source countries; and
- individuals from the same country can have widely differing reasons for travelling to Australia and, over time, trends in the types of reason for travel can change.[46]

However, the Commission notes that changes to the number of genuine refugees coming to Australia to seek asylum are difficult to determine as most boat people now do not receive access to independent legal advice or to the formal refugee determination process.

The impact of the introduction of the preliminary screening process, which commenced at Port Hedland in mid-1994, is demonstrated in the following table.

Table 2.2	Entry of boat people into the formal refugee determination process				
Year of arrival	Entering refugee process		Not entering refugee process		Total
	n	%	n	%	n
1989-90	242	99.6	1	0.4	243
1990-91	152	88.4	20	11.6	172
1991-92	68	100.0	–	–	68
1992-93	71	40.8	113	61.4	184
1993-94	199	100.0	–	–	199
1994-95	162	14.8	935	85.2	1,097
1995-96	61(a)	10.4	528	89.6	589

Source: Australian National Audit Office, *op cit*, Table 6.1, page 71.

(a) Twelve were assisted by the Department. The other 49 lodged applications even though the Department's initial screening had been negative. None of the 49 received assistance in lodging an application and none was found to be a refugee: Australian National Audit Office, *op cit*, page 73.

46 Facsimilie from Director, Compliance and Enforcement Section of the Department, dated 13 February 1998, page 2.

The Australian National Audit Office, in its 1998 report *The Management of Boat People*, drew attention to the fact that 'more boat people applicants have been granted protection visas at administrative review [by the Refugee Review Tribunal] than at the primary process'.[47] No other Australian administrative decision-making system has a higher approval rating at the review stage than at the primary stage. In light of the Audit Office's finding that the cost of review is about double that of a primary decision, the Department is recommended to 'investigate the causes of lower approval rates in the primary process [13%] as compared to the administrative review stage [26%] of the refugee determination system'.[48]

The Department responded to this recommendation by stating that Tribunal decisions are evaluated for relevance to future decisions but have no precedent value.[49] This response does not address the Audit Office's suggestion that one of the causes of 'this unusual circumstance' may be 'that the primary determination is made on incomplete information'.[50] The Audit Office heard evidence that 'some protection visa applicants may be unwilling to provide information which, if passed to the government of the country of origin, could place family members or friends at risk of persecution'.[51]

Conclusions

One significant benefit resulting from the changed processing system is that the length of detention has been greatly reduced. In the early and mid-1990s people were detained for periods in excess of three years before being deported or granted resident status. While this is still occurring, it happens on fewer occasions. Now, most boat people are detained for only up to a month before deportation. Those who apply for asylum are generally detained for several months, rather than years, before their status is finally decided.

47 *Op cit*, page 90.

48 Id, pages 90-91.

49 Id, page 91.

50 Id, page 87.

51 Ibid.

Table 2.3	Boat people in detention as at June 1996	
Year of arrival	Mean days in detention (no longer in detention)	Mean days in detention (still in detention)
1989-90	1,201	na
1990-91	701	na
1991-92	446	na
1992-93	120	1,366
1993-94	224	758
1994-95	255	546
1995-96(a)	16	104

Source: Australian National Audit Office, *op cit*, Table 4.2, page 35.

(a) Only those arriving before 20 May 1996. Caution must be exercised in interpreting this table, especially the third column. Those with 104 mean days in detention as at end June 1996 who arrived before 20 May 1996 had less time to accumulate days in detention that those detained earlier.

The Audit Office attributes the 'dramatic decline' in mean times in detention to the Safe Third Country Agreement with China of January 1995 and to faster processing of protection visa applications by the Department.[52] The Department has attributed the decline to

> [i]ncreases in processing resources dedicated to handling applications from detainees, improved streamlining of processes and increased priority setting for applicants in detention ... streamlining and strengthening arrangements (including through international agreements) for obtaining travel documentation ...[53]

Lengthy detention is in no-one's interests, whether detainees, the government, the Department or taxpayers. The length of time people spend in detention is decreasing and there are now many fewer long-term detainees in detention. This is a very welcome trend.

However, if the processes now are so fast that claims are not properly assessed, the consequences for a genuine refugee who is denied protection are extremely serious. The person will be returned to a situation where he or she is at risk of persecution. Since new arrivals at the Port Hedland centre have not been told of their rights or provided with automatic access to independent legal advice, fewer than 6.1 percent have been recognised as refugees.

52 Op cit, page 34.

53 Facsimile from Director, Compliance and Enforcement Section of the Department, dated 13 February 1998, pages 4-5.

This policy seems to have had more impact on people coming from China who are less likely to have a concept of the role of lawyers in Western society or knowledge of the requirements of the Refugee Convention. In fact, only one Chinese national who has arrived by boat since the start of 1995 has been granted refugee status.

The sharp decline in the number of boat people accepted as refugees raises questions about how adequately Australia is assessing and meeting its international obligations to refugees.

Part 2

Human Rights Law

3 Detention and human rights law

> Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights.[1]

3.1 Overview of human rights principles

In the last 50 years, under the auspices of the United Nations, the international community has developed a series of detailed instruments and standards concerning human rights. These standards are contained in a variety of covenants, conventions, treaties, declarations, principles and rules. Some of these instruments are binding on Australia in international law.

International obligations and commitments entered into by Australia do not automatically become part of Australian law. While courts can refer to these standards as part of the process of interpreting existing laws and developing Australia's common law, legislation by Parliament is generally required to give effect to international commitments on human rights in Australian law, enforceable by the courts.

'Human rights' are defined for the purposes of the HREOC Act as those rights and freedoms recognised in the provisions of the international human rights instruments scheduled to or declared under the Act (section 3). The instruments relevant to this Inquiry include

- the International Covenant on Civil and Political Rights (ICCPR)[2]
- the Convention on the Rights of the Child (CROC)[3]

1 Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live adopted by the United Nations General Assembly in 1985, article 2: UN Doc. A/40/53. See also at http://www.umn.edu/humanrts/instree/w4dhri.htm

2 The ICCPR was adopted by the United Nations General Assembly in 1966: UN Doc. A/6316 (1966). Australia ratified the ICCPR on 13 August 1980: HREOC Act Schedule 2; *Australian Treaty Series* (1980) No. 23; *United Nations Treaty Series* Volume 999 page 171. See also at http://www.unhcr.ch/refworld/refworld/legal/instrume/regional/un/un.htm or http://www.umn.edu/humanrts/instree/ainstls1.htm

3 The CROC was adopted by the United Nations General Assembly in 1989: UNGA resolution 44/25 dated 20 November 1989: UN Doc. A/RES/44/25. Australia ratified the Convention on 17 December 1990. A declaration under section 47 of the HREOC Act in relation to this instrument came into effect on 13 January 1993: *Australian Treaty Series* (1991) No. 4. See also at http://www.unhcr.ch/refworld/refworld/legal/instrume/regional/un/un.htm

- the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the Religion Declaration).[4]

In addition, the Commission is responsible for reporting on matters relating to discrimination on the ground of sex[5] and, in doing so, takes into account the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[6]

The relevant international standards contained in these instruments are detailed in sections 3.3 (the use of detention) and 3.4 (the conditions of detention) below.

Foremost among these instruments is the ICCPR, one of the three instruments forming the 'International Bill of Human Rights'.[7] The civil and political rights guaranteed by the ICCPR include a number which are relevant to the situation of unauthorised arrivals in detention, notably the freedom from torture and from cruel, inhuman or degrading treatment (article 7), the freedom from arbitrary detention (article 9) and the right to be treated with humanity while in detention (article 10).

These standards and the others set out in the ICCPR are authoritatively, although not yet comprehensively, interpreted by the Human Rights Committee. This Committee is established by the ICCPR (article 28) and appointed by the States Parties to monitor the implementation of the Covenant. In its discussions of the regular reports of States Parties on their compliance with the Covenant (article 40), in its 'General Comments' issued on particular articles[8] and in determinations of individual complaints (article 41), the Human Rights Committee is building a body of law on the correct interpretation and application of the Covenant.

4 The Religion Declaration was adopted by the United Nations General Assembly in 1981: UNGA Resolution 36/55: UN Doc. A/36/684 (1981). A declaration under section 47 of the HREOC Act in relation to this instrument came into effect on 24 February 1993. See also at http://www.umn.edu/humanrts/instree/ainstls1.htm

5 *Sex Discrimination Act 1984* (Cth) (the Sex Discrimination Act) section 48(1)(g).

6 CEDAW was adopted by the United Nations General Assembly in 1979: GA Res. 34/180: UN Doc. A/34/46. Australia ratified the Convention in 1983: schedule to the Sex Discrimination Act; *Australian Treaty Series* (1983) No. 9; *United Nations Treaty Series* Volume 1249 page 3. See also at http://www.unhcr.ch/refworld/refworld/legal/instrume/regional/un/un.htm

7 The others are the Universal Declaration of Human Rights, adopted and proclaimed by United Nations General Assembly resolution 217 A (III) of 10 December 1948: UN Doc. A/810 at 71 (1948); and the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly in 1966: UN Doc. A/6316 (1966). Australia ratified the ICESCR on 10 December 1975: *Australian Treaty Series* (1976) No. 5; *United Nations Treaty Series* Volume 993 page 3. See also at http://www.unhcr.ch/refworld/refworld/legal/instrume/regional/un/un.htm

8 The Committee's General Comments No. 1 (1981) to No. 25 (1996) are compiled in UN Doc. HRI/GEN/1/Rev.3, 15 August 1997. See also http:www.umn.edu/humanrts/gencomm/hrcomms.htm

The Committee has identified a number of other international documents as accurately reflecting its interpretation of article 10 of the Covenant. Of particular relevance to this Inquiry among these documents are the UN Standard Minimum Rules for the Treatment of Prisoners (the Standard Minimum Rules)[9] and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the Body of Principles).[10] Compliance with the standards established by these UN documents has been held to be a minimum requirement for compliance with the ICCPR's dictate that people in detention are to be treated humanely (article 10).[11] In this report the Commission details the relevant provisions of the Standard Minimum Rules and the Body of Principles in its evaluation of Australia's compliance with the ICCPR.

In addition to international human rights instruments for which the Commission has direct and indirect responsibilities under the HREOC Act and the Sex Discrimination Act, others adopted by Australia are also relevant to the subject of this Inquiry. While the findings and recommendations set out in this report flow from those instruments within the Commission's jurisdiction, the other relevant standards are noted where applicable because they flesh out or emphasise the standards on which the Commission relies and because they equally detail the international obligations undertaken by Australia.

Foremost among these are the Convention Relating to the Status of Refugees (the Refugee Convention)[12] and the Protocol Relating to the Status of Refugees (the Refugee Protocol).[13] In fact, in the case of children seeking refugee status, the Commission has direct jurisdiction under the Convention and Protocol by virtue of CROC article 22(1) which requires Australia to assist these children to enjoy their human rights pursuant to all human rights and humanitarian instruments to which Australia is a party in addition to CROC.[14]

9 The Standard Minimum Rules were approved by the United Nations Economic and Social Council in 1957. They were subsequently adopted by the United Nations General Assembly in Resolutions 2858 of 1971 and 3144 of 1983: UN Doc. A/CONF/611, annex I. See also at http://www.umn.edu/humanrts/instree/ainstls1.htm

10 The Body of Principles was adopted by the United Nations General Assembly in 1988: GA Res. 43/173, annex: UN Doc. A/43/49 (1988). See also at http://www.unhcr.ch/refworld/refworld/legal/instrume/regional/un/un.htm or http://ww.umn.edu/humanrts/instree/g3bpppdi.htm

11 General Comment No. 21 (1992), paragraph 5. In addition the Third Committee of the General Assembly in its 1958 Report stated that the Standard Minimum Rules should be taken into account when interpreting and applying article 10.1: United Nations, Official Records of the General Assembly, Thirteenth Session, Third Committee, 16 September to 8 December 1958, pages 160-173 and 227-241.

12 The Refugee Convention was adopted by the United Nations General Assembly in 1951. Australia ratified the Convention on 22 January 1954: *Australian Treaty Series* (1954) No. 5; *United Nations Treaty Series* Volume 189 page 137. See also at http://www.umn.edu/humanrts/instree/ainstls1.htm or http://www.unhcr.ch/refworld/refworld/legal/instrume/regional/un/un.htm

13 The Refugee Protocol was adopted by the United Nations General Assembly in 1967. Australia ratified the Protocol on 13 December 1973: *Australian Treaty Series* (1973) No. 37; *United Nations Treaty Series* Volume 606 page 267. See also at http://www.unhcr.ch/refworld/refworld/legal/instrume/regional/un/un.htm

14 Among other instruments, these include the International Covenant on Economic, Social and Cultural Rights discussed below.

The Refugee Protocol updates the Refugee Convention, extending its protections beyond refugees and stateless persons in the aftermath of the Second World War who were the original concern of the international community. The Convention defines 'refugee' and imposes on States Parties an obligation of *non-refoulement* (article 33). A refugee is a person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . .[15]

Article 33 prohibits States Parties from returning ('refouling') a refugee to the frontier of a country where his or her life or freedom would be threatened. This obligation of non-refoulement is also imposed by the ICCPR. The Human Rights Committee has pointed out that, in relevant circumstances, placing a refugee in this danger violates his or her right to freedom from torture and cruel, inhuman and degrading treatment and punishment (article 7).[16]

On their face, Refugee Convention article 33 and ICCPR article 7 seem to impose no positive obligations on States Parties. However, a number of positive actions are implicitly required if a state is to avoid breaching its obligation of non-refoulement. In particular, the state from whom protection is sought must have an effective procedure to determine the validity of the asylum seeker's claim to be a refugee.[17] The Convention on the Rights of the Child also imposes a positive obligation on States Parties with respect to both child asylum seekers and refugee children. These children have a right 'to receive appropriate protection and humanitarian assistance in the enjoyment of [their] human rights' (article 22). What is 'appropriate' assistance is largely defined by the ICCPR, the International Covenant on Economic, Social and Cultural Rights and the Refugee Convention.

Australia has therefore undertaken an obligation, pursuant to the ICCPR, CROC and the Refugee Convention and Protocol, to protect asylum seekers while their status is being determined and to respect their human rights during that process when they are within Australian territory (as detailed in section 3.2 below). Under the ICCPR Australia has undertaken to 'take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the ... Covenant' and to ensure that any person whose rights are violated 'shall have an effective remedy ... determined by competent ... authorities'.[18]

15 Refugee Convention article 1A(2).

16 General Comment No. 20 (1992), paragraph 9.

17 Joint Standing Committee on Migration *Asylum, Border Control and Detention*, Australian Government Publishing Service, Canberra, 1994, page 55, paragraph 3.21; S Goodwin-Gill *The Refugee in International Law*, Clarendon Press, Oxford, 2nd ed, 1996, page 90.

18 ICCPR article 2.2 and 2.3. A similar obligation is imposed with respect to children's rights by article 4 of CROC.

Like the Human Rights Committee established by the ICCPR, the Executive Committee of the High Commissioner [for Refugees] Programme issues authoritative interpretative statements, 'Conclusions', on the meaning of the Refugee Convention and Protocol. Executive Committee Conclusion No. 44, 'Detention of Refugees and Asylum Seekers' (1986) (ExComm Conclusion 44[19]) is detailed in section 3.3 below.

A second treaty ratified by Australia, and directly within the Commission's jurisdiction in the case of asylum-seeker children as noted above, is the International Covenant on Economic, Social and Cultural Rights. The Commission has some additional responsibilities indirectly in relation to this Covenant because of its responsibilities under CEDAW and the International Convention on the Elimination of All Forms of Racial Discrimination and the obligation imposed by HREOC Act section 10A. Section 10A requires the Commission to perform its functions with regard for the indivisibility and universality of human rights.

States Parties to the International Covenant on Economic, Social and Cultural Rights recognise the rights of everyone without discrimination to the highest attainable standard of health (article 12), to education (article 13) and to participate in cultural life (article 15) among others. Relevant provisions of this Covenant are noted in the evaluation of the conditions of detention in Parts 3 and 4 of this report.

Finally, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention)[20] elaborates Australia's obligations under ICCPR article 7. It defines torture, confirming that it is a crime against humanity which can, and indeed must, be prosecuted by a State Party in whose territory an alleged torturer is found.[21]

Before considering in some detail the key provisions of the ICCPR and the particular protections for children set out in CROC, the issue whether non-citizens, particularly unauthorised arrivals, are entitled to the benefit of human rights protection must be assessed.

19 UN Doc. A/AC.96/688, paragraph 128. See also at http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom44.htm

20 The Torture Convention was adopted by the United Nations General Assembly in 1984: UNGA resolution 39/46 dated 10 December 1984: UN Doc. A/39/51. Australia ratified the Convention on 8 August 1989: *Australian Treaty Series* (1989) No. 21; *United Nations Treaty Series* Volume 1465 page 85. See also at http://www.umn.edu.au/humanrts/instree/ainstls.htm

21 Unless the alleged perpetrator can be extradited directly to another country willing to prosecute.

3.2 Human rights and non-citizens

Australia must respect the human rights of all persons within its jurisdiction, including non-citizens. As a State Party to the ICCPR Australia is bound by international law to ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction ... without distinction of any kind'.[22] The Human Rights Committee has emphasised

> In general, the rights set forth in this Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.[23]

The ICCPR does not recognise a right of aliens to enter or reside in another country and entry can be made subject to some restrictions. However, those who are present enjoy the protection of the Covenant.[24] In particular, aliens like citizens 'have the full right to liberty and security of the person' as provided by ICCPR article 9.[25] Further, aliens placed in detention must, like citizens, 'be treated with humanity and with respect for the inherent dignity of the human person' (article 10).[26]

Similarly the Convention on the Rights of the Child extends the rights of children to every child within the jurisdiction of a State Party 'without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's [status]' (article 2.1).

3.3 Rights relevant to detention of unauthorised arrivals

The detention of unauthorised arrivals in Australia raises a number of issues in international human rights law. This section examines those issues and the provisions relevant to them before concluding with the findings and recommendations of the Inquiry with respect to detention of unauthorised arrivals. The issues will be considered under two headings

1. the right to detain, including the right to take unauthorised arrivals into detention, the reasons for which they may be held in detention, the duration of detention and the detention of children in particular
2. discretionary release and judicial review of detention.

22 ICCPR article 2.1. A proviso must be entered here to point out that ICCPR article 25 concerning participation in public affairs, including the right to vote, is stipulated to benefit only citizens. Article 13, on the other hand, applies exclusively to aliens and stipulates the circumstances in which they may be expelled from a country.

23 General Comment No. 15 (1986), paragraph 1.

24 Id, paragraph 5.

25 Id, paragraph 7.

26 Ibid.

The right to detain

Australia detains all unauthorised arrivals in its territory or territorial waters until they are released on a bridging visa, granted entry to Australia or removed. Many unauthorised arrivals are asylum seekers to whom, as detailed in section 3.1 above, Australia has undertaken the obligation of protection while their claims for refugee status are being assessed.

Detention as a deterrent to others

The UNHCR Guidelines on Detention of Asylum Seekers (1985) make it clear that the detention of asylum seekers as part of a policy to deter future asylum seekers is contrary to the principles of international protection.[27] However Ministers for Immigration, Members of Parliament and senior departmental officers have stated repeatedly that one reason for the prevailing policy of mandatory detention of unauthorised arrivals is to deter further arrivals.

When introducing the Migration Amendment Bill into Parliament in May 1992, the then Minister for Immigration, the Hon. Gerry Hand MP, stated

> I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community. Their release would undermine the Government's strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.[28]

A later Minister, Senator the Hon. Nick Bolkus, stated

> We in the Government and Opposition believe the detention policy is an important part of our armoury in terms of ensuring that those who want to come to Australia think very seriously about whether they are refugees before they come here.[29]

27 UNHCR Guidelines on Detention of Asylum Seekers (1985), in *Detention of Asylum-Seekers in Europe*, UNHCR, Regional Bureau for Europe, 2nd ed, Geneva, 1995, page 7, Guideline 3: Exceptional Grounds of Detention.

28 House of Representatives, *Hansard* 5 May 1992, page 2371.

29 ABC TV, 'Lateline', 23 June 1993.

International human rights law does not permit policies to deter the future unauthorised arrivals where those policies may result in breaches of human rights. For example, derogation from obligations under the ICCPR is permitted only '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'.[30] The Government has serious concerns that large numbers of people will arrive at our borders seeking refugee status, although to date the numbers arriving in this way have been extremely modest (an average of 332 per year in the period 1989-97). Even so the Government's concerns do not satisfy the requirements for derogation from human rights obligations. Any measures to deter further arrivals must be implemented in a manner consistent with Australia's international commitments.[31]

Freedom from arbitrary detention

The Refugee Convention does not prevent the use of detention during the process of assessment. However, it only permits detention that is 'necessary' and the rights of the person under the ICCPR must be fully respected at all times.

Article 9.1 of the ICCPR guarantees the right of 'everyone' to 'liberty'. There are, of course, occasions on which a state deprives a person of his or her liberty. The ICCPR does not prohibit this. However, any deprivation of liberty must be on grounds and in accordance with procedures established by law. That is, the detention must be 'lawful'.

There is an additional criterion set out in the ICCPR, namely that the detention must not be arbitrary. The ICCPR recognises that countries sometimes enact laws, or implement them in ways, that are arbitrary. Article 9.1 provides in part

> No one shall be subjected to arbitrary arrest or detention.

This right extends to 'all deprivations of liberty, whether in criminal cases, or in other cases such as ... immigration control'.[32]

The Convention on the Rights of the Child similarly protects children in particular from arbitrary deprivation of liberty. Article 37(b) provides in part

> No child shall be deprived of his or her liberty unlawfully or arbitrarily.

30 ICCPR article 4.1.

31 None of the countries with legal systems similar to Australia's rely on mandatory detention of unauthorised arrivals: Australian National Audit Office *The Management of Boat People* Auditor-General Report No. 32, Canberra, 1998, page 31, mentions New Zealand, Canada, the USA and the UK.

32 Human Rights Committee, General Comment No. 8 (1982), paragraph 1.

In addition, the detention of a child is to be used only as a measure of last resort and, when it is used, only for the shortest appropriate period of time (article 37(b)). In assessing what would be an appropriate period, the decision maker must take into account the best interests of the child (article 3.1).

Arbitrariness in international law

The term 'arbitrary' includes not only actions which are unlawful *per se* but also those which are unjust or unreasonable.[33] In 1990, in the case of *Alphen v The Netherlands*, the Human Rights Committee stated

> The drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but *reasonable* in all the circumstances. Further, remand in custody must be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.[34]

The question whether a particular restriction on liberty is necessary and reasonable or arbitrary for the purposes of the ICCPR is not a matter of purely subjective judgement. The jurisprudence of the Human Rights Committee indicates that, to avoid the taint of arbitrariness, detention must be a *proportionate* means to achieve a legitimate aim, having regard to whether there are alternative means available which are less restrictive of rights.[35]

In a recent decision on a communication complaining of the prolonged detention of an asylum seeker by Australia, the Human Rights Committee considered whether prolonged mandatory detention pending determination of refugee status was 'arbitrary' within the meaning of article 9.1. Australia sought to justify the prolonged detention on the basis that the complainant entered Australia unlawfully and may have absconded if not detained. The Committee concluded, however

33 Documentary references and a summary of these debates are given in M Bossuyt, *Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987, page 343.

34 Communication No. 305/1988, Human Rights Committee Report 1990, Volume II: UN Doc. A/45/40, paragraph 5.8 (emphasis added).

35 In *A v Australia*, Communication No. 560/1993, the Committee stated 'remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context': Views of the Human Rights Committee, 30 April 1997: UN Doc. CCPR/C/59/D/560/1993.

> ... detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. *Without such factors detention may be considered arbitrary, even if entry was illegal*. In the instant case, the State Party has not advanced any grounds particular to the author's case, which would justify his continued detention ... The Committee therefore concludes that the author's detention ... was arbitrary within the meaning of Article 9, paragraph 1.[36]

As noted in Chapter 2, the average duration of detention is dropping in Australia. Contrary to the Government's response to the Human Rights Committee's decision, this does not resolve the human rights problem for Australia. The Human Rights Committee's comments raise questions about the validity of all but a very brief period of detention in most cases.

Before the Human Rights Committee decision and without reference to international standards,[37] the High Court of Australia adopted a similar test of the lawfulness of administrative detention of unauthorised arrivals.[38] The question before the Court was whether the Parliament could constitutionally empower the executive arm of government to impose detention or whether this detention could only be imposed by a court. As noted in Chapter 2, the Court held that 'administrative' detention of unauthorised arrivals is within the constitutional legislative power of the Commonwealth.

The Court distinguished between punitive and non-punitive detention. Punitive detention can only be imposed by a court. In this case it was held that the objective of the detention was not punitive. However, administrative detention may *become* punitive if not 'limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable the application for an entry permit to be made and considered'.[39] In fact, three of the seven judges held that the detention in *Lim's Case* was punitive.

Justice Gaudron stated

> Detention in custody in circumstances not involving some breach of the criminal law and not coming within well-accepted categories of the kind to which Brennan, Deane and Dawson JJ refer (the powers of the legislature to punish for contempt and of military tribunals to punish for breach of military discipline and the exceptional cases of involuntary detention in cases of mental illness or infectious disease) is offensive to ordinary notions of what is involved in a just society.[40]

36 Id, page 24 (emphasis added).

37 The High Court found that it could not refer to relevant international standards because the Act stipulates (then section 54T, now section 186) that it overrides all laws other than the Constitution.

38 *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 110 ALR 97.

39 Id, per Chief Justice Mason at page 100; per Justices Brennan, Deane and Dawson at pages 117-118; per Justice Toohey at page 128.

40 Id, page 155.

International standards are clearly higher than those found by the High Court in Australian domestic law. International law requires Australia to ensure 'aliens' enjoy human rights including freedom from arbitrary detention. Whether detention is ordered by the Parliament, the executive or the courts, it will be arbitrary unless reasonable, necessary and proportionate.

Necessity and proportionality

In considering what would be a proportionate response to unauthorised arrivals, Australia must take into account its specific international obligations to them. As noted above, the Refugee Convention prevents States Parties *unnecessarily* restricting the movement of asylum seekers (article 31.2). Some asylum seekers will have no choice but to flee their countries before applying through the 'proper channels', appearing in a country of asylum as illegal entrants. The Convention prohibits states from penalising people in this situation provided they present themselves directly to the authorities and show good cause why their entry was illegal (article 31.1).

Detention of unauthorised arrivals may amount to a penalty contrary to the Convention. It may also be difficult to justify as necessary as required by the Convention. If so, the detention will be arbitrary contrary to ICCPR article 9.1 and CROC article 37(b).

ExComm Conclusion 44

The circumstances that may make it necessary to detain asylum seekers have been elaborated in ExComm Conclusion 44. Where the detention of asylum seekers is deemed to be necessary it should only be used

- to verify identity
- to determine the elements on which the claim to refugee status or asylum is based
- to deal with cases where refugees or asylum seekers have destroyed their travel and/or identification documents in order to mislead the authorities of the State in which they intend to claim asylum or
- to protect national security or public order.

In elaborating ExComm Conclusion 44, the UNHCR stated that the detention of asylum seekers should not be automatic or unduly prolonged. For example, in determining the elements on which a claim to refugee status is based, individuals should only be detained if necessary to undergo a preliminary interview. The detention of a person for the entire duration of a prolonged asylum procedure is not justified.

In relation to asylum seekers using fraudulent documents or travelling with no documents at all, the Conclusion recognises that detention is permissible only where there is an intention to mislead the authorities. Asylum seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.[41]

The Executive Committee also

> (c) Recognised the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum seekers from unjustified or unduly prolonged detention [and]
>
> (d) Stressed the importance for national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum seekers and that of other aliens.

Australia's policy of detention of asylum seekers is automatic and mandatory and applies to almost all unauthorised arrivals until their claim for protection is determined finally. It goes well beyond what ExComm Conclusion 44 deems 'necessary' for the purposes of compliance with the Refugee Convention, CROC and the ICCPR.

UNHCR Guidelines

The UNHCR has produced a set of 'Guidelines on Detention of Asylum Seekers' (the Guidelines) to assist governments in developing and implementing detention policies and practices.[42] The Guidelines apply to all asylum seekers who are in detention or in detention-like situations. They apply to all persons who are confined within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where the only opportunity to leave this limited area is to leave the territory.[43] The Guidelines, therefore, are relevant to the operation of Australia's immigration detention centres.

The Guidelines, like ExComm Conclusion 44, state that the right to liberty is a fundamental right, recognised in all the major human rights instruments, both at global and regional levels, and that therefore 'the use of detention against asylum seekers is, in the view of UNHCR, inherently undesirable'[44] and 'as a general rule, asylum seekers should not be detained'.[45]

41 See also Note on International Protection, 15 August 1988: UN Doc. A/AC.96/713, paragraph 19.

42 In *Detention of Asylum-Seekers in Europe*, UNHCR, Regional Bureau for Europe, 2nd ed, Geneva, 1995, page 7.

43 Guideline 1: Scope of the Guidelines. This definition of detention is based on the Note of the Sub-Committee of the Whole on International Protection of 1986, 37th Session, UN Doc. EC/SCP/44, paragraph 25.

44 UNHCR Guidelines, *op cit*, paragraph 2.

45 Id, Guideline 2: General Rule.

They also state that detention is especially undesirable for vulnerable people 'such as single women, children, unaccompanied minors and those with special medical or psychological needs'.[46]

The Guidelines make it clear that asylum seekers should be detained only as a last resort on exceptional grounds. If exceptional grounds exist then detention must be clearly prescribed by a national law which conforms with general norms and principles of international human rights law.[47]

The Guidelines affirm that the only permissible grounds for detention are the four grounds provided in ExComm Conclusion 44. Detention of asylum seekers for any other purpose, 'for example, as part of a policy to deter future asylum seekers, is contrary to the principles of international protection'.[48]

The Guidelines state that detention must be reasonable and proportionate in order to meet the standard set out by ICCPR article 9.1.

> Where detention of asylum seekers is considered necessary it should only be imposed where it is reasonable to do so and without discrimination. It should be proportional to the ends to be achieved (i.e. to ensure one of the above purposes) and for a minimal period.[49]

Even so detention should be exceptional, a last resort after all possible alternatives to detention have been exhausted.

> Where there are monitoring mechanisms which can be employed as viable alternatives to detention (such as reporting obligations or guarantor requirements), these should be applied first unless there is evidence to suggest that such an alternative will not be effective.[50]

Convention on the Rights of the Child

The detention of the children of asylum seekers is complicated by the apparently competing factors affecting their interests. On the one hand, detention, especially for prolonged periods, stifles their development and can cause actual harm. CROC acknowledges this by requiring that any detention of a child be a measure of last resort and for the shortest appropriate period of time (article 37(b)). In addition, CROC imposes the positive obligation upon States Parties to take appropriate measures to ensure to every child a standard of living adequate for his or her physical, mental, spiritual, moral and social development (article 27).

46 UNHCR Guidelines, *op cit*, paragraph 2.

47 Id, Guideline 3: Exceptional Grounds of Detention.

48 Ibid. See also Note of the Sub-Committee of the Whole on International Protection, *op cit*, paragraph 51(c).

49 Id, Guideline 3: Exceptional Grounds of Detention.

50 Ibid.

On the other hand, children have a right to live with and enjoy the protection and assistance of their parents. The Preamble to CROC acknowledges that 'the child, for the full and harmonious development of his or her personality, should grow up in a family environment'. CROC article 9.1 obliges States Parties to ensure that children are not separated from their parents against their will except when it is necessary in the best interests of the children. These provisions clearly apply to children and their families seeking asylum and deprived of their liberty under the Migration Act.

Australian law provides that the Minister may grant a bridging visa to a child under the age of 18 who comes within the guidelines prescribed in Migration Regulation 2.20. The bridging visa allows the child to be released from detention pending consideration of an application to remain in Australia (Migration Act section 73). The Minister has no discretion, however, to grant a bridging visa to release the child's parents. A child released from detention would therefore be denied the protection and assistance of his or her parents. This may lead to a breach of article 9.1 of CROC. This explains why only two children of a possible total of 581 have been released on bridging visas since 1 September 1994.

The UNHCR's Guidelines resolve the seeming conflict by directing that minors who are asylum seekers should not be detained.[51] Where children are detained, however, CROC article 37(b) requires that it be a measure of last resort and for the shortest appropriate period of time. The UNHCR Guidelines direct states to take steps to ensure an appropriate environment for children who are detained. Conditions akin to a prison are to be avoided.

> If children who are asylum seekers are detained in airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. All efforts must be made to have them released from detention and placed in other accommodation.[52]

CROC recognises the rights of children seeking refugee status to education (article 28), recreation (article 31), medical and dental care (article 24) and, in the case of children suffering from torture or trauma, special measures to assist them (article 39).

51 Id, Guideline 5: Detention of Persons under the Age of 18. Reference is also made to CROC articles 3, 9, 20, 22 and 37, the UN Rules for Juveniles Deprived of their Liberty and the UNHCR Guidelines on Refugee Children, 1994.

52 Id, Guideline 5.

Conclusion

Australia's detention policy does not meet the minimum standards in ExComm Conclusion 44 or the UNHCR's Guidelines. It makes detention of unauthorised arrivals mandatory in almost all cases while ExComm Conclusion 44 states that detention is inherently undesirable and that as a general rule asylum seekers should not be detained. Australia's detention regime goes well beyond what the UNHCR considers 'permissible' or 'necessary' detention. It is not proportional and would be considered arbitrary and unreasonable under the provisions of international law, including ICCPR article 9.1 and CROC article 37(b).

Discretionary release and judicial review of detention

Judicial oversight of all forms of detention is a fundamental guarantee of liberty and freedom from arbitrariness. ICCPR article 9.4 provides

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Similarly CROC article 39(d) provides

> Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

The Human Rights Committee has emphasised that article 9.4 protects all those in detention and is not restricted to those detained as alleged or proven criminals.

> [T]he important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States Parties have in accordance with article 2(3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the covenant.[53]

The Human Rights Committee has determined that the lack of provision for review of the detention of an alien for a period of only one week amounts to a breach of article 9.4.[54]

53 General Comment No. 8 (1982), paragraph 1.

54 *Torres v Finland*, Communication No. 291/1988. View adopted 2 April 1990, Report of the Human Rights Committee, Vol II, Supplement No.40: UN Doc. A45/40, page 96.

In correspondence with the Commission the Department has contended that Australian law and policy satisfy the requirements of ICCPR article 9.4.[55] According to the Department non-citizens are able to have the 'lawfulness' of their detention tested because they have the legal right to challenge the proper application of current detention provisions to them. However, the provisions of article 9.4 require that the merits of detention in individual cases be reviewable according to the terms on which detention is permitted by international law under article 9.1 of the Covenant, that is, that it is not unlawful or arbitrary and can be shown to be a proportional means to achieve a legitimate aim. Moreover, article 13 extends the protections of the Covenant to unauthorised arrivals during the process of determining the legality of their entry or stay in Australia.[56] These include the guarantee of equality before the law (article 26) and the right to a fair and public hearing by a competent, independent and impartial tribunal (article 14.1).[57]

In its examination of a complaint about Australia's immigration regime, the Human Rights Committee emphasised that judicial oversight must be able to examine the merits of detention.

> In effect ... the court's control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the *Migration Amendment Act*. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under Article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of Article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", Article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the Covenant. As the State Party's submissions in the instant case show that court review available to [the complainant] was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the *Migration Amendment Act*, the Committee concludes that the [complainant's] right, under Article 9, paragraph 4, to have his detention reviewed by a court, was violated.[58]

55 Evidence, letter from the Deputy Secretary of the Department, dated 29 August 1996, page 3, in response to complaint by Complainant PH57.

56 Human Rights Committee, General Comment No. 15 (1986), paragraph 9.

57 Id, paragraphs 7 and 9.

58 *A v Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, 30 April 1997, at page 24.

As explored in Chapter 2, the High Court has acted in one instance to read down a Migration Act provision which appeared on its face to exclude access to judicial review for persons held in immigration detention (section 183).[59] The present laws are an improvement on those in force at the time *Lim's Case* was decided. However, judicial review of detention in Australia remains very limited. The courts have no power to order the release of detainees of their own motion, no provision is made for the courts to review periodically the detention of non-citizens or to otherwise consider the compatibility of the detention with the ICCPR as required by article 9.4. The Migration Act mandates the detention of all unauthorised arrivals without the possibility of release unless they satisfy the very restrictive criteria for a bridging visa or persuade a court that they have been wrongly defined as an unlawful non-citizen. For the small number eligible for a bridging visa the release decision in most instances is dependent upon the exercise of a personal and non-compellable discretion of the Minister. The Minister can be required to make this decision according to law but cannot be required to exercise the discretion in favour of any particular applicant.

Australian law does not permit the individual circumstances of detention of non-citizens to be taken into consideration by courts. Neither does it permit the reasonableness and appropriateness of detaining an individual to be determined by the courts. Therefore, Australia is in breach of ICCPR article 9.4 and CROC article 37(d).

Findings and recommendations on detention

The Commission finds

- The detention regime in the Migration Act violates the ICCPR and CROC and is therefore a breach of human rights under the HREOC Act.
- The mandatory detention regime under the Migration Act places Australia in breach of its obligations under ICCPR article 9.1 and CROC article 37(b). The ICCPR and CROC require Australia to respect the right to liberty and to ensure that no-one is subjected to arbitrary detention. If detention is necessary in exceptional circumstances then it must be a proportionate means to achieve a legitimate aim and it must be for a minimal period. The detention regime under the Migration Act does not meet these requirements. Under current practice the detention of unauthorised arrivals is not an exceptional step but the norm. Vulnerable groups such as children are detained for lengthy periods under the policy. In some instances, individuals detained under the Migration Act provisions have been held for more than five years. This is arbitrary detention and cannot be justified on any grounds.

59 *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 110 ALR 97.

- The Migration Act does not permit the individual circumstances of detention of non-citizens to be taken into consideration by courts. It does not permit the reasonableness and appropriateness of detaining an individual to be determined by the courts. Australia is therefore in breach of its obligations under ICCPR article 9.4 and CROC article 37(d) which require that a court be empowered, if appropriate, to order release from detention.

- To the extent that the policy of mandatory detention is designed to deter future asylum seekers, it is contrary to the principles of international protection and in breach of ICCPR article 9.1, CROC articles 22(1) and 37(b) and human rights under the HREOC Act.

The Commission recommends

R3.1 In accordance with international human rights law the right to liberty should be recognised as a fundamental human right. No-one should be subjected to arbitrary detention. The detention of asylum seekers should be a last resort for use only on exceptional grounds. Alternatives to detention, such as release subject to residency and reporting obligations or guarantor requirements, must be applied first unless there is convincing evidence that alternatives would not be effective or would be inappropriate having regard to the individual circumstances of the particular person. A detailed model for conditional release is set out in Chapter 16.

R3.2 The grounds on which asylum seekers may be detained should be clearly prescribed in the Migration Act and be in conformity with international human rights law. Where detention of asylum seekers is necessary it must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the following legitimate aims

  - to verify identity
  - to determine the elements on which the claim to refugee status or asylum is based
  - to deal with refugees or asylum seekers who have destroyed their travel and/or identification documents to mislead the authorities of the state in which they intend to claim asylum and
  - to protect national security or public order.

  The detention of asylum seekers for any other purpose is contrary to the principles of international protection and should not be permitted under Australian law.

R3.3 Detention is especially undesirable for vulnerable people such as single women, children, unaccompanied minors and those with special medical or psychological needs. In relation to children article 37(b) of CROC states that the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Children and other vulnerable people should be detained, even as permitted by R3.2, only in exceptional circumstances. For children, the best interests of the individual child should be the paramount consideration.

R3.4 Detention should be subject to effective independent review. Review bodies should be empowered to take into consideration the individual circumstances of the non-citizen including the reasonableness and appropriateness of detaining him or her. Review bodies should be empowered to order a person's release from detention. The lawfulness of detention should be subject to judicial review. Migration Act sections 183, 196(3) and 72(3) so far as they provide that the Minister's discretion is personal and non-compellable should be repealed.

3.4 Rights relevant to the conditions of detention

The 'fundamental and universally applicable'[60] requirement of international law is that people in detention must be treated 'with humanity and with respect for the inherent dignity of the human person' (ICCPR article 10.1, CROC article 37(c)). In addition, a child in detention must be treated 'in a manner which takes into account the needs of a person of his or her age' (CROC article 37(c)). Especially when detention is prolonged, Australia's obligations to 'ensure to the maximum extent possible the survival and development of the child' (article 6) and 'to take appropriate measures to ensure ... a standard of living adequate for the child's physical, mental, spiritual, moral and social development' (article 27) further elaborate what is required in the case of the detention of children.

The minimum requirements for 'humanity' and 'dignity' in detention have been set out by the Human Rights Committee in General Comments and by incorporation of the detailed provisions of the Standard Minimum Rules and the Body of Principles into ICCPR article 10.1.

Most of the UN Standard Minimum Rules for the Treatment of Prisoners (1957) apply to people detained for any reason, including those in remand before a criminal trial or following conviction but prior to sentencing and those imprisoned for debt or other non-criminal process (Rule 94). While the Rules do not refer explicitly to administrative

60 Human Rights Committee, General Comment No. 21 (1992), paragraph 4.

detention (that is, as in the case of the detention of unauthorised arrivals in Australia, detention not ordered by a court), the vulnerability of these detainees is even greater than that of civil prisoners detained by order of a court. People in administrative detention are clearly protected by ICCPR articles 7, 9 and 10 among others and the Human Rights Committee has extended to them the protections of the Standard Minimum Rules.[61]

The 'Preliminary Observations' in the Rules state that their objective is 'to stimulate a constant endeavour to overcome practical difficulties in the way of their application' because 'they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations' (Rule 2). In response, Australian correctional administrators refined the Rules for contemporary Australian conditions and adopted the 'Standard Guidelines for Corrections in Australia' in 1987.[62]

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) further detail the minimum relevant standards for compliance with ICCPR article 10.1. The UN Working Group on Arbitrary Detention has considered the status of the Body of Principles and noted that most of the provisions are declaratory of existing rights under customary international law.[63]

In Parts 3, 4 and 5 of this report the conditions of detention in the immigration detention centres are evaluated by reference, in particular, to the fundamental requirement in the ICCPR and CROC of humane treatment as detailed in the Standard Minimum Rules and the Body of Principles. Where relevant, Australia's other international human rights obligations are also noted.

61 Id, paragraphs 2 and 5.

62 Published by the Corrective Services Ministers' Conference. Revised in 1994.

63 Deliberation 02, Report of the Working Group on Arbitrary Detention: UN Doc. E/CN.4/1993/24, page 9.

Part 3

Conditions of Detention

4 Evaluation of conditions of detention

4.1 Introduction

This Part of the report discusses the conditions and treatment in detention of unlawful non- citizens who arrive by boat or plane and are detained at one of the four immigration detention facilities until they are either granted asylum or removed from Australia.

While the report examines the conditions of detention at the Villawood, Perth and Port Hedland Immigration Detention Centres, the Port Hedland centre is the primary focus.

This is because

- it is the main facility for detaining boat people
- it was the major focus of the Commission's inquiry into detention practices
- the majority of complaints to the Commission by detained asylum seekers were lodged by individuals and groups, or on behalf of individuals and groups, held at Port Hedland
- it is very isolated
- local policies at Port Hedland in relation to access to legal advice and the separation of new arrivals appear to be in breach of human rights under the HREOC Act.

This Part (Chapters 4 - 7) deals with

- physical conditions of detention
- security measures and
- the segregation of newly-arrived detainees at Port Hedland.

Part 4 (Chapters 8 - 14) evaluates the services available to detainees including provision for recreation, education and training, and assistance from interpreters and lawyers.

The information contained in these Parts and Part 5 (Chapter 15) was gathered through site inspections, interviews with centre staff and detainees and the investigation of individual complaints to the Commission. The Department was invited to provide written comments on the material contained in these Parts. These comments are incorporated where relevant.

In undertaking inspections of the Villawood, Maribyrnong, Perth and Port Hedland Immigration Detention Centres the Commission found that many of the issues raised and concerns identified in relation to the detention of asylum seekers were common in all centres. They include security practices and the range of services provided to detainees including medical, education and recreation facilities and services and facilities for the observance of religious and cultural practice.

On the other hand, the Commission found that the physical conditions of detention and the provision of services varied significantly among the centres. The conditions of detention at the Perth centre and Stage One at Villawood do not meet the minimum standards required in prisons and are not adequate for the long-term detention of asylum seekers. Detention in these facilities is in breach of human rights under the HREOC Act.

The Port Hedland centre and Stage Two of the Villawood centre now generally meet the minimum standards for the humane treatment of detainees required under the HREOC Act, although there are particular issues where that standard is not met. The Commission has observed a noticeable improvement in the conditions of detention at Port Hedland over the past two years.

The Commission has had a longstanding interest in the conditions under which asylum seekers are detained in Australia. In 1983 the then Human Rights Commission conducted an inquiry into the observance of human rights at the Villawood centre.[1] In 1992 the Commission prepared a report on the detention of asylum seekers in Darwin and Port Hedland. This report found that the most serious problem faced by detainees, in terms of international human rights standards, was the length of time they were held in detention awaiting the determination of their refugee status.[2]

Although changes to the processing of applications has greatly reduced the length of detention, the length of time spent in detention still represents the most serious problem experienced by detainees. For example, at the time of the Commission's most recent visit to the Port Hedland centre in May 1997, 67 per cent of detainees had been detained for more than six months and 39 per cent had been detained for more than two years.[3]

The length of time people spend in detention makes the need for adequate conditions of detention critical. As the vast majority of asylum seekers are detained for periods of time which exceed a few months, the Department must ensure that its facilities and services meet the long-term health, welfare and educational needs of detainees. Lengthy periods of detention intensify problems with the conditions of detention.

1 Human Rights Commission, *The Observance of Human Rights at the Villawood Immigration Detention Centre,* Report No. 6, Australian Government Publishing Service, Canberra, 1983.

2 Human Rights and Equal Opportunity Commission, *Detention of Asylum Seekers - Darwin and Port Hedland,* Report of the Acting Secretary's visits to Darwin and Port Hedland Detention Centres/Processing Areas, August and December 1991, 1992, page 31.

3 Resident Listing for the Port Hedland Immigration Reception and Processing Centre dated 5 May 1997, provided by the Department.

4.2 Structure of analysis

The analysis in each chapter of Part 3 and 4 includes an examination of

- relevant legislation and departmental and Australian Protective Service (APS) policy and procedures
- the treatment and experience of detainees
- responses received from the Department
- relevant human rights law
- whether local practice is consistent with departmental and APS policy and/or instructions
- any breaches of human rights law.

The analysis includes a series of findings and recommendations. The recommendations are based on the findings and provide alternatives to existing legislation, policy and practice with a view to bringing the treatment of detainees into conformity with Australia's international human rights obligations and Australian law.

4.3 Description of centres

Port Hedland

The Port Hedland Immigration Detention Centre is situated at Port Hedland 610 kilometres south-west of Broome and 1,641 kilometres north-west of Perth in Western Australia. The town is on the edge of the Great Sandy Desert with a mean maximum temperature in summer of 45 degrees celsius. The nearest town, Newman, is 461 km away.

The centre is next to a beach in a semi-residential area of the town. It covers an area of 3,374 hectares and consists of nine accommodation blocks, a school block, a kitchen/mess block, a laundry and an administration block. All of the buildings are air-conditioned and have cyclone protection meshing covering all windows. In 1995 a number of internal fences topped with razor wire were installed which, when the gates are shut, fence off each accommodation block. Three accommodation blocks, E, I and J, are separated from the main detention compound. These blocks are used to detain new arrivals while their health status and claims on Australia are being determined, detainees who are going to be removed from Australia and people who re separated from other detainees in the centre for security reasons.

Block and play area,
Port Hedland detention centre, May 1997.

Villawood

The Villawood Immigration Detention Centre, also known as the Westbridge complex, is located on the disused Westbridge Migrant Hostel site at Villawood in south-western Sydney. It is made up of two separate detention centres, Stage One and Stage Two.

Stage One is a purpose-built medium security detention facility accommodating up to 70 detainees. The accommodation is dormitory style with separate dormitories for men and women. Stage One also has two designated family rooms. It contains common recreation rooms, a dining room, a visiting area and a tarred outdoor exercise yard. This yard is enclosed by a four metre high brick wall which is topped with barbed wire. On 17 October 1997 Stage One held 51 adults and one child; 37 males and 15 females.[4]

The majority of detainees at Villawood are held in Stage Two. Detainees are moved from Stage Two to Stage One if their behaviour becomes difficult to manage, they have a medical condition which requires close observation, they are awaiting removal to their country of origin or their applications to the Immigration Review Tribunal or the Refugee Review Tribunal have been unsuccessful. Stage One is also used to hold new arrivals and people who are detected at the airport and removed from Australia within a day or two.

Stage Two is a low security facility made up of nine brick accommodation blocks and separate administration and recreation areas. Stage Two is enclosed by a double fence line made up of 4 metre high wire fences topped with barbed wire. Internal fences separate the visiting and administration area from the accommodation blocks. On 17 October 1997 Stage Two held 157 adults and 16 children; 28 females and 145 males.[5]

4 List of Detainees at the Villawood Immigration Detention Centre dated 17 October 1997, provided by the APS.

5 Ibid.

Villawood Stage Two, October 1997.

Perth

The Perth Immigration Detention Centre is located within the perimeter of the Perth Domestic Airport Complex. The centre is around eleven kilometres north-east of the Perth central business district. It is a purpose-built medium security facility. Accommodation is dormitory style with separate dormitories for male and female detainees. The centre can hold up to 44 people. It can accommodate no more than four women and there are no facilities for families.

Most detainees at the Perth centre are airport arrivals and people who have overstayed their visas. In some cases, boat arrivals are transferred from Port Hedland to Perth.

The centre is made up of dormitories, an administration area, a control room, a visiting area, an observation room, an indoor recreation area, an enclosed internal exercise yard and a medical room. On 8 August 1997 22 men and no women or children were held at the Perth centre. At that time no boat people were detained there.[6]

Maribyrnong

The Maribyrnong Immigration Detention Centre is located in Maidstone in Victoria. It is approximately 13 kilometres north-west of the Melbourne GPO. Accommodation is dormitory style. Female and male detainees are accommodated in separate areas. The male and female dormitories each have their own recreation facilities and external courtyards. The centre also has four family units. These are located in an area which is separate from the dormitories.

6 List of Detainees at the Perth Immigration Detention Centre dated 8 August 1997, provided by the Department.

4.4 Departmental duty of care and the contracting of services

Many of the conditions which the Inquiry identified as failing to meet minimum human rights standards have been the responsibility of the Australian Protective Service (APS) in the first instance. The Department nevertheless owes a duty of care to detainees under the Migration Act and must bear ultimate responsibility for them, whoever is the actual service provider.

Migration Series Instruction 92, General Detention Procedures, Section 8, outlines the duty of care APS and departmental officers have and how this should be carried out.[7]

> Officers have a duty of care with respect to detainees. This means that officers are obliged to take all reasonable action to ensure that detainees do not suffer any physical harm or undue emotional distress while detained. Officers should be aware of the potential for serious consequences for the detainee, the Department and themselves if they fail to fulfil their duty of care.

At the time of the Inquiry the APS was engaged by the Department to provide a custodial service and to manage the daily running of the immigration detention centres under a memorandum of understanding. The APS is a government agency. The memorandum of understanding set out the respective roles of the two organisations.

In 1997 the Department called for new tenders to provide the custodial service in the centres. In November 1997 the Department announced that Australasian Correctional Services Pty Ltd (ACS) had been selected as the preferred service provider for the four centres. The ACS is a private for-profit corporation. ACS's responsibilities will include providing a custodial service, the maintenance of facilities, the daily running of the immigration detention centres and looking after the basic needs and welfare of detainees. In summary, the ACS will be responsible for ensuring that each of the centres provides a secure, safe and humane environment for detainees.

The General Agreement between the Department and ACS is intended to create a framework in which both parties can work together in an open and cooperative manner to provide an immigration detention service which achieves the goals set out in the Immigration Detention Standards. These Standards were developed by the Department and cover areas such as the dignity of detainees, privacy, social interaction, educational and recreational activities, selection and training of personnel, the management of security, the treatment of detainees with special needs and reporting responsibilities. A guiding principle in the Standards is that the dignity of the detainee is to be upheld in culturally, linguistically, gender and age appropriate ways.

The Department has also developed a comprehensive set of performance measures and benchmarks to measure the performance of the service provider against the Standards. Payment of fees and the continuation of the contract will depend on these performance standards being met.

7 For a description of Migration Series Instructions, see Chapter 8, footnote 1.

While the running of the immigration detention centres has now been contracted to ACS, ultimate responsibility for detainees remains with the Department. Under the new arrangements the Department will oversee the performance of ACS to ensure that the performance standards are being complied with. It will also retain responsibility for issues relating to the migration status of detainees and handling requests by detainees for legal advice.

In December 1997 the ACS assumed responsibility for the operation of each of the immigration detention centres. The Department expects to have a continuing presence in each. Each centre will continue to have a manager who is an employee of the Department. Withe the exception of the manager of the Perth centre, the centre manager works in the detention centre. In the new arrangements, the role of the centre manager will be

- providing case management of individual detainees and overseeing and coordinating all aspects of applications to remain in Australia
- facilitating requests for legal advice from detainees
- working cooperatively with the service provider to ensure that the Immigration Detention Standards are met
- monitoring whether the service provider is fulfilling its contractual obligations at the local level
- performing a quality assurance role.

The privatisation of the operations of the centres raises new issues. First among them is the accountability of a private custodial service provider that is not subject to the same public scrutiny as the APS. In addition to this concern is the effect of contracting a private agency on the duty of care owed by the Department to detainees. The jurisdiction of agencies such as the Commonwealth Ombudsman, for example, in relation to private agencies providing core government services is to date unresolved. Second, custodial staff working at the immigration detention centres will no longer have the status of public servants and the strict code of conduct and tenure of employment that is attached to this status. Third, the new service provider has experience only in running correctional institutions. These are or should be quite different in nature from administrative detention centres. This transition then should be closely observed.

In a submission to a review of the APS in February 1997 the Commission recommended that where functions are to be performed on a contractual basis by another body on behalf of the Commonwealth

- provisions regarding compliance with human rights laws should be inserted as standard non-negotiable clauses in contracts
- all potential contractors should be assessed as to their ability to meet these legislative requirements

- consideration should be given to the adoption of transparent and rigorous tendering processes in which any equity, anti-discrimination and human rights conditions or requirements are made explicit and subject to provisions for monitoring and evaluation.

The Commission reaffirms these recommendations in the light of the findings of this Inquiry. The Commission welcomes the inclusion of quality standards pertaining to conditions of detention in the General Agreement between the Department and ACS.

As the new arrangements represent a significant change to the way immigration detention centres are managed, the Commission will carry out site inspections at each of the immigration detention centres within twelve months of ACS taking over.

5 Physical conditions of detention

5.1 Introduction

Responsibility for the quality of the accommodation and facilities in the immigration detention centres has been shared between the Department and the APS. The Department has responsibility for

- deciding on the location of detention centres
- purchasing and/or constructing appropriate buildings
- the design of the centres
- carrying out maintenance on and upgrades of the buildings and
- providing basic facilities, such as kitchens, beds and recreational areas.

Within the facilities and buildings supplied by the Department, the APS was responsible for security in the centre and providing for the basic needs of detainees. This included ensuring that detainees have adequate food, shelter and medical care.

The Department and the APS were jointly responsible for providing physical conditions of detention which were just and humane and consistent with safety and public health standards.

This chapter examines the general conditions of detention at the Villawood, Perth and Port Hedland immigration detention centres.

5.2 Human rights law relevant to physical conditions

The conditions of detention for all persons deprived of their liberty must ensure humane containment and treatment of detainees. They must avoid imposing cruel, inhuman or degrading treatment which would violate ICCPR article 7 and CROC article 37(a). They must ensure positively the humane treatment of detainees, respectful of dignity, in accordance with ICCPR article 10.1 and CROC article 37(c). The privacy of detainees must be protected so far as possible in detention. ICCPR article 17 requires that privacy must not be arbitrarily or unlawfully interfered with. Interference with privacy may be arbitrary when it is unreasonable in the circumstances of contrary to the provisions, aims and objectives of the Covenant.[1]

1 UN Human Rights Committee, General Comment No. 16 (1988), paragraph 4.

The Standard Minimum Rules detail minimum standards with respect to general conditions to avoid violation of ICCPR article 7 and to ensure compliance with ICCPR article 10.1. They specifically address the standard of sleeping accommodation to be provided to detainees.

> All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet the requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation (Rule 10).
>
> Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the institution (Rule 9(2)).
>
> Every prisoner shall, in accordance with local or national standards, be provided with a separate bed and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure cleanliness (Rule 19).

Lighting and sanitation are also addressed.

> In all places where prisoners are required to live or work,
>
> (a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation (Rule 11).
>
> The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner (Rule 12).

In the case of children, CROC article 37(c) requires that their detention must additionally take into account their needs as children according to their age. The principal requirement is for any detention of a child to be for 'the shortest appropriate period of time' (article 37(b)). When this obligation is violated or when it is deemed 'appropriate' to detain a child for a lengthy period, Australia's obligations to secure the child's 'adequate' development (CROC articles 6.2 and 27.3) are especially relevant in assessing the conditions of that detention.

5.3 Australian correctional institutions

Conditions in Australian correctional facilities provide a useful reference point for assessing whether immigration detention centres are providing fair and just conditions of detention in line with Australia's international human rights obligations. Correctional facilities are of two broad kinds. Police lock-ups and watchhouses serve primarily to detain people during investigation of alleged offences and prior to bail or conviction and sentence where that detention is very short-term. Prisons accommodate people who have been sentenced or who are held in custody pending trial.

Detention in Australian immigration detention centres is almost always of a longer duration than the standard overnight or over a weekend detention in a police cell. The standard of the accommodation and services, therefore, should be closer to that of a prison than a police lockup. A review of the respective standards provides a useful reference point for the evaluation of the conditions of immigration detention.

The Standard Guidelines for Corrections in Australia were first published in 1978. They were reviewed in 1992 and republished in 1994 and 1996. The Standard Guidelines are based upon the Standard Minimum Rules. They are for guidance only and are not intended to be law. They deal primarily with prisons and as such do not deal directly with administrative detention. However, the fact that they are based on the Standard Minimum Rules, which deals with administrative detainees under Rule 94, makes them relevant to determining the rights of people held in immigration detention centres.

Some immigration detention centres in their lack of adequate space, natural light and recreational, educational and other services and facilities have more in common with some Australian police watchhouses and lockups than they do with prisons. The Standard Guidelines do not necessarily apply to prisoners who are being held in police cells. Because watchhouses are designed to be used for very short periods of detention, the standards of the conditions and facilities are lower than the minimum standards required for prisons.

In 1996 Queensland's Criminal Justice Commission conducted a detailed research project on police watchhouses in that State. The research examined the interconnected issues of overcrowding, lengthy stays by prisoners and poor conditions in watchhouses. It was found that the conditions in watchhouses are in practice below those required for prisons.[2] In particular, it was found that most watchhouses are poorly designed to cope with the heat, prisoners in most watchhouses are denied the opportunity to have clean clothes daily, the standard of bedding is poor, the meal allowance makes it difficult to provide prisoners with good quality food, opportunities for recreational activities are very limited, more than half the watchhouses did not allow visits by relatives or friends and prisoners are often forced to share cells with prisoners of different categories.[3]

2 Criminal Justice Commission, *Report on Police Watchhouses in Queensland,* Goprint, Brisbane, 1996, page 36.

3 Id, page 88.

The Criminal Justice Commission considered whether watchhouses should be upgraded to meet the minimum standards for the treatment of prisoners but concluded that it would be preferable to transfer prisoners to a correctional centre within a very short time of their sentence, remand or arrest, rather than to upgrade watchhouses to deliver the level and range of services and facilities available at correctional centres.

It was recommended that section 32 of the *Corrective Services Act 1988* (Qld) be amended to provide

> a person sentenced to a term of imprisonment or required by law to be detained in custody for a period shall be transferred as soon as possible, at the convenience of the police, to a correctional centre, but in any case shall not be detained in a watchhouse for more than a period of three days after the commencement of such sentence or period of detention, except in the circumstances set out below.[4]

Similarly, those immigration detention centres that do not meet the minimum standards for the treatment of prisoners should only be used for a matter of days until arrangements can be made to transfer the detainee to a centre with a fuller range of facilities and better conditions.

5.4 Villawood

On 26 September 1997 244 people were in detention at Villawood.[5] Of this total, eleven (fewer than one in 20) were boat people and the remainder were people who had overstayed their visas and unauthorised arrivals who came to Australia by plane. People are detained at Villawood for periods varying from 24 hours to more than four years. Of those at Villawood on 26 September 1997, 55 had been in detention for more than six months, 23 for more than twelve months and twelve for more than three years.[6] People are held in Stage One for periods of time varying from 24 hours to more than seven months.

The Department has advised the Commission that it 'has been examining options for substantially improving the quality of detention facilities in Sydney. Funding of some $4m over two years has been provided in the 1997 Budget for the Department to refurbish the Villawood immigration detention centre.'[7]

4 Id, page 42, Recommendation 4.2.

5 Resident Listing for the Villawood immigration detention centre dated 26 September 1997, provided by the Department

6 Ten of these twelve people were detained at Port Hedland until August 1997.

7 Letter from Director, Compliance and Enforcement Strategy, dated 30 March 1998.

Stage Two

In Stage Two people live in family groups in accommodation blocks. Each accommodation block contains 12 flats and a common recreation room. Each flat has two rooms and a bathroom. Families have their own flats and unaccompanied females and males share a flat with a person of the same sex. The accommodation area is surrounded by a number of playing fields and open space. Detainees are free to leave their flats and move around the enclosed accommodation area. Within Stage Two there are indoor recreational areas, grassed sports fields and large amounts of open space. There is also an outdoor visiting area, school rooms and welfare, legal and medical offices.

During the Commission's site inspection of Stage Two in October 1997 it found that, while the living conditions were in general run down and old, they were clean and basic maintenance had been carried out. The individual flats provided adequate space and privacy for families and unaccompanied detainees. Accommodation blocks were surrounded by ample open space and grassed areas.

Stage One

Apart from a few designated family rooms, accommodation in Stage One at Villawood is dormitory style. The male dormitory can sleep 50 people and is made up of a number of petitioned-off areas. There are three double bunks in each of these areas. While the petitions form a divide between groups of bunks, they do not form separate rooms. Each petitioned-off area faces onto a common hallway in the dormitory. The female dormitory is an entirely open room and can sleep 29 people. Bathrooms are located next to each of the dormitories. Detainees are not allowed in the dormitories between 7.30am and 1.00pm each day, as they are closed for cleaning. Stage One also contains two sick bays, two observation rooms, common recreation rooms, a dining room, a visitng area and a tarred outdoor exercise yard.

Men's dormitory, Villawood Stage One, October 1997.

The male and female dormitories are separated by common recreational rooms. At the time of the Commission's site inspection in October 1997 the recreational areas in Stage One consisted of

- two television rooms
- a common room with a pinball machine
- a tarred outside exercise yard
- two grassed areas that only opened when there are sufficient APS officers on duty.

In general, the recreational areas are shared by male and female detainees, however, female detainees also have their own television area next to the female dormitory.

Conclusions from the site inspection

During the Commission's site inspection of Stage One in October 1997 it observed that the facilities in Stage One were old and overcrowded. It observed that there is insufficient space to adequately accommodate the number of people detained there. The male dormitory has small windows that let in fresh air and a small amount of natural light. The female dormitory does not have any windows.

Lack of facilities and space

The Commission observed that the space available to detainees in Stage One is very limited. They have few places within the centre where they can go during the day and very few recreational or educational activities in which they can participate.[8] Access to many areas in Stage One is restricted. For example, detainees can only go to the dining room at set meal times and dormitories are closed for cleaning from 7.30am to 1.00pm each day.

The recreational areas available to detainees in Stage One provide living space which is neither adequate nor comfortable. The recreational areas do not have sufficient chairs and tables to seat all the people held there. The majority of the space in the exercise yard is uncovered, making most of the outside area unusable in the summer months and during wet weather. The lack of facilities and space observed in the site inspection means that detainees in Stage One may have no choice but to spend most of their time standing in the common recreation areas with nothing to do.

The larger number of men than women in Stage One also means that the common recreational areas are dominated by the male detainees. This may worry some women and leave them with limited space within the centre where they can feel wholly comfortable and secure.

8 The recreational facilities available in Stage One are addressed in Chapter 12.

The Commission also observed that during the day, except for meal times, Stage One is very noisy. The noise is a result of televisions that are always on, people bouncing balls in the exercise yard and the voices of around 50 people confined within a relatively small area. The Commission conducted interviews with detainees in an office in Stage One. Due to the surrounding noise, officers found it difficult to hear what was being said. The Commission interviewed a Nigerian woman who complained that the noise meant that it was difficult for her 18 month old baby to sleep during the day.

Movement within the centre

The site inspection revealed that movement within Stage One is very restricted. Generally, detainees can move between the dormitory and the indoor recreational areas and the exercise yard. In the mornings movement is restricted to the recreational areas. Apart from the small grassed area, there are no recreational areas in Stage One where detainees can see outside the detention centre or have surfaces other than concrete and tar under their feet. The grassed area was locked during the Commission's site inspection. The Commission was advised by APS staff that this area remains locked most of the time because there are usually insufficient APS officers on duty to supervise it.

Complaints

The Commission received five complaints in 1997 from detainees at Villawood about the conditions of detention in Stage One. Of these complaints, four have been from detainees living in the male dormitory. They claim that there is nothing for them to do in Stage One and that they have no privacy. In his letter of complaint to the Commission an Iraqi detainee stated

> I coming to Australia for a protection and they trick me like a dog, it is not all right this. Here now at Stage one, they not have private rooms, no library, no system at all. Special the Muslim persons, they get up at 4 o'clock in the morning for a pray ... so after that I cannot sleep, I cannot think properly and at the end they have no human rights here.[9]

The above-mentioned Nigerian woman made a complaint to the Commission about the conditions in Stage One. She and her daughter were held in Stage One from March to October 1997, when they were released from detention on a protection visa. In a written statement to the Commission she described the conditions.

9 Evidence, Complainant V2, letter of complaint dated 8 May 1997, page 3.

> In Stage Two [my daughter] could play with other children, I had my own room where she could sleep very well in the afternoon. In Stage One it is noisy and she can't sleep. It is bad for my daughter. [My daughter] has rough sore knees because she has to crawl on the hard surface. Apart from children that were here for one night and a woman with a new born baby who was here for three months, there have been no other children in Stage One.[10]

The Department advised that the complainant and her daughter were being held in Stage One due to concerns about the mother's mental health and allegations that she was planning to escape.[11]

Information provided by the APS and the Australian Federal Police

In 1983 at the hearing of the then Human Rights Commission's inquiry into the observance of human rights at the Villawood Immigration Detention Centre, the Australian Federal Police, who at the time were responsible for running the centre, agreed that dormitory accommodation posed some problems and that single accommodation would be better. That inquiry recommended that arrangements be made to afford detainees access to sleeping quarters at all times and that appropriate measures be undertaken to ensure greater privacy in sleeping areas. Those recommendations have not been implemented.

Overcrowding

A detention centre is overcrowded when the number of people being held there is greater than the accommodation capacity of the centre. In March 1997 a policy commenced at Villawood under which all detainees who are unsuccessful at the Refugee Review Tribunal or Immigration Review Tribunal are to be transferred from Stage Two to Stage One.[12] In briefings provided by APS management at Villawood the Commission was advised that, since this policy began, the number in Stage One has risen to over 50 people and this has created an accommodation problem. The Commission was told that before this policy came into place Stage One would hold between ten and 25 people. In October 1997 the APS advised that there was an overcrowding problem in Stage One. The Commission was told that on some nights in the first weeks of October 1997 there were more male detainees than beds. This resulted in detainees having to sleep on mattresses on the floor.

10 Evidence, Complainant V1, statement dated 15 October 1997, page 1, paragraph 5.

11 Evidence, letter from the Secretary of the Department dated 29 May 1997, page 5.

12 This policy is addressed in more detail in Chapter 6.

Findings and recommendations on Villawood

With respect to the physical conditions at Villawood Stage Two the Commission finds

- Men, women and children have been detained in the Villawood Immigration Detention Centre for periods of time ranging from one or two days to periods in excess of three years. On 26 September 1997 twelve people held in Stage Two had been in detention for more than three years.
- The conditions in Stage Two are in general fairly run down. However, the facilities are clean and basic maintenance has been carried out.
- The individual flats provide adequate space and privacy for families and unaccompanied detainees.
- Accommodation blocks are surrounded by ample open space and grassed areas.
- The accommodation arrangements in Stage Two are adequate and meet the minimum standard for humane treatment required by ICCPR article 10.1.

With respect to the physical conditions at Villawood Stage One the Commission finds

- Men, women and children have been detained in Stage One for periods of time varying from 24 hours to more than seven months.
- The closure of the dormitories for five and a half hours during the day combined with the inadequacy of the recreational facilities and furniture in Stage One means that there are no places where a detainee can find privacy, read or relax during a large part of the day.
- The current sleeping arrangements in dormitories do not provide for the privacy of detainees. The infringement of privacy caused by the cramped conditions and the dormitory accommodation cannot be justified as necessary either for the containment of the detainees or for the maintenance of order in the centre.[13] Therefore, the interference with detainees' privacy is arbitrary contrary to ICCPR article 17 and CROC article 16 and breaches human rights under the HREOC Act.
- Due to the policy of transferring unsuccessful applicants at the Refugee Review Tribunal and Immigration Review Tribunal from Stage Two to Stage One, conditions in Stage One are currently overcrowded. Stage One does not have the space to accommodate adequately its current detainee population of over 50 people. These cramped conditions are in breach of ICCPR article 10.1 and of human rights under the HREOC Act.

13 While interference with privacy is permitted by ICCPR article 17, that interference must not be arbitrary in the sense of being unreasonable in the particular circumstances or contrary to the provisions, aims and objectives of the Covenant: Human Rights Committee, General Comment No. 16 (1988), paragraph 4.

- Accommodating male detainees on the floor in Stage One is not adequate and does not constitute the provision of adequate bedding. This practice does not meet the requirements of Standard Minimum Rule 19 and is in breach of ICCPR article 10.1 and of human rights under the HREOC Act.

- The windows in the male dormitory provide insufficient natural light and ventilation. The female dormitory does not have any windows. These conditions do not satisfy the requirements of Standard Minimum Rule 11(a) and are in breach of ICCPR article 10.1 and of human rights under the HREOC Act.

- The conditions in Stage One are only marginally better than those found in police watchhouses in Queensland where people stay for very short periods. The standard of the facilities and conditions do not meet the minimum requirements for prisons and administrative detention centres.

- The facilities and conditions in Stage One are inadequate for the detention of adults for any period in excess of seven days. The general conditions in Stage One breach ICCPR article 10.1 and human rights under the HREOC Act. The inadequacy of the facilities is of particular concern given the periods of time people may spend in Stage One.

- Children and women should not be detained at all in Stage One. The detention of children in Stage One is in breach of articles 27.3 and 37 of CROC and of human rights under the HREOC Act.

The Commission recommends

R5.1 The Department should cease using Stage One at Villawood for the long-term detention of unauthorised arrivals.

R5.2 Women and children should not be held in Stage One for any period of time.

R5.3 Stage One should be used only for the short term detention of men awaiting transfer to either Stage Two or an immigration detention centre other than Perth. These detainees should be transferred as soon as possible and in any event before the expiry of seven days' detention.

R5.4 The decision to detain a person in Stage One should be reviewed every 48 hours.

R5.5 The number of adult detainees held in Stage One should be reduced to no more than 25 to avoid overcrowding.

R5.6 The Department should fund the refurbishment of Stage One and

* afford detainees access to sleeping quarters at all times, as recommended by the Human Rights Commission in 1983
* provide sufficient chairs to allow all detainees a place to sit in the recreational areas
* open the grassed areas to detainees from 6.00am to 9.00pm each day
* install adequate shade provision in outside recreational areas so that they can be used in the summer months
* make provisions for greater privacy for detainees sleeping in dormitories, perhaps including the construction of private separate rooms to sleep no more than four detainees.

5.5 Perth

On 8 August 1997 no boat people were being held at the Perth Immigration Detention Centre. Of the 22 detainees, 91 per cent had been held at the Perth centre for more than a month and 23 per cent had been held for more than six months. Three people had been detained at Perth for more than eight months.[14] The Commission received a complaint on behalf of a detainee who was held at the Perth centre for a period of more than four years.[15]

In a response to a complaint from a detainee at the Perth centre the Department advised that for persons who enter Australia in an unauthorised manner and seek to engage Australia's protection obligations, the average period of time in detention at Perth is in the range of nine to twelve months, although longer periods of stay are not uncommon.[16]

Overview of conditions

The Perth Immigration Detention Centre is a purpose-built detention centre. It is made of brick and is air-conditioned throughout. Accommodation is dormitory style. There are separate dormitories for males and females. The female dormitory contains five bunks, a bathroom, washing machine, fridge, tea and coffee making facilities, a lounge and a television. The door of the female dormitory is kept locked from the outside and detainees have to call an APS officer through the intercom system if they want to leave the room. The female dormitory is separate from the main detainee population and facilities in the centre.

14 List of detainees at Perth IDC dated 8 August 1997, provided by the Department.

15 Complainant P2, letter of complaint dated 16 February 1996.

16 Evidence, letter from the Secretary of the Department dated 26 November 1997, page 4, in response to a complaint by Complainant P3.

There are four male dormitories. Two dormitories sleep eight people, the remaining two sleep six and ten each. Detainees are allocated to dormitories on the basis of ethnic background and religion. Each detainee has his own locker in the dormitories.

Men's dormitory,
Perth detention centre,
May 1997.

The centre also contains an administration area and control room, an observation room, a medical room, a visiting room, a dining room and recreation areas. The recreation areas are

- a recreation room containing a table tennis table and a television
- a second recreation room with a television
- an internal concrete exercise yard which has a basketball court and exercise equipment, surrounded by a 20 foot brick wall topped with barbed wire.

The main recreational facilities are shared by both sexes. Female detainees can also use the centre car park as an exercise yard. The centre uses closed circuit cameras to monitor the recreation areas, the visitors' room, the dining room and the foyer area.

Conclusions from the Commission's site inspections

The Human Rights Commissioner visited the Perth Immigration Detention Centre on 20 February 1997 and staff assisting the Commissioner visited on 26 May 1997. During these visits, the Commission observed that the facilities were slightly worn and the recreational areas were run down. In general, the centre was clean and basic maintenance had been carried out. It was appropriately heated. The walls and ceiling of the male dormitories had been defaced by detainees and needed to be painted. Florescent tubes provided the main lighting in the centre. The dormitories received small amounts of natural light.

Lack of facilities and space

As at Villawood the space available for detainees within the Perth centre is very restricted. While use of the dining area is restricted to meal times, detainees have unrestricted access to the dormitories. The Commission observed that there were insufficient recreational activities and space available for detainees.[17] For example, one recreation room contained an old television set, an empty book case and a few chairs. The indoor recreation rooms do not provide sufficient seating for the people detained there nor do they provide tables at which detainees could sit to read, write or participate in other activities. The majority of the outside exercise yard was not covered, making this area very unpleasant to use in the hot summer months or when it is raining. There are no grassed recreation areas.

The Commission also observed that both recreation rooms were very noisy due to loud television sets and the use of the table tennis table.

Movement within the centre

Generally, detainees are free to move between the dormitories and the recreational areas. Recreation and kitchen facilities are closed and detainees are locked in their dormitories at 10.30pm each night. Dormitories are unlocked at 7.00am in the morning. Between 7.00am and 10.30pm detainees have freedom of movement within the recreation and dormitory areas.

Greater restrictions are placed on the movement of female detainees within the centre. As outlined above, the door to the female dormitory is always kept locked from the outside. Female detainees must call for an officer if they want to leave the room and go to one of the recreational areas. At the time of the Commission's site inspection no women were being held at this centre. The female dormitory was being used by a man about to be removed from Australia.

17 The recreation facilities at this centre are addressed in Chapter 12.

Privacy

Detainees at the Perth centre have very little privacy. Accommodation is dormitory style and all recreation and common areas are kept under surveillance by closed circuit television. Additionally, the male showers are communal.

Complaints

The Commission has received six complaints from or on behalf of detainees at the Perth Immigration Detention Centre. The letter of complaint on behalf of a detainee from the People's Republic of China who had been held at the Perth centre from August 1992 to November 1997, a period of more than five years, stated

> The long term jailing has made [him] mad sometimes. Once he used a stick to break many window glass in the detention centre.[18]

A detainee from Liberia wrote to the Commission to complain about his detention at Perth from 22 April 1996 to 26 May 1997. He described the centre as a gaol and asked for the assistance of the Commission indicating he contemplated suicide by hanging.[19]

An 18 year old Iraqi detainee also made a complaint. He was critical of the use of surveillance cameras and that there is no park to sit in. He also stated that the timing of meals and the turning off of lights do not accommodate Muslim prayer times.[20] The issues relating to religious observance are addressed in Chapter 13.

Findings and recommendations on Perth immigration detention centre

With respect to the physical conditions at the Perth centre the Commission finds

- Men and women are detained at the Perth centre for periods varying from 24 hours to more than four years. In August 1997 23 per cent of detainees had been held there for more than six months.
- Children and families are not detained at the Perth centre.
- The Perth centre can accommodate four women and 40 men.

18 Evidence, Complainant P2, letter of complaint dated 16 February 1996, page 2, paragraph 3.

19 Evidence, Complainant P3, letter of complaint dated 15 May 1997.

20 Evidence, Complainant P1, letter of complaint dated 16 June 1997.

- The sleeping arrangements and surveillance cameras interfere with the privacy of detainees. The infringement of privacy caused by the dormitory accommodation cannot be justified as necessary either for the containment of the detainees or for the maintenance of order in the centre. Therefore, the interference with detainees' privacy is arbitrary contrary to ICCPR article 17 and breaches human rights under the HREOC Act.

- The windows in the male and female dormitories provide insufficient natural light and ventilation. These conditions do not meet the requirements of Standard Minimum Rule 11(a) and are in breach of ICCPR article 10.1 and human rights under the HREOC Act.

- Locking people in dormitories during the day represents a level of security which is unnecessarily high for administrative detention.

- The conditions in the Perth centre are slightly better than those found in police watchhouses in Queensland. However, the standard of the facilities and conditions do not meet the minimum requirements for prisons and administrative detention centres.

- The facilities and conditions in the Perth centre are inadequate for the detention of adults for any period of time in excess of seven days. The general conditions breach ICCPR article 10.1 and human rights under the HREOC Act. The inadequacy of the facilities is of particular concern given the periods of time people are spending in this centre.

The Commission recommends

R5.7 The Perth Immigration Detention Centre should be used only for the short-term detention of people awaiting transfer to an immigration detention centre other than Stage One at Villawood. The Department should cease using this centre for the long-term detention of unauthorised arrivals. Adult detainees should not be held in the Perth centre for more than seven days.

R5.8 The decision to detain a person in the Perth centre should be reviewed every 48 hours.

R5.9 As at present, children and families should not be detained in the Perth Immigration Detention Centre.

R5.10 Female detainees should not be held at the Perth Immigration Detention Centre for any period of time due to the gender imbalance in detainee numbers and the nature of the conditions for female detainees.

R5.11 The Department should refurbish the Perth Immigration Detention Centre and

* provide sufficient chairs and tables to allow all detainees a place to sit in the recreation areas
* install adequate shade provision in open-air recreational areas so that they can be used in the summer months
* examine the availability of outdoor recreational facilities, such as park land, near the Perth centre and make arrangements for the regular use of these areas by detainees
* make provisions for greater privacy for detainees sleeping in dormitories, perhaps including the construction of separate rooms to sleep no more than four detainees.

5.6 Port Hedland

On 5 May 1997, 213 people were in detention at the Port Hedland Immigration Detention Centre. All of these detainees were boat people. Of this total, 156 were males and 57 females; 38 were children. One hundred and forty-three of these people had been detained for more than six months; 91 for more than one year; 84 for more than two years and 16 for more than three years.[21]

Fifteen people from the 'Labrador' were held in detention at Port Hedland for almost five years from 25 August 1992 until 14 July 1997, when they were removed from Australia to the People's Republic of China.

Overview of conditions

The Port Hedland centre is located on part of the former BHP single men's quarters. It is made up of a number of two storey concrete buildings with air-conditioning and cyclone protection.

The centre has nine accommodation blocks. People are housed in accommodation blocks on the basis of their ethnic origin and the boat on which they arrived. Family groups are allocated their own bedrooms and unaccompanied people share rooms with other detainees of the same sex. Each bedroom has between two and six beds. Every accommodation block has two sets of toilets and bathrooms and a common room. Detainees are able to choose where they want to sleep. Once a week APS officers record where people are sleeping. Three accommodation blocks are separated by internal fences from the rest of the detention centre: blocks E, I and J.

21 List of Residents for the Port Headland Reception and Processing Centre dated 5 May 1997, provided by the Department.

In addition, the Port Hedland centre has a large air-conditioned kitchen and dining area, administrative offices, school rooms, an outdoor visiting area and a number of small buildings, such as laundries and storerooms.

The following table gives some indication of the fluctuation in the detainee population at Port Hedland.

Table 5.1	Port Hedland detainee population fluctuations		
Date	Number	Date	Number
1 Jan 1992	443	30 June 1992	422
1 Jan 1993	413	30 June 1993	297
1 Jan 1994	337	30 June 1994	208
1 Jan 1995	869	30 June 1995	858
1 Jan 1996	363	30 June 1996	315
1 Jan 1997	318	30 June 1997	326
1 Jan 1998	44		

21 Source: Information provided by the Department in a facsimile from the Director, Compliance and Enforcement Strategy, dated 9 April 1998.

In May 1997 major refurbishments were being carried out on four accommodation blocks. A new accommodation area was also being built. The new accommodation blocks will house up to 160 detainees. $11 million have been provided by the federal government to pay for the refurbishment, due for completion by November 1998.

The renovated accommodation blocks consist of both family rooms and smaller rooms to accommodate unaccompanied detainees. The family rooms sleep a maximum of six people. Each accommodation block will include a supplies cupboard and a common room. Every common room will have a television, sink, fridge, tables and chairs and shelving.

Detainees living in blocks other than E, I and J are able to move out of their accommodation blocks and into the main compound 24 hours a day. There are no locks on any doors. Detainees are not locked inside their rooms or the accommodation blocks for any periods of time. In 1995 a number of internal fences were installed around each of the accommodation blocks. In general, these internal fences remain open and are only closed when there is a major security incident. The gates between the main compound and the administration area are kept locked. If detainees want to see the centre manager, welfare officer or the medical staff who are located in the administration area, they must report to the APS officer at the gate.

E, I and J blocks are surrounded by wire fencing. The gates which separate them from the rest of the centre are kept locked. These blocks are used for new arrivals, people who are going to be removed from Australia and people who have been involved in a security incident or are in conflict with other people in the centre. The rooms in J block are smaller than those in other accommodation blocks.

At the time of the Commission's visit in May 1997, E block was being renovated and was not in use. J block also was not being used. The Commission inspected E block and noticed that the windows on the bottom floor facing the administration block had been painted out. During the Commission's visit, ten people were living downstairs in I block, five people from the 'Grevillea' who were in conflict with others from their boat and five men from North Africa.

Conclusions from the site inspection

The accommodation areas where detainees were living were clearly quite old. The toilet and bathroom areas observed by the Commission were stained and encrusted with dirt.

In general, the accommodation areas were adequate for the families and unaccompanied people living in them. However, the Commission saw some bedrooms that were quite crowded. It was also observed that detainees were only provided with single beds. This bedding combined with the cramped nature of some of the accommodation would make it difficult for couples to obtain sufficient privacy for their personal relationships.

The refurbished accommodation areas will improve the living conditions of the bedrooms and should enhance the privacy available to detainees. It is noted that all the new bedding is made up of single beds arranged in double bunks.

In May 1997 all detainees, apart from those living in I block, were free to come and go from their accommodation blocks into the main compound. They had access to sufficient open space. The main detainee population were neither locked in their rooms nor in the accommodation blocks.

Management at the centre gives detainees responsibility for cleaning the accommodation blocks. It allows people to move rooms or create partitions within rooms to accommodate the needs of family groups and reflect the changing nature of relationships. These arrangements are welcome as they give detainees some control over their daily lives and personal relationships.

People detained in blocks E, I and J have their freedom of movement restricted to the small area circumscribed by the internal fences. The conditions in these areas and recommendations relating to the use of these areas are covered in Chapter 7.

Complaints

Most of the complaints received by the Commission from people in detention at Port Hedland have related to the long periods of time they have spent in detention, difficulties in obtaining access to legal advice and use of force by APS officers. In general, complainants and detainees to whom the Commission spoke seemed relatively happy with the general conditions of detention. What they were most concerned about was the months, and in some cases many years, they had spent within the confines of the detention centre.

A complainant from the 'Vagabond' who had been in immigration detention since July 1994 stated

> Unlimited time of the imprisonment and other problems make us feel like we are dangerous criminals. Luckily, we are not. The more we are staying, the more our spirit is going to be worse seriously. At last my friend .... who join to buy an electronic dictionary with me, committed suicide by taking tablets on 13 May 1997. Luckily he was rescued on time.[22]

This complainant also expressed concern about being confined to the detention centre and the internal fences.

> We are not provided to take excursion normally. Inside the camp, fences are everywhere [so] that we cannot go back and forth comfortably. In Galang camp [Indonesia] I had been on the beach every Sunday and public holiday for the whole day without police watching.[23]

The Commission has received three complaints about the conditions in the separated accommodation blocks. Complainants have alleged that, apart from a few short breaks a day, they were locked inside the accommodation block and restrictions were placed on their ability to communicate with the outside world. For example, they claim they were not allowed to watch television, read newspapers, listen to the radio or make contact with people outside the detention centre. These allegations are detailed in Chapter 7.

22 Evidence, Complainant PH7, letter of complaint dated 15 May 1997, page 2, paragraph 9.

23 Evidence, Complainant PH7, letter of complaint dated 15 May 1997, page 1, paragraph 2.

Findings and recommendations on Port Hedland

With respect to the physical conditions at Port Hedland the Commission finds

- Men, women and children have been detained in the Port Hedland immigration detention centre for periods that vary from less than a month to more than five years. As at 5 May 1997 there were 16 people who had been detained for more than three years.
- The accommodation areas in use are old and in need of renovation.
- The sleeping quarters are slightly crowded and do not provide adequate space and privacy for families and unaccompanied detainees. The new accommodation blocks should help to address these issues.
- Accommodation blocks in the main compound are surrounded by open space and grassed areas.
- Detainees in E, I and J blocks have greater restrictions placed on their freedom of movement than detainees elsewhere in the centre.
- The internal fences restrict the ability of detainees to move freely around the detention centre - in particular to and from the administration area.
- The accommodation arrangements in the main accommodation blocks are adequate and meet the minimum standard for humane treatment required by ICCPR article 10.1 and the HREOC Act.

The Commission recommends

R5.12 All the gates between the main compound and the administration area should generally be left open, allowing detainees to move freely around centre.

R5.13 There should be an independent review, perhaps conducted by the Australian Federal Police, into whether the system of internal fencing is still required at the centre. The review should give consideration to, firstly, the security objectives achieved by the fences and, secondly, whether the restrictions placed on detainees' freedom of movement are justified by these security objectives.

R5.14 Detainees should be provided with access to the beach at least once a week.[24] A pilot program should be begun to allow long-term detainees and families to have unsupervised access to the beach on a regular basis.

R5.15 Increased shade should be provided in the outside areas, creating more spaces that detainees can use during the day.

24 The beach is around 350 metres from the centre.

6 Security

6.1 Authority

Until the end of 1997, the Australian Protective Service (APS) was the custodial service provider in all immigration detention centres. The APS was also responsible for the management of services such as education, medical and welfare to detainees. These responsibilities will now lie with a private service provider, Australasian Correctional Services Pty Ltd (ACS). While the detention service provider bears responsibility for the provision of these services in the first instance, the Department retains a duty of care to asylum seekers held in its centres.

The custodial service includes the management of security issues such as surveillance, the use of force, the authority to hold detainees in observation rooms and procedures for transferring detainees to State prisons. The Port Hedland and Perth Station Instructions[1] set out the broad custodial responsibilities of the APS as

- exercising custody over residents in the least restrictive manner possible
- ensuring conditions of custody are just and humane by creating and maintaining conditions under which the rights of individuals are safeguarded, except those which must necessarily be denied as a result of custody
- providing appropriate services for residents and their families to counter as far as possible any damaging effects of custody
- providing physical conditions for residents and their families to counter as far as possible any damaging effects of custody
- maintaining security of the detention centre and reporting every matter which may jeopardise the security and operation of the centre and the welfare of detainees and
- providing advice on the development and operation of the detention centre.

The Station Instructions at Villawood defined the role of the APS as providing a custodial service in line with the Migration Series Instructions and the Memorandum of Understanding between the Department and the APS.

Departmental staff and detention service providers have a very difficult job to perform. The centres hold men, women and children from diverse ethnic and cultural backgrounds and a variety of mental health, personality profiles and recent experiences, including torture and trauma in some cases. They are administrative detention centres and not correctional facilities. The service provider must balance the need to provide humane conditions of detention to this broad cross-section of people with the requirement to maintain security within the centre.

1 For a description of Station Instructions, see Chapter 9, footnote 1.

Table 6.1	Security incidents logged at Port Hedland October 1991 to November 1995

Incident type	Number logged
Major disturbance	11
Escape, attempted escape or perimeter breach	111
Suicide attempts	11
Demonstrations	17
Other	261
Total	411

Source: Australian National Audit Office *The Management of Boat People* Auditor-General Report No. 32, Canberra, 1998, pages 41-43.

An expert committee convened by the Department late in 1994 to report on security at Port Hedland found

> ... the boredom and monotony of life in the [centre] has the potential to be the catalyst for problems amongst or with residents. Residents are considered to have far too much unproductive time in which to ponder, speculate and react to rumours as to their fate.[2]

While additional programs were introduced the Audit Office found in 1998 that 'more could be done to reduce "unproductive time". This could lead to reduced stress and likelihood of major incidents, and hence lower guarding costs.'[3]

To assist APS officers to adjust to the unique circumstances of immigration detention centres some training was provided in cross-cultural issues, counselling, conflict resolution and communications skills. Several detainees at Port Hedland made positive comments about APS officers in their statements to the Commission during both site inspections. However, the Commission has also received several complaints about security practices including surveillance, the use of unreasonable force and the practice of isolating detainees in observation rooms.

2 Quoted by Australian National Audit Office *The Management of Boat People* Auditor-General Report No. 32, Canberra, 1988, page 47.

3 Id, page 48.

In discussions with the Commission in May 1997, the APS officer in charge at Port Hedland reported that the main problems with staff were with the 'fly-ins' who are relied on to supplement the small local pool of labour. Fly-ins are attracted by the good salary offered for short-term deployment to the centre. He reported that he had had to remove fly-ins from duties for inappropriate behaviour both during work and after hours.

The private service provider Australasian Correctional Services assumed responsibility for the centres in late 1997. The experience of the APS should affect the ways in which the ACS now approaches the task.

6.2 Physical layout

The Port Hedland centre is surrounded by a high wire fence topped with barbed wire. Some surveillance cameras operate on the perimeter fences. Since its commissioning as an immigration detention centre, security has been increased. In 1995 a number of internal fences topped with razor wire were installed which, when the gates are shut, fence off each accommodation block. In addition, double and triple fences covered in hessian have been erected around parts of the centre preventing visual contact between detainees and members of the community.

At the Perth centre detainees are kept locked within the confines of the purpose-built detention centre, which includes an exercise yard, enclosed by a brick fence topped with barbed wire. The centre is monitored by closed circuit cameras.

Exercise yard,
Perth detention centre,
May 1997.

Stage One at Villawood has a physical layout similar to that of the Perth centre. Detainees' freedom of movement is restricted to the purpose built brick detention centre and the exercise yard which is attached. Both areas are monitored by closed circuit cameras.

Stage Two is a low security facility. The entire area is enclosed by a double wire fence which is 4 metres high and topped with barbed wire. The inner fence is monitored by sensors which are sensitive to movement. Internal fences separate the accommodation area from the visiting and administration areas.

6.3 Surveillance

All of the centres use the following forms of surveillance

- closed circuit cameras
- body and room searches
- searching incoming mail for unauthorised articles
- 24-hour foot patrols of the grounds and accommodation blocks.

The use of closed circuit cameras is kept to a minimum at the Port Hedland facility. The APS officer in charge advised the Commission in May 1997 that additional closed circuit cameras would be installed as part of an upgrade. Stage One at Villawood is monitored by nine closed circuit television cameras which are located in the garage, the administration area, the main entry gate, the dining room/visiting area, the male dormitory, the female common room and on the external fence. Closed circuit cameras monitor the visiting area, the recreation areas, the dining room and the major hallway in the Perth centre. The Migration Series Instructions do not provide guidelines on surveillance. However, the Port Hedland and Perth Station Instructions provide specific directions on various forms of surveillance including room searches and body searches.

Room searches

The Port Hedland and Perth Station Instructions provide

- The searching of a detainee's sleeping quarters or personal items is to be conducted by two officers. Where possible the detainee or a representative of the detainee is to be present during the search.
- Where any unauthorised article is found during the search, the article is to be confiscated and the matter reported.

The Instructions state that searches are not for the purpose of harassing, agitating or punishing the detainee but for discovering and preventing any item potentially detrimental to the general safety, security and welfare of the centre. During site inspections of the Perth and Port Hedland centres in May 1997, Commission officers were shown numerous examples of ingeniously crafted weapons and missiles confiscated from detainees during room searches.

confiscated from detainees' rooms, Port Hedland detention centre, 30 May 1997.

In a response to an individual complaint the Department advised that room searches at Port Hedland are conducted for the following reasons.

> Searches are conducted when it is considered, on reasonable grounds, that it is necessary to do so to ascertain whether there is a concealed weapon which may be used to inflict bodily harm, or assist the person to escape from custody. The object of making searches is not to harass or punish the residents - it is to discover and prevent any item potentially detrimental to the general safety, security and welfare of the Centre.[4]

The substance of complaints to the Commission were not in relation to confiscating goods but rather conducting room searches late at night and in the early hours of the morning, the noise made by APS during their night patrols and room searches and the state of disarray in which rooms may be left after searches. During the 1996 site inspection detainees from the 'Quokka', 'Labrador' and 'Wombat' advised the Commission that APS officers search rooms at any time of the night and day and leave rooms in a mess. These detainees stated that most of the APS are good but at night they walk down the corridors speaking loudly and make a lot of noise.

4 Evidence, letter from the Secretary of the Department dated 26 November 1997, page 4, in response to a complaint by Complainant PH6.

When this was raised with the APS officer in charge in May 1997, the Commission was advised that this was no longer a problem as APS officers have been instructed to be considerate of the fact that waking children repeatedly through the night is extremely disruptive to the many families detained at the centre. The Commission was also told by the officer in charge that late night room searches were no longer occurring. Contrary to what detainees told the Commission, he insisted that room searches are only conducted during the day. A complainant from the 'Grevillea' told the Commission in May 1997

> When the APS search our rooms they like to come in the night not at day when we are awake. The last time they came at 11.00pm when we were asleep and brought dirt and sand into our rooms on their boots. They stood on my bed.[5]

One practice cited by detainees as particularly intimidating is the hourly surveillance of rooms undertaken by APS officers day and night during the initial period of segregation. There is no warning given for 'room checks' and many detainees complained that this total lack of privacy was very distressing. Detainees from the 'Melaleuca' group who were isolated for several weeks described this practice as 'psychological torture'.

> ... we were locked in and the APS came in each hour once every hour to check up on us during the night. A number of us did not sleep. It was particularly difficult for the women with men coming into their rooms every hour. They said that this was for our own safety but we could not imagine what these safety issues were.[6]

In May 1997 centre management at Port Hedland advised the Commission that the intensive surveillance, while not pleasant, was necessary to ensure the safety of detainees during a time when feelings of vulnerability were likely to be greatest. In particular, the centre manager said the unpredictability of how detainees will respond to being detained demands additional attention by custodial officers.

The Commission received a complaint about an incident at Port Hedland on 22 December 1996 in which a detainee reacted violently to the invasion of his privacy at 6.30am by two APS officers conducting a room allocation check.[7] Additional APS officers were called, several sustaining minor injuries from the violent struggle that ensued. The detainee received a bloodied nose during the incident and was taken to an observation room. The incident was investigated by the Australian Federal Police (AFP) in the course of the investigation of alleged APS brutality earlier in December 1996.

5 Evidence, Complainant PH6, statement dated 1 June 1997, page 2, paragraph 3.

6 Evidence, Complainants PH13, PH14 and PH15, record of interview of 31 May 1997, page 2, paragraph 1.

7 Evidence, Complainant PH54, letter of complaint dated 23 December 1996.

The AFP investigation found that, while security checks are required on a random basis at the Port Hedland centre it was claimed that on this occasion the APS officers involved showed little regard for personal privacy or cultural difference. The AFP recommended a review of the timing of room searches, especially in relation to searches in the early hours of the morning.[8]

Body searches

Body searches are conducted on induction. They have also been the source of complaints to the Commission. The Port Hedland Station Instructions state

- On induction a detainee is to be (pat down) searched in the presence of two officers. No resident is to be searched in the presence of another detainee. When body cavities require examination, that examination is to be carried out by a Medical Officer. Cavity searches will only be approved by the DIMA Centre Manager.
- If under the age of ten (10) years, [children] are to be searched by female officers (and only if absolutely necessary), and in the presence of the parent(s) or person accompanying the child, unless the parent or that person refuses to be present.

A group of Iraqi detainees at Port Hedland told the Commission that soon after their boat was apprehended they were searched and required to remove their clothing. Clearly referring to 'immigration officers and APS' these detainess alleged

> They took us to a big hall. They searched us carefully and we had to take our underwear off and in the bathroom we had to take off all our clothes. When we were naked they did not touch us ... [We were made to undress] without our permission. This was embarrassing for us. It is against our religious commandment to appear naked in front of others ... being naked in front of each other is not allowed by our religion.[9]

The Department denies that departmental or APS officers could have conducted such a search and has advised the Commission that this must have been done, if at all, by the Australian Customs Service which has wide ranging search powers under its own legislation.[10]

8 Evidence, Australian Federal Police, *Investigation into complaints at the immigration reception and processing centre, Port Hedland*, July 1997.

9 Evidence, Complainants PH13, PH14 and PH15, record of interview of 31 May 1997, page 1, paragraph 2.

10 Letter from W J Farmer, Secretary of the Department, dated 27 March 1998, page 2.

In another complaint, a detainee from the 'Pheasant' described how, on being returned to the Port Hedland centre from hospital after receiving treatment for a suicide attempt, she was taken to an observation room and

> searched by two female officers ... I had to take all my clothes off including my underwear for the search.[11]

The medical records state that the woman's clothes were searched by APS officers when she returned from the hospital. Nowhere do the records document that this women was strip-searched. The Department advised the Commission that 'it is clear from all the evidence that [this woman] removed her own clothes' and that neither departmental officers nor APS staff have ever strip-searched detainees.[12] In a later incident, described below, this complainant was apprehended with two pieces of fruit and, becoming upset, removed her clothes. The Commission could not agree that in the earlier incident just described the evidence points in the same direction. In fact, there is no evidence on the point other than the complainant's allegation.

6.4 The use of force

The Migration Series Instructions on general detention procedures authorise the use of limited force in the management of immigration detention.

- The definition of the term "detain" in s5(1) of the Migration Act permits officers to take such action and use such force as is reasonably necessary to take a person into or to keep a person in immigration detention. Officers also have the common law right to use reasonable force to protect themselves.
- While use of force is permissible in self defence and the defence of others, officers should be aware that the use of greater force than necessary to secure and restrain a detainee may amount to an assault.

The Instructions also provide strict principles governing the use of physical restraints such as hand and leg cuffs. The key guiding principle is that

- handcuffs represent a use of force in securing and restraining a detainee. Therefore, they must only be used if the person handcuffed had conducted him or herself or his or her demeanour was such to suggest that he or she would be likely to escape, injure or interfere with persons or property or that he or she threatened violence. If a person is unreasonably handcuffed then he

11 Evidence, Complainant PH5, statement dated 1 June 1997, page 3, paragraph 3.

12 Letter from Mr W J Farmer, Secretary of the Department, dated 27 March 1998, page 2.

> or she is entitled at common law to bring an action to recover damages for the indignity and the detention of him or her may be ruled to be unlawful.

In addition, the Instructions for dealing with children state

- under no circumstances are [children] to be held in handcuffs or any other form of mechanical restraint.

Detainees at Port Hedland, Perth and Villawood have complained to the Commission about the way they have been physically handled by APS officers including complaints alleging physical assaults by APS officers.

Unreasonable force

Restraint of a woman reacting violently

In a complaint to the Commission a Port Hedland detainee from the 'Pheasant' alleged the use of unreasonable force against her by APS officers when she left the mess with an extra piece of fruit.

> At the time I asked for an interpreter so I could explain that I had been given the fruit. As there was no interpreter I thought that [their hand gestures to say no] were making a joke of me. I had a glass in one hand and my fruit in the other. Suddenly the two female APS officers attacked me from behind and got hold of my arm and twisted both my arms over my back. I yelled out in pain, but they didn't understand. Instead, they held me more tightly. There were 2 female and 3 male APS officers there. The other 3 male APS officers came closer to hold me more tightly. They held me exactly like what happened to people being led to be shot in China. Because I was in pain, I turned my mouth back to bite one of the hands that was holding my shoulder. I didn't really mean to bite the hand of one of the male APS officers. I was just trying to get his hand off my shoulder. All 5 officers were holding me. Some held my hands and the others held my legs. They pushed me down onto the ground and pushed my mouth onto the sand outside the mess.[13]

The APS officer in charge at Port Hedland advised the Commission during briefing discussions in May 1997 that the level of force applied in this case was necessary because the detainee had reacted violently to having a second piece of fruit taken from her.

13 Evidence, Complainant PH5, statement dated 1 June 1997, page 1, paragraph 5.

As part of its inquiry into this complaint the Commission obtained incident and investigation reports from the Department about these events. The reports record that at 12.20pm on Sunday 18 May 1997 when the detainee tried to leave the dining area with two oranges she was stopped by an APS officer who asked her to give him the fruit. When the officer went to return the oranges to the kitchen area, the woman threatened him with her cup. The officer tried to take the cup from the detainee and the detainee bit him on the hand.

From the incident reports it appears that after this the woman sat on the ground and refused to move until an interpreter arrived. Two female officers were called to move her from the dining area. In the course of trying to remove her, the detainee allegedly scratched and bit these officers. The incident reports record that the detainee was restrained by APS officers placing their hands on her and cuffing her hands behind her back.

The reports on the incident record that at 12.35pm the shift supervisor and two APS officers escorted the detainee to the observation room. On the way there she again refused to move and repeated her request for an interpreter. The detainee struggled against being taken to the observation room, allegedly kicking two APS officers. She was then carried into the administration area.

From the incident reports it appears that in the observation room the woman bashed her head against the door, removed her clothes and tried to hang herself with them. The centre manager, mental health nurse and the interpreter then attended the observation room. The mental health nurse spoke to the woman at length and administered anti psychotic medication by intra-muscular injection to control her behaviour.

The medical records state that this detainee had bruises to the upper right arm which were consistent with being grabbed firmly.

The Commission is satisfied that the force used by the APS officers involved in this incident was reasonable and necessary to control the complainant once she had injured an officer. The complainant’s allegation that APS officers pushed her onto the ground and pressed her mouth into the sand are not supported by the official reports on the incident.

While the force used was necessary given the violent behaviour of the detainee, the Commission is very critical of the way APS officers handled this incident. The inflexibility of the APS officers in not allowing the detainee to leave with the extra fruit and the insistence that she move from the dining area before an interpreter arrived turned a minor event into a major security incident. The Commission is very concerned by the use of anti-psychotic medication by intra-muscular injection to control this woman’s behaviour and questions whether this was justified in the circumstances. The reports prepared by the APS and the Department on this incident do not record important facts such as the use of handcuffs and intra-muscular injection to control the detainee.

In response to this incident the centre manager called for a report from each of the APS officers involved and requested that the detainee be referred for a complete psychiatric assessment. The APS officer in charge issued an instruction advising officers that excess fruit is not to be removed from detainees and arranged for refresher training.

Alleged assault of a child

In another case a complainant from the 'Grevillea' has alleged that in mid-December 1996 an APS officer at Port Hedland deliberately kicked a fence on which his seven year old son was leaning, injuring his son's head and causing him to fall to the ground and lose consciousness. The complainant claims that after this incident his son has had problems with his memory and with studying. He also claims that, although he complained to the centre management about the incident, it was not investigated.[14]

The Commission investigated these allegations and in July 1997 formally approached the Department for comment. On 10 December 1997 the Commission received the Department's response to the allegations. In relation to the complaint by the detainee from the 'Grevillea', there is insufficient evidence for the Commission to find that the boy was assaulted by an APS officer and his human rights breached. The lack of evidence is in part due to the failure of APS and departmental staff to conduct any inquiries into the allegations when they were brought to their attention.

The injury is described in the incident report as a large lump with a small cut in the centre. This injury is consistent with the version of events provided by the father. The Australian Federal Police inquired into the complainant's allegations as part of its investigation into events which took place on 14 and 22 December 1996. They interviewed centre staff and the father and son about the alleged events. The boy described the APS officer who he said kicked the fence. His description closely matches that of one of the APS officers who has had allegations of physical assault against detainees referred to the Director of Public Prosecutions to determine whether charges should be laid. The AFP also obtained a statement from another detainee from the 'Grevillea' who, the father said, had witnessed what happened to his son. In her statement this detainee said that she was playing at the front of her accommodation block with the complainant's son and another child. She stated the complainant's son was climbing the fence and that an APS officer was on the other side of the fence and kicked it with his foot. She stated that the boy then fell off the fence and landed on the ground. She said that she did not see the fence hit the boy on the head. It is not clear from this statement whether she actually saw the APS officer kick the fence.

While there is some evidence that tends to support the father's allegations, he did not directly witness how his son sustained his injury nor could he clearly identify the APS officer allegedly responsible.

14 Evidence, Complainant PH6, statement of complaint dated 1 June 1997.

Records provided by the Department show that at the time the complainant told APS officers and one of the nurses that an APS officer had injured his son. The incident report records that the son said he injured himself while playing with other children and that the father was telling the son what to say. The report from the medical staff records that the son disputed the father's version of events. However, as the complainant only speaks Cantonese, it would be very difficult for the English-speaking APS and nursing staff to make any conclusions about what the father may have been saying to the son. The claim that the complainant's son was having difficulties studying and with his memory is not supported by medical evidence or information provided by his school teachers.

It is difficult for the Commission to come to any conclusion about what happened to the complainant's son, due to the lack of details contained in the reporting of the incident and the failure of staff at the centre to conduct any inquiries into the incident. The Commission is extremely critical of the fact that no investigations were conducted into the complainant's allegation that his son was physically assaulted by an APS officer. This is a very serious allegation which should have been fully investigated. Records show that this allegation was brought to the attention of the APS officer in charge and the centre manager. At the very least an attempt should have been made to identify the APS officer who is alleged to have kicked the fence and to locate and interview witnesses to the event. This complaint brings into question both the appropriateness of keeping children in detention and the ability of the Department to fulfil its duty of care to children.

Alleged assaults of Chinese detainees

In December 1996 the Commission received a complaint from a group of Port Hedland detainees from the People's Republic of China claiming that they were mistreated and physically assaulted by APS officers following an attempt to present a petition in relation to the imprisonment of a fellow detainee.[15] They claimed that a number of detainees were injured and denied access to medical treatment. It was also claimed that this incident resulted in the imprisonment of detainees in inhumane conditions. The Commission immediately initiated an inquiry into the matter by approaching the Department to comment on the allegations. The Department referred the matter to the AFP. The Commission agreed to suspend its inquiry pending the AFP's investigation and report.

The AFP reported in July 1997 finding that on the whole APS officers acted reasonably in the management of the main disturbance.[16] The AFP concluded that the APS displayed reasonableness for approximately four hours and at all times looked for opportunities to prevent any confrontation.

15 Evidence, Complainant PH54, letter of complaint dated 23 December 1996.

16 Evidence, Australian Federal Police, *Investigation into complaints at the immigration reception and processing centre, Port Hedland*, July 1997.

However, the AFP referred allegations of assault by three APS officers to the Director of Public Prosecutions to determine whether charges should be laid. An officer of the AFP has advised the Commission that the Director of Public Prosecutions has decided not to lay charges against these three officers. This decision was primarily due to the fact that the witnesses to the events had been removed from Australia. In its report the AFP also expressed concern about the mass isolation of detainees from their families, allegations of physical assaults by APS officers during isolation, the reporting and investigation of the incident in question and incidents in general, and the health care procedures for handling major incidents.

The AFP investigation also found that the majority of complaints by detainees were made against APS officers who were not permanent staff. The allegations of assault were made against staff who had been temporarily transferred to Port Hedland from other regions. The AFP concluded that the on-site training of APS officers was less than satisfactory.

In relation to the provision of medical care, the AFP investigation found that the centre nurse was not called in until some hours after the main incident had concluded and was not present when 72 detainees where taken to the isolation block and locked in rooms. The investigation shows that detainees who were injured in the incident were not seen by the nurse until after 7.30pm that night or on the morning of the next day. In addition, children who allegedly sustained injuries during the incident did not receive immediate medical attention.

Other findings by the AFP include

- that during the incident an APS officer was instructed to disconnect the phone to prevent detainees from contacting people outside the centre
- that there was evidence to suggest that the centre manager acted in an intimidating manner towards a detainee for making contact with the Commonwealth Ombudsman following the incident.

The Commission is critical of the delays in providing injured people with medical care, the actions taken by staff to prevent detainees making contact with people outside the centre and the mass isolation of detainees for such a long period of time. It is extremely concerned that more than six detainees have independently alleged that they were assaulted by APS officers on the way to, or while they were held in, the isolation block. The Commission is satisfied that the AFP's investigation of the matter has provided the most suitable response to the complaint. The Commission is also critical of the Department's failure to conduct any proper internal investigations into these events after they occurred and that it only referred the matter to the AFP after the Commission initiated an inquiry. The Commission is also concerned about the deportation of people who are witnesses to alleged criminal assaults.

Unreasonable restraint

Complaints have also been received from detainees alleging unreasonable or inappropriate use of handcuffs. Port Hedland detainees from the 'Cockatoo' told the Commission during the site inspection in 1996 that a group of hunger strikers who attempted mass suicide on 15 July 1995 were physically restrained by having their hands cuffed behind their backs and leg cuffs applied. They stated that the APS moved in and handcuffed them and wrapped their wounds, but would not send them to hospital. They said that while their hands and feet were shackled the APS injected some members of the group, including 13 and 14 year olds. They claim that some people vomited and one person lost consciousness. They were then transported to E block where they were locked inside the rooms. These detainees claim that the handcuffs were not removed until they protested about this.

A Port Hedland report dated 1 May 1995 on another incident records

> At 1820hrs [on this date] a female detainee was taken from the main compound area to the Centre Managers office as it was believed she had been on an unauthorised fishing trip. After waiting for the rest of the group to depart the resident produced a blade and attempted to slash her wrist. Centre manager restrained resident so as not to harm herself again. APS took resident to nurses office where she was comforted and given medication. Resident was then placed in the obs[ervation] room where she was trying to bite her wrists constantly. Under centre manager instructions her wrists were bandaged and flexi cuffs were placed on her wrists and hands were put behind her head and then flexi cuffed to the bed. This was done so that resident would not harm herself.

The incident report does not indicate how long the detainee was restrained in this position.

Handcuffs required for outside specialist appointment

In another complaint lodged by a detainee at Villawood, the Commission was told that the detainee was not permitted to attend an appointment with a medical specialist on 29 May 1997 because he refused to be handcuffed while being escorted to the specialist's surgery outside the centre. When he complained at the time that he was not a criminal and had waited two months for the appointment he was told that without handcuffs he could not see the doctor. The detainee told the Commission he refused to be cuffed and missed the appointment.

The Commission conducted preliminary inquiries into this matter. In October 1997 the Department confirmed in writing that the detainee was required to wear handcuffs while APS officers transported him to and from an appointment with a skin specialist.

The Department advised that this decision was based on a security assessment of the situation. The detainee did not attend the medical appointment because he refused to wear handcuffs.[17]

The Commission is concerned by the decision to handcuff this detainee. From the information before the Commission it is not satisfied the use of handcuffs was warranted on this occasion. There is not sufficient evidence to suggest that the detainee was conducting himself in a manner that would suggest he was likely to escape or inflict injury on himself or others. It needs to be remembered that detainees are being held in administrative detention and must be treated accordingly. Immigration detainees have not committed any criminal offence. They should only be handcuffed in extreme circumstances and as a last resort. The decision to use handcuffs on this occasion meant that the detainee missed his appointment with a specialist and had to wait many months for a new appointment. In October 1997, some five months later, the Department advised that another appointment was being made for this detainee.

Handcuffs required for hospital appointment

In a similar case at the Perth centre, a complainant alleges that he did not receive medical care as APS officers would only take him to the hospital if he wore handcuffs. He states

> I have a medical problem on my private parts and back of head. They say before I go to hospital that they have to handcuff me which I refuse because I'm not a criminal.[18]

On 15 July 1997 the Commission wrote to the Department to obtain a response to the allegations. A response was received on 10 December 1997. The medical documents provided as part of the response show that from December 1996 until May 1997 the detainee complained of a skin condition at the back of his neck and penile warts. These conditions were treated by the centre nurse and a doctor from the local medical centre.

The medical records indicate that in March 1997 this detainee was required to wear handcuffs if APS officers were to transport him to the local medical centre. Because the detainee refused to wear handcuffs, he was not taken to the medical centre. The cancellation of these arrangements caused this complainant discomfort, as the warts were not removed. The medical records do not indicate whether the warts were operated on before he was removed from Australia. The use of handcuffs does not appear to have been warranted on this occasion. The information provided by the Department does not indicate that this detainee was likely to escape or injure himself or others.

17 Evidence, facsimile from the Department dated 14 October 1997, page 2.

18 Evidence, Complainant P3, letter of complaint dated 15 May 1997.

This complainant also alleged that, following an argument with an APS officer, he was handcuffed and put in a room without a window for six days. Reports on the incident supplied by the Department show that on 10 May 1997 there was a disturbance involving the complainant and at least two APS officers. This disturbance resulted in the complainant biting an APS officer on the arm and being restrained. The Resident Observation Form and the Daily Occurrence Log record that the complainant was restrained at 11.20pm by handcuffs and flexi-cuffs around the feet. The flexi-cuffs were removed at 6.15am and the handcuffs were removed at 7.53am on the following day. The handcuffing and shackling of this detainee, who was already secured in an observation room, appears to represent a use of excessive force in relation to the circumstances of the case and to have been neither appropriate nor necessary. Following this incident, the detainee was held in the observation room for more than three days. The Commission is continuing its investigation of this complaint.

Chemical restraint

The Migration Series Instructions and Station Instructions do not provide any guidance on the chemical restraint of detainees who are difficult to manage in high risk situations. Port Hedland, however, has a 'Protocol for the Management of a Disturbed Resident' in circumstances where a detainee becomes extremely agitated or disturbed and is in danger of harming himself or herself or others. The Protocol authorises the general nurse and centre manager in consultation to administer an intra-muscular injection when counselling and oral sedation have failed or cannot be administered.

The Station Instructions also provide for the transfer of mentally or physically ill residents to a more suitable facility which shall be determined by the designated officer in charge and the centre manager. Transfers of this nature of mentally ill residents at all centres are usually to the nearest psychiatric hospital or psychiatric wing of a State prison.

The Commission has received allegations that chemical restraint by intra-muscular injection has been used at Port Hedland. During the 1996 site inspection, the Commission spoke to detainees in relation to the use of intra-muscular injections. In one case it was alleged 22 detainees, including four children, who were on hunger strike were segregated and several chemically restrained by injection following a mass suicide attempt. The APS incident report of 15 July 1995 records

> At 1125hrs APS attended to 18 detainees who had slashed their wrists with blades from disposable razors. All residents had to be restrained and handcuffed, 3 had to be sedated and 1 female required stitches. All others had superficial wounds. At 1501 hrs all residents placed in single rooms in [the isolation block] and one placed in Admin [observation] due to violent nature. At 1555hrs all residents have been uncuffed. Appropriate action taken to ensure welfare of all concerned.

The Department has advised the Commission that 'chemical restraint is not practised'.

> On rare occasions medical personnel have administered sedation to detainees who were experiencing extreme stress in circumstances where they might be a danger to themselves or others.[19]

The mental health nurse told the Commission in May 1997 that in the year she had been working there she had only used intra-muscular injection in the context of an 'extraction setting', that is, the preparation for and deportation of detainees. Given that 'extractions' can occur in the early hours of the morning, the level of distress caused could warrant, according to the centre's Protocol, the use of chemical restraint.

It is a matter for interpretation whether non-consensual sedation of a detainee is or is not 'restraint'. It is clear that this form of behaviour management is not confined to the deportation process. Medical records obtained by the Commission in the investigation of a complaint by a woman from the 'Pheasant' show that in the week before the Commission's visit the behaviour of this detainee was managed by the mental health nurse administering anti-psychotic medication through intra-muscular injection.[20] This detainee's medical records show that, while she was detained at Port Hedland, she was chemically restrained on four separate occasions.

6.5 Hunger strikes

Hunger strikes are not a new phenomenon among asylum seekers detained in Australian immigration detention centres. They certainly occurred in the early 1980s. In response to a hunger strike in 1992 by three Cambodian women at Villawood, the then Minister for Immigration promulgated a regulation allowing the Department to direct physicians to force-feed asylum seekers whose lives are at risk because of their refusal to eat. The provision has been amended from its original form and is now contained in regulation 5.35 of the Migration Regulations. Permitted medical treatment includes

- administration of nourishment and fluids and
- treatment in a hospital.

The regulation authorises medical treatment to be given to a detainee if, on the advice of a Commonwealth Medical Officer or registered medical practitioner, the Secretary of the Department forms the opinion that

- the detainee needs medical treatment and
- if medical treatment is not given to that detainee, there will be a serious risk to his or her life or health and
- the detainee fails to give, refuses to give, or is not reasonably capable of giving, consent to the medical treatment.

19 Letter from W J Farmer, Secretary of the Department, dated 27 March 1998, pages 2-3.

20 Complainant PH5.

In addition the regulation authorises the use of reasonable force (including the reasonable use of restraint and sedatives) for the purpose of giving medical treatment to a detainee. Detainees who are given medical treatment as prescribed by the regulation are taken for all purposes to have consented to the treatment.

This regulation has not been invoked to date. Its lawfulness has not been settled. In 1992 in a case involving the force feeding of the Cambodian hunger strikers at Villawood, Justice Powell noted that in most cases medical treatment without a person's consent is authorised by both statute and common law authority but that there is doubt about the lawfulness of an authority under delegated legislation, not statute, for which no common law authority exists and which may be in breach of international law.[21]

Hunger strikes a form of protest

Force feeding of hunger strikers is a contentious aspect of the debate surrounding the complex practical, ethical and medical implications of hunger striking. It may breach ICCPR article 10.1 which states

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

A psychiatric expert on managing asylum seekers wrote with others recently

> In displaced persons ... who have fled state persecution, the threat of force-feeding by government authorities creates the risk of further psychological traumatisation. Compared with other detainees, newly arrived asylum seekers held in detention are likely to have even less access to family, friends, lobby groups, established networks, and political leaders. Thus, a hunger strike may provide one of the few avenues for effective protest in a context where the range of options is limited.[22]

Detainees writing to the Commission convey the sense that hunger striking is an act of desperate protest arising out of intense anxiety concerning repatriation to a country in which an asylum seeker fears he or she will be persecuted. The letter from 34 Iraqis, for example, records their response to threats by the centre manager to isolate them completely if they persist in their hunger strike.

> He forgets that we have no other choice to save our lives from the brutal Iraqi regime.[23]

21 *Department of Immigration, Local Government and Ethnic Affairs v Gek Bouy Mok,* Supreme Court of New South Wales, Equity Division, 30 September 1992 (unreported).

22 D Silove et al, 'Ethical considerations in the management of asylum seekers on hunger strike', in *The Journal of the American Medical Association*, August 7 1996, Volume 276, at page 412.

23 Evidence, Complainants PH13-46, letter of complaint dated 21 April 1997.

Departmental policy on hunger strike management

There are no Migration Series Instructions or Station Instructions for the treatment of hunger strikers. During site inspections the Commission was told by centre managers and APS officers in charge that hunger strikes are managed on a case by case basis. This position was outlined to the Commission by the Department in 1992 in response to a complaint about the treatment of a hunger striker at Maribyrnong in 1990.

> The Department has found it appropriate to respond to hunger strikes by detainees on a case by case basis. This is in preference to requiring officers to follow prescriptive guidelines, which may not be able to cover all contingencies effectively. Certain practical accommodation arrangements, increased observation activity, medical services, and any other measures of a compassionate or humanitarian nature are invariably put in train in such situations by the manager of the detention centre when a hunger strike commences. Regular contact is maintained with the detainee in order to monitor body weight and general health. If necessary, the detainee can be placed in hospital. Where services cannot be provided by the detention centre, the centre manager will coordinate the provision of these services.[24]

Hunger strikes involving groups of detainees are understandably viewed as very disruptive to the efficient functioning of an immigration detention centre. This has security implications. It may require extra staff being rostered on to handle the daily management of the detainees which may involve undertaking labour intensive duties such as unscheduled or frequent visits to hospital or intensive observation. Additional medical and welfare supervision is required to monitor the health of hunger strikers. An impact is also likely on the detainee population not involved in the actual hunger strike, in terms of the distress it may cause especially if the hunger strike is located in a public area of the centre or if several members of the population are isolated because of their refusal to eat. Additional disruption can be caused by unpopular changes to scheduled recreation and other activity timetables due to the diversion of staff to the management of the hunger strike.

Treatment of hunger strikers

The complaints received by the Commission from detainees during and following their hunger strikes demonstrate that relations between detainees and custodial officers and centre managements can become strained in the course of managing and resolving the dispute. Effective management of hunger strikes requires skilled handling to reconcile the right of hunger striking detainees to protest in this manner and the Department's duty of care. Custodial officers receive no training at the local level in the management of hunger strikes, however, and rely heavily on direction from medical and departmental staff.

24 Evidence, letter from the Secretary of the Department dated 14 August 1992, page 2, in response to a complaint by Complainant M1.

The Commission is unaware of any detainee on hunger strike being force fed. Detainees are frequently admitted to hospital for rehydration or observation. Most complaints to the Commission involve the segregation of hunger strikers, withdrawal of privileges, verbal abuse and taunting with food.

Responsibility for the management of these strikes is shared between the custodial service provider and the Department.

Perhaps the most serious infringement of the rights of detainees on hunger strike is the alleged restriction on communications during the hunger strike. While the Department and APS have advised the Commission that there are no procedures for the management of hunger strikes, a common approach is taken across the centres. Until late 1997 hunger strikes appear to be managed by

- the isolation of the hunger strikers from the main detainee population
- the withdrawal of privileges for the duration of the hunger strike
- the APS, centre management and medical staff making regular contact with hunger striking detainees
- refusing to meet the demands of detainees while they continue with the hunger strike.

Hunger strike by Iraqis at Port Hedland

The Commission received a complaint from 34 Iraqis at Port Hedland who went on hunger strike from 12 to 18 March 1997. The aim of their strike was to express their sadness at the decision by the Department to reject their applications for protection visas. These detainees told the Commission that when they told the centre manager of their intention to commence a hunger strike he

> was very angry and rude and he said “If you will insist on your decision to go into hunger strike [I] will withdraw all [your] privileges ... I’m not ready to work for 24 hours for Iraqis ... I will isolate the Iraqis”.[25]

In their complaint they claim that when they commenced the hunger strike they were moved to E block and segregated from the rest of the detention centre. They state that they were locked inside this accommodation block and were unable to see visitors or make contact with anyone outside the centre, apart from the Refugee Review Tribunal, the Commission and their lawyer. During the hunger strike, the detainees were visited by representatives from the United Nations High Commissioner for Refugees and the Department, as well as their lawyer. However, they were not permitted to make contact with their families, friends or other people in the community.

25 Evidence, Complaints PH13-46, letter of complaint dated 21 April 1997.

A relative of one of the hunger strikers rang the Commission during the strike. He was very worried because the centre management would not let him talk to his brother-in-law and he was concerned about his health.

Taunting hunger striking detainees with food was another common allegation. Members of the large group of Iraqi hunger strikers at Port Hedland in 1997 claimed food continued to be delivered to them despite their repeated requests not to have food placed before them. They also alleged that the APS guards set up a portable barbeque in front of the accommodation block in which they were isolated and proceeded to barbeque meat and eat it in front of them.

> The manager ordered them to bring us some food and we asked them to take it away. The next day they brought cooked food and put it in the common room. The APS were wringing their hands and saying it was delicious food. They provided us with better food and served it in nice crockery to try to entice us to eat. On Sunday night they put a BBQ into the [common room] inside the building and they opened the door which led to the corridor and they cooked sausages and meat to put the smell of the food into the building.[26]

The Commission notes that, while the perception of hunger strikers may be that they are being harassed in this way, the intention of the staff may be, consistent with their duty of care and in the interests of detainees' health, to entice the protesters to take food.

The same group of Iraqis also alleged that the centre manager threatened to withdraw the APS guards so that they would be left in complete isolation locked in their accommodation block. They stated that the centre manager taunted them with comments such as

> Not everyone will be transferred to hospital if he gets dehydrated or tired ... Australian hospitals don't have beds for you.[27]

Hunger strike by Somalis at Villawood

In August 1997 the Commission received a complaint from 21 Somali asylum seekers at Villawood about the way they had been treated during a hunger strike in July 1997. Like the Iraqis, they undertook the strike to express their unhappiness with decisions by the Department to reject applications for protection visas. They staged the hunger strike outside the dining area of the centre.

26 Evidence, Complainants PH13, PH14 and PH15, record of interview of 31 May 1997, page 5, paragraph 2.

27 Evidence, Complainants PH13-46, letter of complaint dated 21 April 1997, page 3.

On 1 September 1997 the Commission wrote to the Department seeking a response to the allegations. The Commission received a response in March 1998. The Commission conducted inquiries into this complaint during its visit to Villawood on 13 to 15 October 1997, interviewing a number of detainees involved in the incident and holding discussions with departmental and APS staff.

The Department advised that the strategy adopted to manage this hunger strike was to counsel the hunger strikers on the effects of prolonged fasting and to urge them to maintain their fluid intake. The hunger strikers were also repeatedly urged to allow their children to eat. They were informed that food would be provided should they wish it and that they would have access to blankets and clothing if they returned to the accommodation blocks. Every effort was made to ensure that the detainees had access to medical assistance. The centre nurse regularly monitored their conditions and the centre doctor was on call at all times. These strategies were developed in consultations between local department and APS staff and senior departmental officers in Canberra.[28]

The Somali detainees claimed that after they went on the hunger strike the APS put black plastic around the area they had congregated in. The APS advised the Commission that this is done to contain the situation and to screen the protest from public view, including from television cameras. The complainants also claimed they were prevented from using the phone.

During discussions in October 1997 senior APS officers confirmed that black plastic was placed around the internal fences and detainees were not permitted to make phone calls. They said that this was done in accordance with instructions they had received from the Department.

The Department stated that the hunger strike was held in the visitors' compound. This is a restricted area in the centre to which detainees do not have free access. The Department advised that the hunger strikers were asked to leave the area and return to their accommodation blocks but refused to do so. As a consequence of this misbehaviour, certain privileges were withdrawn. In particular, APS officers did not allow the hunger strikers to use the telephone except for calls to their legal advisers, urgent personal calls or calls to seek consular assistance.[29]

The Somali detainees also claimed that during the hunger strike APS officers refused their requests for blankets, food and shelter for the children of those involved in the strike. In a statement to the Commission one complainant said

8 Evidence, Letter from the Secretary of the Department dated 25 March 1998 in response to a complaint by Complainants V4-24, pages 2 and 3.

29 Id, pages 6 and 7.

> At the night time, around 7 or 8pm, we asked [APS officer in charge] and [centre manager] to allow the women and the children to go to the visitors room to take shelter from the cold weather. He refused. Some time later, we asked [APS officer in charge] and [centre manager] for blankets. He refused. We said ok but only for the children alone. There were six children including a 21 day old baby. [APS officer in charge] refused. Around 10.30 or 11pm, [APS officer in charge] allowed the children to eat. They gave food to the children in the kitchen area. We convinced the mother of the 21 day old baby ... to go back with her child to their room. At about 11pm the APS put plastic around the open ground where we were sleeping so no detainees who were going to the kitchen could see us and black plastic around the whole visiting area ... That night we slept on the open ground. We covered the children with our jackets. The weather was below zero. The children's hands were freezing.[30]

APS managers at Villawood told the Commission that they had received instructions from the Department in Canberra that the hunger strikers were not to be given any food, blankets or access to the phone. They said that they did not comply with the instruction about the food and made sure that the children were fed. The Commission was told that the APS had organised blankets for the hunger strikers and these were kept on standby in the kitchen area. The APS said that the Department's policy is to make things as difficult as possible for people on a hunger strike.

The Department agrees that it refused to provide the hunger strikers with blankets while they continued to protest in the visitors' compound. The Department does not encourage the actions of detaines who disregard the rules of the centre by providing additional facilities to support or prolong their actions. The Department believes that if it were to give into the demands of hunger strikers the length and number of these protests would increase. This would place an increased number of detainees at risk of harm and the operation of the centres would become unmanageable.[31]

The Department advised that, in this case, where the strike was held out of doors in cold weather, the hunger strikers were repeatedly encouraged to return to their accommodation blocks. They could have continued their hunger strike in their rooms. They were continually reminded that clothes and blankets were available in their rooms and that food would be provided on request. However, it was also explained to the group that any who left the visitors' compound would not be permitted to return to rejoin the protest.

The Department stated that the parents of children involved in the strike were repeatedly requested to allow their children to eat and were counselled about the effects of prolonged fasting on young children. The Department stated that on the second night of the protest the parents of some children agreed to allow their children to be taken inside and cared for by two female detainees not involved in the strike.

30 Evidence, Complainant V4, statement dated 22 October 1997, paragraph 7.

31 Evidence, Letter from the Secretary of the Department dated 25 March 1998 in response to a complaint by Complainants V4-24, pages 3 and 4.

The Department considers that the decision to continue the hunger strike outside the accommodation blocks in winter was made by the hunger strikers. The Department states that it was advised that those involved had bags containing warm clothing with them during the protest.[32]

On the basis of the evidence that has been obtained to date the Commission has found that

- five children were present with those on hunger strike; a three week old baby was present for a few hours
- detainees requested food, shelter and blankets for the children
- food was provided to the children at around 9.00pm on the first night and when requested after this
- five children slept for more than two nights in the grassed area outside the dining room and visiting area in the middle of winter
- at no point during the hunger strike were children provided with blankets by the Department or the APS or allowed to sleep inside the dining room
- blankets and warm clothing were available for the children and adults involved in the hunger strike, but only if they had returned to their accommodation areas.

The Commission acknowledges that in the first instance parents in detention are responsible for the care of their children. However, this does not remove the Department's duty of care to child detainees. Children should not be punished for the decision of their parents to go on a hunger strike. Under no circumstances should children be denied basic necessities in an attempt to encourage parents to end, or at least not to prolong, a hunger strike. While adult detainees could decide for themselves whether to continue the strike in the cold or return to their rooms, this was not a choice open to the five children involved. They were dependent on both their parents and the Department for protection. Denying children shelter and blankets in the middle of winter, especially when the shelter and blankets were readily available, is inconsistent with the care requirements placed on the Department by Migration Series Instruction 92 and breaches the Department's obligations under CROC.

Records provided by the APS and statements from individual detainees show that there were a number of security incidents during the course of the five day hunger strike. Allegations of assault have been made by APS officers against detainees and by detainees against APS officers. Charges of assault have been laid against four Somali detainees.

32 Id, pages 4 and 5.

The Somali detainees have claimed that, when they were trying to pass through the gate between the visiting and accommodation areas, APS officers treated them in a violent manner, injuring some people in the group. A female detainee claimed that after she passed through the gate she was assaulted by an APS officer. In a statement to the Commission she said

> When I passed through the gate ... a security man came to me and slapped me on the face with his open hand ... He came from in front of me and he just hit me and hit me hard. From the way he slapped me my lip inside cracked and bled ... After he slapped me in the face I became dizzy and fell to the ground on my side. After I fell down he kicked me in the back.[33]

The Department has advised that the APS running log indicates that on 21 July 1997 a number of Somali detainees were involved in an altercation with APS officers. This altercation resulted in a number of the officers being assaulted by detainees. Injuries sustained by the officers included facial cuts, bruises and a crushed hand.[34]

Allegations have also been made that on the third day of the hunger strike a Somali woman was assaulted by a number of APS officers when trying to change her baby's nappy. In her statement to the Commission this woman said

> Then the security officer stood up in front of me. I asked please can I go in [to the toilet]. She did not wait till I had finished what I said. She grabbed me on the throat and pushed me back, I was still holding my daughter. I was wearing a jacket and a small veil and she grabbed the jacket and choked me with it. When she pushed me she was still holding my throat. I then put my daughter down. At first she used both hands, but then she used one hand and had her telephone in the other. When she went to get her telephone I tried to take her hands from my neck. I then walked out the dining room door with the officer still holding my neck. The officer then grabbed me with her arm around my neck and threw me on her back and put me to the ground. I fell to the ground backwards with my face up. After I fell she did not leave me, she jumped on me, she grabbed me by the throat and choked me. Another woman came and grabbed my clothes on the chest and started pushing me up and down on the ground .... A security man held my legs so I could not move. I was on the floor held like this for about 10 minutes.[35]

33 Evidence, Complainant V6, statement dated 21 October 1997, paragraph 5.

34 Evidence, Letter from the Secretary of the Department dated 25 March 1998 in response to a complaint by Complainants V4-24, page 2.

35 Evidence, Complainant V5, statement dated 21 October 1997, paragraph 11.

On 1 September 1997 and 14 November 1997 the Commission wrote to the Department to seek its response to the allegations. In both letters the Commission requested that the allegations of assault be referred to the AFP as a matter of urgency. In March 1998 the Department advised that these allegations had been referred to the AFP. The AFP indicated that it would not proceed with an investigation because the NSW Police Service had investigated the events of 21 to 25 July 1997.

Other complaints

An allegation common to complaints made to the Commission by hunger strikers or by others on their behalf is that personal taunting or verbal or physical abuse is used by APS officers and centre management. A detainee from the 'Cockatoo' told the Commission in January 1996 about harassment by the Port Hedland centre manager of a group of 22 detainees on hunger strike in 1995. The detainee alleged the manager said that even if they sat there for ten years he would not care. According to this detainee the centre manager said that if they fainted he would hose them down or take them to sea and let them swim back to China and that Australians saw them as useless and would take no pity on them.

This detainee alleged that the taunting became so distressing that the hunger strikers resolved to slash their wrists whereupon they were all physically wrestled to the ground, chemically restrained, hand and leg cuffed and then isolated from the main compound. The Department has advised the Commission that sedative injections were administered to these detainees for 'personal health reasons' by medical professionals and not by APS officers.[36]

In a complaint investigated by the Commission in 1992 the complainant was being held at Maribyrnong. He alleged that when he was on his 16th day of a hunger strike in 1990 he was forcibly brought to the kitchen to smell the food and enticed to eat, causing him to vomit. The episode frustrated him so much that he lashed out angrily which prompted APS officers to handcuff him and transfer him to Sunbury Police Station. From there he was transferred to Pentridge prison before being returned to Maribyrnong.

6.6 Observation rooms

The Port Hedland and Perth Station Instructions state

- Where the designated officer in charge is of the opinion that the medical or mental condition of a detainee requires that he or she be placed under close supervision for his or her own health or well being, or the health or well being of other residents, the designated officer in charge may order the close supervision of the resident in an observation room.

36 Letter from W J Farmer, Secretary of the Department, dated 27 March 1998, page 3.

- The period of placement in an observation room is not to extend beyond 24 hours unless discussion between APS and the Department authorises such an extension.
- Detainees placed in an observation room are entitled to all rights and privileges, subject to the conditions of their placement.
- Detainees held in isolation are to be given the opportunity for adequate open air recreation for a minimum period of, at the very least, one hour per day during their isolation unless their conduct is considered to be dangerous to staff or other detainees.
- Observation rooms are not to be used as a form of punishment.

Port Hedland

In addition, the Port Hedland Station Instructions provide that detainees who attempt to leave the centre without lawful excuse or who become violent or unduly aggressive may, at the direction of the shift commander, be placed in an observation room until they are interviewed by the departmental centre manager. The departmental centre manager has discretion as to how long a resident in this category will remain in an observation room.

Station Instructions for dealing with children held in custody state clearly that children are not to be held in an observation room. There is no qualifying provision for cases involving a child accompanying a parent who is placed in isolation.

The Commission was advised by the centre manager in May 1997 that the primary use for observation rooms was to assist detainees to calm themselves following a security incident or where the detainee was considered at risk of self-harm.

Four complaints to the Commission raise the issue of being held in observation rooms. All but one of these complaints concern the Port Hedland centre. The Department has advised the Commission

> [The Department] relies heavily on the voluntary cooperation of detainees with the security requirements of detention centres. Observation rooms provide a temporary, higher security environment in circumstances where there is a clear risk that this voluntary cooperation will not be forthcoming and a detainee might accordingly breach security or operational rules. In such cases, transfers back to regular accommodation from the observation rooms occurs when it is assessed that the detainee will conform to detention centre operational and security requirements. The observation rooms are also used where detainees present a danger to themselves or others or are in need of close supervision for medical reasons. In these circumstances, transfer back from the observation rooms occurs

> when the detainees no longer present a risk to themselves or to others or are no longer in need of close supervision for medical reasons. The purpose of such detention is not punitive.[37]

Evidence as to the use of observation and isolation rooms in particular cases, however, supports the view that isolation is used punitively on some occasions. It is also clear from the Department's statement that isolation can be used in anticipation of a breach of centre rules, that is as preventive isolation.

A group of Chinese nationals held at Port Hedland complained that after a major disturbance at the centre in December 1996 a large group of people was held in isolation.[38] The AFP conducted a detailed inquiry into this matter and confirmed that as a result of the disturbance 72 detainees, mostly males, were locked in individual rooms in one of the designated isolation blocks.[39] Most of these detainees were segregated for up to six days with minimal and in some cases no contact with their families. The AFP found that there was no reasonable explanation given by centre management for the prolonged period of separation. In statements taken by the AFP a number of detainees independently alleged that during their period of isolation they were physically assaulted by APS officers, subjected to room searches and identity checks and denied medical attention.

The extended period of the isolation, the increased level of searching and the rough handling detainees appear to have been subjected to suggest that the purpose of the isolation was to punish the detainees who played a role in the disturbance of 14 December 1996. The period of isolation cannot be justified on any grounds. It is not justified on the basis of the health and well being of either the individuals being isolated or other detainees. The prolonged isolation of these detainees, its punitive nature and the conditions of the isolation are inconsistent with the Station Instructions and breach human rights under the HREOC Act.

Management at Port Hedland indicated during the January 1996 inspection that the most common disciplinary measures are warnings, forfeiture or postponement of privileges and isolation in an observation room. The Commission was provided with records of incident reports from January 1995 to March 1996 which confirm that detainees were routinely placed in observation rooms for transgressions such as being found fishing on the beach without authorisation or queue jumping at the line-up for meals. Observation rooms were also recorded as being used to manager domestic.

37 Ibid.

38 Evidence, Complainant PH54, letter of complaint dated 23 December 1996.

39 Evidence, Australian Federal Police, *Investigation into complaints at the immigration reception and processing centre, Port Hedland*, July 1997.

disputes and unruly behaviour. These practices contravene the Station Instructions which prohibit the use of observation rooms as a form of punishment.

Perth

An African detainee at the Perth centre alleged that, following an argument with an APS officer, he was held in an observation room without a window for a period of six days. The Commission initiated an investigation into the allegation and requested an interview with the detainee during the scheduled site inspection at Perth in May 1997. The Department first agreed and then cancelled the appointment on the basis that the detainee was due to be deported on the morning of the Commission's inspection. Documents provided by the Department record that, because this detainee refused to take the prescribed travel medication his removal from Australia was delayed until 16 June 1997. The Commission was not advised of this delay although the Department was aware of the Commission's desire to interview this detainee and that officers of the Commission were in Western Australia until 2 June 1997. The investigation of this matter was complicated by the Commission not being able to obtain a full statement of events from the complainant.

The Commission commenced a formal inquiry into this complaint in July 1997. In December 1997 a response was received from the Department. The documents provided by the Department record that following this incident the detainee was held in the observation room for a further three and a half days. After this event, there were no further security incidents involving this man and he ended his hunger strike on the next day. The Department has not provided a reasonable explanation for the isolation of this detainee for this period of time.

6.7 Transfer from Stage Two to Stage One at Villawood

Detainees at Villawood are transferred from the low security Stage Two to the medium security Stage One if their behaviour becomes difficult to manage, they have a medical condition which requires close observation, they are awaiting removal or their Tribunal applications have been unsuccessful. The policy to move detainees to a higher level of security when their Refugee Review Tribunal applications are unsuccessful began in March 1997.

The Department advised the Commission in October 1997 that this policy was adopted to prevent unsuccessful applicants from escaping from immigration custody before they can be removed from Australia. This decision was based on the Department's experiences in 1996-97 when 21 detainees escaped from Stage Two. Of the people who escaped, 19 had been unsuccessful at the Tribunal.[40]

40 Evidence, facsimile from the Department dated 8 October 1997, page 2.

From 1 July to 23 October 1997 59 detainees were transferred to Stage One after their applications to the Tribunal were unsuccessful.[41] In general, this policy applies to all detainees whose applications have been refused. However, there appear to be some exceptions. During the Commission's site inspection in October 1997 the Commission became aware of a Somali woman who was not moved to Stage One, as she had three young children and was not considered to be at risk of escaping. The Commission has received three complaints about the operation of this policy.

As outlined in Chapter 5.4, the Commission has serious concerns about this transfer policy due to the lack of facilities in Stage One and the overcrowding it has created. This policy has also resulted in people being detained in Stage One for periods in excess of six months while they pursue their review rights with the Federal Court or make humanitarian applications to the Minister. The detention of people for lengthy periods in overcrowded spaces and poor conditions has created a volatile environment in Stage One. This has lead to an increase in security incidents and a related increase in the number of detainees being transferred to State prisons, as tempers have risen and conflicts increased.

The Commission is also aware of at least two cases where the mental health of female detainees deteriorated significantly following their transfer to Stage One. Clearly, there are significant human costs attached to this transfer policy.

Transferring people back to Stage Two occurs infrequently. From 1 July to 23 October 1997 only three detainees were moved back to Stage Two.[42]

The Commission is concerned that there are no written guidelines, memorandums or procedures relating to the operation of this transfer policy. In the absence of written criteria or guidelines it is not clear what factors are considered when deciding whether or not to transfer a person between Stage One and Stage Two. For example, it is not apparent whether the decision making process considers factors such as a person's age, family status, sex, mental health, the review options or further applications they may pursue or whether they have in fact ever attempted to escape or are likely to do so.

The Commission's inquiries have found that the process for transferring people between Stage One and Stage Two is neither transparent nor open. The decision to transfer a person to Stage One is arbitrary as it is based for example on the assumption that people who are unsuccessful at the Refugee Review Tribunal are more likely to escape, rather than on a case by case assessment of whether a particular individual is likely to escape and how the transfer may affect his or her welfare and mental health.

41 Evidence, letter from the officer in charge, APS, at Villawood dated 23 October 1997.

42 Ibid.

6.8 Transfer to prison

The Migration Series Instruction 157 and individual centre Station Instructions provide guidance on the limited authority to transfer detainees to State prisons. Migration Series Instruction 157 arose in part from the Commonwealth Ombudsman's report into the transfer of detainees from centres to State prisons. It states that, as there is no clear statutory basis for the selective transfer of detainees, the decision to transfer a detainee should be made as a last resort. All decisions to transfer a detainee must be fully documented and are made by the State Director of the Department or his or her delegate. In this restricted context, immigration detainees should only be imprisoned where

- no purpose-built immigration detention centre exists or is available or accessible and only until other arrangements are made
- the detainee has completed a custodial sentence in prison and is awaiting deportation or removal
- the person being detained is considered unsuitable for mixing with other immigration detainees or
- a detainee's behaviour places himself or herself or others at risk or indicates risk of the detainee absconding.

Port Hedland

The Port Hedland Station Instructions state that a detainee should be transferred to prison where there are reasonable grounds to believe that the security of the centre or the welfare and safety of staff and residents would be placed at risk if the detainee was not transferred. A detainee may be considered for transfer to prison where

- his or her criminal record for a serious offence or crime of violence presents a significant risk to the safety of the public, staff or other residents
- there are reasonable grounds to suspect that the continued custody of the resident in the centre may result in a physical assault on staff or other detainees or
- the transfer of the detainee is considered necessary for the good order, management and safety of the centre.

Notwithstanding these considerations, a detainee is not to be transferred to a prison unless there has been counselling regarding an unacceptable standard of behaviour and the detainee advised that unless there is an improvement in conduct he or she will be transferred to a prison.

In December 1995 the Commonwealth Ombudsman reported on an investigation into complaints concerning the transfer of immigration detainees to State prisons. The investigation arose from complaints to the Ombudsman from long-term immigration detainees who had been transferred to State prisons to be held in custody while their immigration situations were resolved. The report shows that the majority of immigration detainees transferred to State prisons to the end of 1995 were not unauthorised arrivals by boat but persons without permanent residency who had committed an offence under Australian law.[43]

The APS at Port Hedland advised the Commission that decisions to transfer asylum seekers to State prisons or lock-ups are rare. This was confirmed by the Senior Sergeant at the South Hedland lock-up. He told the Commission that since the numbers at the centre had dropped there was much less need for police assistance and the use of the lock-up. In discussions with the Commission in May 1997 he advised that the only detainees he had held recently were one relating to the December 1996 incident and another who had been charged with indecent assault. He advised that in general detainees are brought to the lock-up to cool down or if they are being charged with a criminal offence. He said that he holds detainees as a favour to the Department and if there are any problems, such as refusal to eat, they will be sent back to the centre. He advised that detainees are usually kept for only two or three days, although more recently it has been three or four days.

Port Hedland incident reports record transfers to the local lock-up. They demonstrate that transfer to the lock-up is a not uncommon means of escalating discipline of detainees. For example, where a detainee is placed in an observation room as a warning and the detainee repeats the transgression, the centre manager in some cases has authorised transfer to the local lock-up. In one case an incident report states

> At 1845hrs APS escorted two male detainees to South Hedland lock-up under centre manager instruction due to them going on an unauthorised fishing excursion for a second time. The two residents are still in APS custody and have a 24 hr static guard (1.5.95).

Villawood

The transfer of detainees to State prisons occurs more frequently from Villawood. During the Commission's visit in October 1997 the APS gave the Commission three reports recommending the removal of detainees from Stage One to a prison.

43 Report of the Commonwealth Ombudsman, *Investigation of complaints concerning the transfer of immigration detainees to State prisons*, December 1995, page 13.

Between 1 January and 23 October 1997 seven detainees were transferred from Villawood Stage One to either Long Bay or Silverwater prisons.[44] In the week before the Commission's October 1997 visit, five detainees were transferred to the Silverwater prison. All five were assessed as exhibiting behaviour which was unacceptable for a medium security immigration detention centre environment. The Department has advised that all five were charged with criminal offences.[45] However, the Commission is only aware of charges against two detainees relating to events which occurred during a hunger strike in July 1997.

In December 1997 a further Villawood detainee was transferred to a NSW prison.

The increase in the number of detainees being transferred from Stage One to State prisons is of concern to the Commission. This increase is in part due to the policy of transferring to Stage One people who are unsuccessful at the Refugee Review Tribunal. This policy has created an environment which increases the likelihood that detainees will behave in a disruptive manner. From the reports provided by the APS, it seems that in general the disruptive behaviour started only when the detainees were moved to Stage One. The Villawood management uses transfers to State prisons as a behaviour management tool. Detainees are transferred to the correctional system when their behaviour is assessed as being unacceptable for the medium security environment of the centre.

Conclusions

Transfers to State prisons are being used too frequently and are not being used only as a last resort. It is not at all clear what degree of disruptive behaviour on the part of a detainee constitutes unacceptable behaviour that warrants a transfer to a State prison. The records of transfer decisions provided by the APS show that unacceptable behaviour is interpreted broadly and relates to a range of behaviours that are difficult to manage. Events outlined in the reports include

- verbal altercations between detainees
- physical assaults on APS officers
- suicide attempts
- threats of self-harm or harm to others
- expressing dissatisfaction with a rule
- not conforming with the rules.

44 Ibid.

45 Facsimile from the Director, Compliance and Enforcement Section of the Department, dated 13 February 1998, page 5.

The Department needs to review Migration Series Instruction 157 to provide some further guidance on the degree of disruptive behaviour that would justify a transfer to a State prison. This is needed to ensure that detainees are not transferred for behaviour, such as threats of self- harm or abusive language, that may be disruptive to centre managements but does not warrant transfer to a State prison. Transfer is a serious punishment that should not be imposed for minor misbehaviour or as a response to mental illness.

In the three cases provided to the Commission the transfer decisions were made in accordance with Migration Series Instruction 157. The disruptive behaviour of all three individuals included allegations of assault against APS officers. Nevertheless, the Commission considers that more could have been done by centre staff to manage the behaviour of these detainees before deciding to remove them.

The Commission is of the view that the Department and the APS are not taking sufficient steps to address the disruptive behaviour of detainees prior to transferring them to a State prison. From the transfer records provided, counselling appears to be the only other strategy used to address disruptive behaviour. Moreover, what constitutes counselling is quite limited in nature and it is not used regularly in all cases. In general, counselling is performed by the APS officers on duty or by centre management.

Detainees who have a history of difficult behaviour are not case managed by an appropriate professional. Social workers and professional counsellors are not called upon to work with detainees who are misbehaving. One detainee who was transferred to a State prison in October 1997 had attempted suicide in July 1997 and threatened to harm himself again in August 1997. Apart from seeing the centre doctor, it is not apparent what counselling or psychiatric care and assessment, if any, he received to help him address the problems underlying his behaviour.

As a matter of priority, management strategies and practices should be developed and implemented at each of the centres to enable them to cope effectively with disruptive behaviour on the part of detainees. This would help to reduce the rate of transfers to State prisons.

The Ombudsman’s Report endorsed the view of an earlier report by the Australian Institute of Criminology that it is highly inappropriate to place an immigration detainee in a prison because of the inappropriate cross-over into the criminal domain. It also endorsed the Institute’s recommendation that the Department adopt the principle that only persons charged with or convicted of a criminal offence be detained in a penal institution. The Ombudsman’s Report recommended that the Department implement a strategy along the lines suggested by the Institute, which included

- penal institutions should not be used as places for immigration detention
- in the short term prisons should be used as a last resort for the detention of unlawful non-citizens
- immigration detainees not convicted of a crime should not be mixed with convicted prisoners - that is, they should be kept in remand centres.[46]

The Commission endorses the recommendations of the Institute and the Commonwealth Ombudsman.

Prisons are correctional facilities with an environment that is very different from administrative detention. For an immigration detainee a transfer to a State prison means a reduction in personal privacy, freedom of movement and other rights and privileges. It may also mean increased isolation, as detainees are separated from members of their families and others of their ethnic and cultural backgrounds who speak the same first language.

Detainees transferred to prisons are generally located in remand areas to minimise the risk of contact with violent convicted prisoners. However, once transferred, detainees fall under the jurisdiction of prison authorities and can be re-classified and moved to less appropriate sections of the prison in response to their behaviour or prison requirements.[47] The Ombudsman's investigation also found that illegal immigrants are exposed to the risk of assault from other prisoners.[48]

For these reasons the transfer of detainees to a State prison or police lock-up is only appropriate on the same basis as any other person, that is, if a detainee is arrested and charged with a criminal offence that would result in a custodial sentence if convicted.

6.9 Human rights law relevant to security in detention

Security practices risk breaching international standards requiring humane treatment of detainees because they limit the parameters of an individual's autonomy and liberty while in detention. Treatment in the name of 'security' may even amount to torture or cruel, inhuman or degrading treatment or punishment contrary to ICCPR article 7, CROC article 37(a) and the Torture Convention. The aim of these provisions is 'to protect both the dignity and the physical and mental integrity of the individual'.[49]

46 Report of the Commonwealth Ombudsman, *Investigation of complaints concerning the transfer of immigration detainees to State prisons*, December 1995, page 70; Australian Institute of Criminology, *The future of immigration detention centres in Australia*, 1989.

47 Report of the Commonwealth Ombudsman, *op cit*, page 12.

48 Id, page 5.

49 Human Rights Committee, General Comment No. 20 re ICCPR article 7 (1992), paragraph 2.

Principle 6 of the Body of Principles makes explicit what is necessarily implicit in ICCPR article 7, namely that

> No circumstances whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

ICCPR article 7 covers 'not only ... acts that cause physical pain but also ... acts that cause mental suffering to the victim'.[50] Practices that are deliberate and are known to inflict emotional or mental distress on detainees, such as isolation or withdrawal of privileges and contact with family, may breach the international prohibition on inhuman treatment of detainees.

Migration Regulation 5.35 authorising the force feeding of hunger striking detainees may constitute a breach of the ICCPR and the Body of Principles. In addition, the segregation of hunger strikers and their harassment, verbally or physically, may constitute a breach of ICCPR articles 7 and 10 and Principle 6 of the Body of Principles.

Handcuffing a highly distressed and mentally unstable person to a bed in a small observation room without a window may be inhuman treatment and cannot be justified by any perceived need to protect him or her from self-harm. The Human Rights Committee has noted that article 7 prohibits corporal punishment and prolonged solitary confinement.[51]

Standard Minimum Rule 31 provides

> Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

The use of isolation as a disciplinary measure is in conflict with this Rule. It is potentially in breach of ICCPR article 7 and, where imposed on a person under 18 years, of CROC article 37(a). In addition, it is in breach of the Station Instructions which explicitly preclude the use of observation rooms as a form of punishment.

Standard Minimum Rule 54 states that custodial officers shall not, in their relations with detainees,

> use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

50 Id, paragraph 5.

51 Id, paragraphs 5 and 6.

The decision of the Australian Federal Police to refer to the Director of Public Prosecutions complaints about unreasonable force indicates that a significant breach of this Rule may have occurred at the Port Hedland centre in December 1996. The use of chemical restraint may also be an unreasonable use of force in some cases, even where it is deemed necessary to achieve the objectives of immigration detention at Port Hedland.

Practices that substantially and arbitrarily infringe the privacy of a detainee, such as random room searches at unreasonable times of the day and strip-searching in front of other detainees as allegedly occurred in the case of the Melaleuca boat group, are degrading. The fact that these practices are unnecessarily extreme affronts the inherent dignity of individuals subjected to them. They also breach the protection of personal privacy in article 17 of the ICCPR.

Article 3.1 of CROC states that the best interests of the child shall be a primary consideration in all actions concerning children. In addition, article 3.3 provides

> States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 19.1 provides

> States Parties shall take all appropriate ... measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect of negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parent(s), legal guardian(s) or any other person who has the care of the child.

Allegations of children being placed in observation rooms with their parents, chemically restrained or physically restrained with hand and leg cuffs, physically assaulted and refused blankets and shelter bring into question the Department's observance of the Convention on the Rights of the Child.

The transfer of detainees to Stage One at Villawood when they are unsuccessful at the Refugee Review Tribunal and the increased use of transfers to State prisons as the primary means of managing disruptive behaviour breach ICCPR article 10.1. Article 10.1 complements the prohibition of torture and other inhuman treatment in article 7. It 'imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty'.[52]

52 Human Rights Committee, General Comment No. 21 (1992), paragraph 3.

> Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.[53]

Standard Minimum Rule 94 requires that civil prisoners 'shall not be subjected to any greater restriction of severity than is necessary to ensure safe custody and good order'.

6.10 Findings and recommendations on security measures in detention

The Commission finds

- While APS officers receive some training to promote understanding of the stress experienced by asylum seekers who are detained, the reliance on 'fly-in' staff who do not receive adequate training has contributed to an atmosphere of punitive control at the Port Hedland immigration detention centre.

- The following security practices breach human rights under the HREOC Act, in particular ICCPR articles 7, 10.1 and 17 and CROC articles 3, 19 and 37

  * the use of observation rooms as a disciplinary measure and for prolonged periods of time
  * the use of unreasonable force by custodial officers against detainees when managing disruptive behaviours - this may include physically assaulting a detainee and the use of handcuffs, shackles and/or chemical restraint which does not represent reasonable force in the circumstances of the case
  * random room searches at unreasonable hours of the day and night
  * the withdrawal of privileges and harassment of hunger strikers
  * failure to provide children of hunger strikers with shelter and blankets while they remained in the protest area with their parents
  * the use of State prisons and police lockups to manage the behaviour of detainees in the absence of other behavioural management strategies.

- The policy of transferring unsuccessful Tribunal applicants to Stage One at Villawood breaches ICCPR article 10.1 as it has resulted in detainees spending weeks, and in some cases more than six months, in conditions that do not meet the minimum requirements for detention in prisons and administrative detention centres established by the Standard Minimum Rules and the Body of Principles.

53 Ibid.

- At Port Hedland room searches have been carried out at unreasonable hours of the day and night.
- Unreasonable force has been used against detainees by the APS for the purposes of managing disruptive or non-compliant behaviour.
- Departmental and APS staff have been aware of allegations that APS officers have assaulted child detainees and have not conducted any inquiries into these allegations.
- Handcuffs have been used to manage detainees in situations that require specialist expertise.
- Shackles have been used to restrain a detainee at the Perth centre. This detainee was shackled in a secured observation room for a period of around seven hours.
- At Port Hedland chemical restraint of detainees has been used to manage difficult behaviour including where there is a risk of self-harm or harm to others.
- At Port Hedland detainees have been isolated in observation rooms as a disciplinary measure and as a means of managing behaviours that require specialised medical or psychological attention, such as psychotic episodes or domestic disputes.
- There are no clear guidelines on what constitutes unacceptable behaviour or the nature or degree of disruptive behaviour on the part of a detainee that warrants transfer to a prison.
- The Department does not have a policy or guidelines or instructions on the treatment and handling of persons who undertake hunger strikes while in detention.
- Hunger strikers may not be treated in accordance with the human rights law guaranteeing fair and humane treatment. This will be subject to further investigation.
- Migration Regulation 5.35 which authorises the force feeding of hunger striking detainees may be in breach of ICCPR article 10.1 which guarantees that detainees shall be treated with humanity and with respect for their inherent dignity.

The Commission recommends

R6.1 As part of its duty of care to detainees in immigration detention the Department should ensure that security practices at all centres do not conflict with the guidelines for security practices and procedures set out in the Station Instructions.

R6.2 The Department should treat seriously all allegations that a detainee has been assaulted. When the allegation involves an alleged assault on a child detainee an independent investigation should be initiated immediately. At a minimum this investigation should include obtaining a statement of the event from the child, identifying the custodial officers involved, identifying and interviewing detainee and custodial officer witnesses and obtaining a full medical assessment of the child and photographic documentation of the injury.

R6.3 The Department and the detention service provider should implement appropriate measures to improve the education and training of all custodial staff deployed, especially staff on temporary transfer from other correctional facilities.

R6.4 All local procedures on room searches should be amended to prohibit searches between the hours of 6.00pm and 9.00am except in a situation of emergency. The Department in conjunction with the detention service provider should review the reason for and the manner in which room searches are conducted, so that they are appropriate to administrative detention.

R6.5 The local procedures of the detention service provider should include clear guidelines on the nature and degree of disruptive behaviour that warrants the use of chemical restraint, handcuffing and transfer to prison.

R6.6 The local procedures of the detention service provider should be amended to state explicitly that under no circumstances are detainees to be shackled.

R6.7 As part of its duty of care to detainees in immigration detention the Department should ensure that the use of observation rooms at Port Hedland does not conflict with the guidelines for the use of observation rooms set out in the local procedures of the detention service provider.

R6.8 Migration Regulation 5.35 relating to the force feeding of a detainee should be repealed.

R6.9 The Department and the detention service provider should review current procedures and practices for managing hunger strikes. The Migration Series Instructions should include provisions for the supervision and treatment of hunger strikers in detention that draw upon appropriate medical and psychological expertise. They should be implemented in local procedures.

They should include a section on the treatment of children directly or indirectly affected by hunger strikes. They should also include strategies for preventing hunger strikes and, in the event that they do take place, strategies for resolving them at an early stage.

R6.10 The custodial officers' training should include a component on the management of hunger strikes.

R6.11 The Department should repeal the Villawood policy of transferring all people who are unsuccessful at the Refugee Review Tribunal to Stage One. Decisions to transfer detainees to Stage One should be made on a case by case basis and consider whether a particular detainee is likely to escape and the effects Stage One may have on his or her welfare and mental health.

R6.12 The Department should amend Migration Series Instruction 157 to provide that detainees can only be transferred to a State prison or police lockup if they are either charged with or convicted of a criminal offence that would result in them serving a custodial sentence.

R6.13 If Migration Series Instruction 157 is not amended along these lines, the Department should develop clear guidelines on the degree and nature of disruptive behaviour that would warrant a transfer to a State prison or police lockup. This should be incorporated into Migration Series Instruction 157.

R6.14 The Department in conjunction with the detention service provider should develop strategies and practices for the management of difficult behaviours within immigration detention centres. Expert advice should be sought in the development of this strategy.

R6.15 The detention service provider should make greater use of professional counsellors and social workers to help address problems experienced by detainees and difficult behaviour.

R6.16 Custodial officers' training should include a component on managing difficult behaviours, conflict resolution skills and managing people who are distressed.

R6.17 The Department should not deport people who are witnesses to alleged criminal assaults until police investigations and, where relevant, prosecutions have been completed.

7 Segregation

Port Hedland is the only immigration detention centre that separates newly arrived detainees from the rest of the detainee population. There are no specific Migration Series Instructions either authorising or governing the initial segregation of detainees or the isolation of detainees during their period of detention. The Station Instructions which govern local policy and procedures at the Port Hedland facility include directions in relation to the use of observation rooms and separate detention.[1] This chapter examines the policy and practice of segregating newly arrived detainees at Port Hedland.

7.1 Conditions of segregation

Some of the conditions of initial segregation of detainees at Port Hedland distinguish the practice of segregation from the commonly held understanding of what constitutes isolation or incommunicado detention.

> A prisoner who is held incommunicado is simply one who is unable to communicate with the world outside the place of detention. Normally a prisoner, once taken into custody, may be expected to be allowed to have contact with a lawyer, with family members, with a doctor, and possibly with others too ... one who is held incommunicado then, is one who is denied access to all of these.[2]

During the initial period of segregation at Port Hedland detainees who arrive with family members are not separated from each other but are accommodated together in a segregated area. There is regular contact with the centre's medical staff for the purpose of health screening and with the welfare staff who arrange clothing and other immediate personal needs. A phone call or correspondence to relatives overseas is also permitted. Many of these conditions contrast with the usual conditions of isolation or incommunicado detention.

Within 24 hours of being detained, newly arrived detainees have explained to them the requirement to cooperate with Australian authorities over screening procedures, the legal basis of their detention, the role of personnel at the centre and the health and welfare services available. They are no longer provided with written notification of these and other matters. They are told that their segregation from other detainees is for the purpose of health, identity and security screening. Screening involves

- interviews by a departmental task force to determine identity and claims relating to detainees' illegal presence in Australia

1 Chapters 12 and 14 last revised in November 1996.

2 N Rodley, *The Treatment of Prisoners Under International Law*, Clarendon Press, Oxford, 1987, page 264.

- comprehensive health checks including chest X-rays and testing of blood, urine and stool samples for a range of health conditions including tuberculosis, hepatitis B and C, rubella, syphilis and HIV infection
- compulsory inoculation.

Port Hedland Station Instructions do not specify that newly arrived detainees are to be segregated or for how long. The Commission was told by the centre manager that this initial period of segregation is usually for two weeks. It is considered a necessary measure to ensure the safety of the main detainee population and the Australian community while the health and security status of new arrivals is unknown. During the Commission's visit in May 1997, the centre manager confirmed that, while letters to relatives overseas are posted during this period, detainees are not permitted to make phone calls to or correspond with people in the Australian community. Although videos and video equipment are provided, access to television is restricted and access to the radio, newspapers, magazines or books is not permitted.

The segregation accommodation blocks provide shared sleeping accommodation in private rooms, toilet and shower facilities and a common room with a television and video. They have their own grounds for exercise and activities.[3]

The Commission was advised by the centre manager that once task force interviews are completed and health test results are cleared and any required treatment is administered, including inoculations, detainees are automatically transferred to the main compound. He told the Commission that the task force takes no more than four days and the health screening can take two to three weeks.

7.2 Complaints

In response to three separate complaints about the practice of segregating newly arrived detainees, the Department advised that E, I and J blocks are generally used as segregation accommodation blocks for either new arrivals or detainees who are being prepared for removal from Australia. Newly arrived residents are separated from those in the main compound while health, quarantine, customs and initial immigration processing takes place. These processes can sometimes take weeks before they are finalised. The average time spent in segregation for all cases is 33 days. This is considerably longer than the centre manager indicated.

The recently-completed report on *The Management of Boat People* by the Australian National Audit Office raises an additional possible rationale for the practice of separate detention of new arrivals, namely, to keep from them information about their right to make a protection visa application and to request legal assistance. The Audit Office noted

3 Evidence, letter from the Secretary of the Department dated 28 November 1997 in response to a complaint by Complainants PH8-12, pages 2-5; and letter from the Secretary of the Department dated 26 November 1997 in response to a complaint by Complainant PH55, pages 2-3.

> The 44 members of the *Teal* group not assisted to apply for protection visas by DIMA were kept in separate detention at Port Hedland IRPC until 1 June 1996. Their protection visa applications were lodged one months after they were allowed to mix with detainees of longer standing ...[4]

Incommunicado segregation of Africans

Allegations of segregating newly arrived detainees under incommunicado-like conditions for several weeks and in some cases months are not uncommon. The Commission is currently investigating allegations made by five African men who were segregated for four to five months after their arrival. They claim that during their segregation they were not provided with access to phones, television, radio or newspapers. They say they were not permitted to receive visitors or correspond with members of the Australian community and were not provided with lawyers despite repeated requests for access. Despite the centre manager advising the Commission that detainees who are segregated upon their arrival may make a phone call to relatives in their country of origin, these complainants told the Commission

> We first telephoned [our country] 2 months after our arrival when we were still in J Block. There was a coin operated phone in J Block. At this time the centre manager said to us that you can use the phone one time but that is all. Since this time we have not been able to use a phone to call people outside the detention centre.[5]

In addition, they alleged that they were not told why they were kept segregated beyond the conclusion of the screening process. They claim they were kept locked up as a group in the separate accommodation block with three half-hour breaks a day during which they could move around the perimeter of the block while still contained within the area by high internal fencing. The Commission raised their situation with the centre manager during the site inspection and was advised that lawyers would be visiting the group in the following week. The Commission was advised by the group later that lawyers did in fact visit them in the following week and that at the same time they were released from segregation and accommodated in the main compound.

Conditions of segregation for 68 Chinese and Sino-Vietnamese

A complainant from the ‘Grevillea’ similarly described the segregation of all 68 members of his group for three months in 1996.[6] During this period, the group was moved on two occasions to accommodation blocks specifically designated for segregation.

5 Evidence, Complainants PH8-12, statement dated 31 May 1997, page 2, paragraph 8.

6 Evidence, Complainant PH2, statement dated 29 May 1997, pages 2 and 3.

The complainant's description of the conditions during the period of segregation corroborates the allegations made by the five African detainees. For example, the group was locked inside the designated blocks with only short breaks allowed during which people could move in a limited area outside. Access to phones, television, radio and newspapers was not provided. They were not told why they were being isolated or for how long and experienced difficulties in gaining access to legal advice.

Department's response to complaints

The complaints by the five Africans and the 'Grevillea' group have been formally investigated by the Commission. In letters of 27 and 28 November 1997 the Department advised that in relation to E block damage to the wiring and antenna mast in the January 1997 cyclone meant that free-to-air television programs could not be received at times. Television and video services are available in I and J blocks. The Department also advised that there may be periods when the television is not available as it needs to be repaired. E, I and J blocks have provision for portable telephones. It is normal practice on arrival and during initial processing for outgoing telephone calls to be restricted. However, this restriction does not apply to detainees who wish to contact a lawyer and seek legal advice. Detainees in E, I and J blocks are free to associate with others in those blocks, but not with residents in the main compound until health screening and initial immigration processing is completed.

The Department's response confirms that detainees in the separate accommodation blocks have tight restrictions placed on using the telephone and that there may be periods of time when they are not able to watch the television. It also confirms that detainees in these blocks are not permitted to associate with residents in the main compound. The Department has advised that the African complainants did have access to the phone in the administration area on a few occasions during the months they were in segregation. They used the phone to call an Arabic welfare officer and their legal adviser after 15 May 1997.[7]

Documents provided by the Department show that one of the complainants from the 'Grevillea' wrote requesting legal assistance in July 1996. However, he did not speak to a lawyer until September.[8] The other complainant from the 'Grevillea' did not request or receive legal assistance during the three months he spent in segregation.[9]

7 Evidence, letter from the Secretary of the Department dated 26 November 1997 in response to a complaint by Complainant PH55, pages 2-3; letter from the Secretary of the Department of 28 November 1997 in response to a complaint by Complainants PH8-12, pages 3-5.

8 Evidence, Complainant PH2, statement dated 29 May 1997.

9 Complainant PH55.

While in segregation the African complainants made a clear request for legal assistance in their undated letter of April 1997. However, arrangements were not made for them to speak with a lawyer until they made a verbal request for assistance to the assistant centre manager in May 1997.[10] Detainees in segregation face significant barriers to gaining access to legal advice.

7.3 Conclusions

Tight restrictions are imposed on the freedom of movement of detainees in segregated accommodation within the centre. Their capacity to communicate with the world beyond the segregated blocks is limited. They are not permitted to communicate with other detainees in the centre nor are they allowed to contact people in the Australian community, apart from legal advisers. However, most detainees will not be aware of their right to legal advice and will not request to see a lawyer.

Members of local community organisations and legal representatives are not permitted to initiate contact with people who are being held in segregation. Contact by the Commission is discussed in Chapter 14.

Generally, these detainees are completely isolated from the world outside the place of detention. Their isolation places them in an especially vulnerable position. Due to the absence of any mechanisms for independent monitoring of their treatment, they are at greater risk of having their human rights breached. Monitoring mechanisms are needed, therefore, to ensure that the Department is exercising its duty of care towards segregated detainees in a way which respects and protects their fundamental human rights. This could be achieved by having an independent person visit the segregated accommodation areas shortly after a new boat group arrives and on a regular basis until the detainees are moved into the main compound.

While the Department has advised the Commission that new arrivals are kept in separate accommodation for ‘a few weeks’ while the health screening and initial immigration processing takes place, in the case of the complaints investigated by the Commission the initial period of segregation lasted for several months rather than weeks. The Department agrees that one complainant was segregated from 13 December 1996 to 5 June 1997, while four North Africans were segregated from 13 February 1997 until 5 June 1997. For each of the complainants initial health and immigration screening was completed around three weeks after their arrival and at no point were travel documents for their removal issued. The Department has not provided any reasons that would justify their detention in the separate accommodation blocks beyond this period.

10 Complainants PH8-12.

Records from the Department also confirm that the members of the 'Grevillea' group were held in segregated detention from 16 June 1996 until 19 September 1996. No reasons have been provided which would justify the segregation of members of this group after the first few weeks.

For many detainees who spoke to the Commission about protracted initial segregation, one of the most difficult conditions was the severe restriction on breaks from being locked up in the accommodation blocks. In May 1997 the Commission was advised by detainees at Port Hedland that one of the initial reasons given to them for this practice was that their health status had not been established and that they were vulnerable to mosquito bites. Detainees from the 'Melaleuca' told the Commission that their three half-hour breaks occurred

> ... after breakfast and [the next] after lunch. The last one allowed is before 6pm. We were told we had to stay inside after this time and we were told because of snakes and because they did not know whether we would bring in diseases.[11]

A number of detainees have independently told the Commission that for the first few weeks of their detention, apart from a few short breaks, they were locked inside the separate accommodation block. The Department has provided general information on the conditions in these accommodation blocks but has not responded to this allegation. This practice is in breach of Standard Minimum Rule 21(1) which requires that every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air weather permitting.

Detainees who had experienced protracted segregation from the rest of the centre and the outside world alleged that the experience was frightening and intimidating precisely because many APS or management procedures relating to their segregation, such as the hourly surveillance for the entire period of segregation, were not explained or not adequately explained.

For detainees who had been subjected to months of segregation, the impact of the additional intensive surveillance was considerable. Some expressed fears for their safety at the hands of Australian authorities as the conditions of segregation were so harsh and inexplicable and because they knew that their segregation was not known to the Australian community due to the prohibition on detainees making outside contact.

The Station Instructions provide for 'incommunicado' detention at Port Hedland.

> 1401. Where there is a requirement to hold a resident incommunicado, the DIMA Centre Manager is to provide a written direction specifying that the resident be held incommunicado, the period of non contact and the persons barred from contact.

11 Evidence, Complainants PH13-PH15, statement of 31 May 1997, page 2, paragraph 1.

> 1403. On receipt of the written direction, the resident is to be informed immediately and sign an acknowledgment of having been so informed. The written direction is to be placed on the residents [sic] dossier.
>
> 1404. The residents legal or consular representative may have access to the resident during the period of incommunicado.[12]
>
> 1407. Each period of incommunicado [detention] must not exceed 48 hours.

The Department's practices in relation to isolating newly-arrived detainees under conditions comparable to incommunicado detention as defined in the Station Instructions are inconsistent with departmental policy. For example, the Station Instructions stipulate that each period of incommunicado detention must not exceed 48 hours. No discretion exists to extend this limit. The initial segregation of newly arrived detainees under conditions that in many respects are similar to incommunicado detention, for any period beyond 48 hours while health, identity and security checks are carried out, is therefore in breach of the local rules.

7.4 Human rights law relevant to segregation

Some of the conditions of initial segregation at Port Hedland are not typical features of incommunicado detention. Segregated detainees are accommodated with family members, permitted to correspond with relatives overseas and have access to doctors. However, many bear the hallmarks of incommunicado detention, including indeterminate segregation without explanation, being locked in the accommodation block during the period of segregation with little exercise, restricted access to phones and no access to information about the outside world through newspapers and radio.

Most importantly, detainees in segregated detention face significant barriers to obtaining access to lawyers. First, detainees have to know that they have a right to request legal advice before they can ask for it. Many detainees are not aware of this right as the Department does not advise them of it. Second, even if a detainee is aware of the right, in many cases requests for legal assistance are not responded to in a timely manner.

Incommunicado detention is a common pre-condition of systematic torture. To ensure that torture does not occur, therefore, states are obliged to make provisions against incommunicado detention.[13]

> The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers ...[14]

12 Note that in practice this does not guarantee access because lawyers and consular officials are not advised that the detainee is being held at Port Hedland. Neither is the detainee advised of the right to access.

13 Human Rights Committee, General Comment No. 20 (1992), paragraph 11.

14 Ibid.

According to the UN Special Rapporteur on Torture, any person in incommunicado detention, no matter what the period, has *inter alia* the right to see a lawyer.[15]

In addition, incommunicado detention breaches the right of detainees under ICCPR article 10.1 to be treated with humanity.[16] Principle 15 of the Body of Principles provides

> ... communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Standard Minimum Rule 37 states that detainees should be allowed to communicate with their family and friends by correspondence and visits.

The Department's policy and practice is to segregate detainees under conditions which in many respects are similar to incommunicado detention. This is in conflict with international human rights law. The Department recognises in its Station Instructions on incommunicado detention the fundamental requirement of minimum safeguards such as time limits and access to lawyers. However, the Instructions, in permitting incommunicado detention, breach ICCPR article 10.1.

7.5 Findings and recommendations on segregation within detention

The Commission finds

- A short period of initial segregation for the purpose of undertaking identity, health and other public risk assessments is not controversial provided that detainees are not held in conditions that are comparable to being held incommunicado.
- Detainees who face significant barriers to making telephone and written contact with lawyers, are prevented from contacting consular representatives and members of the Australian community, have no access to radio, newspapers, books and magazines and who may not be able to access the television are being held in conditions which in many respects are identical to incommunicado detention. Detainees are being segregated in such conditions for weeks and, in

15 *Machado v Uruguay* (83/1981) in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, UN Doc. CCPR/C/OP/2 1990, page 108.

16 See, for example, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, UN Doc. CCPR/C/OP/2 1990: *Arzuaga (Gilboa) v Uruguay* (147/1983), page 176; *Conteris v Uruguay* (139/1983), page 168; *Machado v Uruguay* (83/1981), page 108; *Penarrieta v Bolivia* (176/84), page 201.

many cases, months. This breaches ICCPR article 10.1 and human rights under the HREOC Act. This practice cannot be justified on any ground. It is difficult, for example, to conceive of the public risk involved in allowing newly arrived detainees to make telephone contact with lawyers, refugee advocacy agencies or members of the Australian community. This is a serious violation of the human rights of people who may seek to engage Australia's protection obligations.

- The Department has not provided any reasons that would justify the initial segregation of detainees for any period exceeding a few weeks.
- The Department's policy of incommunicado detention for asylum seekers for any period breaches Australia's human rights obligations and is a breach of human rights under the HREOC Act.
- The rules for incommunicado detention at Port Hedland are not always observed in practice, particularly in relation to the fundamental safeguards of adhering to time limits and providing access to lawyers.
- The Department's failure to respond to requests for legal assistance from detainees in segregated detention within a reasonable period of time is in breach of section 256 of the Migration Act, ICCPR article 10.1 and human rights under the HREOC Act.
- There is an absence of monitoring of the conditions of initial segregation for newly arrived asylum seekers who are detained at the Port Hedland centre.

The Commission recommends

R7.1 The Department should develop a formal policy for inclusion in the Migration Series Instructions on the segregation of newly arrived asylum seekers covering limitations on the maximum time detainees can be segregated, the purpose of segregation and the conditions of segregation. The Station Instructions should prohibit explicitly conditions that are features incommunicado detention. They should state specifically the right of detainees to make telephone contact with members of the Australian community including lawyers and require that any officer should facilitate such contact where it is requested.

R7.2 Detainees should not be held in separate detention for more than a period of 21 days.

R7.3 Detainees should not be locked inside their rooms or the accommodation blocks for any period during the initial segregation. Arrangements should be made for them to access the recreational facilities in the main compound.

R7.4 The Department should develop an effective method for auditing the local procedures and practices of the detention service provider to identify any inconsistencies between departmental and local policy, and between departmental policy and local practice on the segregation of detainees for the purpose of undertaking initial health, identity and risk assessments.

R7.5 In the initial induction session the reason for, and the conditions of, the initial segregation should be explained clearly to detainees. Detainees should be told how long the segregation will last. This session should also outline the method of surveillance that will be used and the reason for it.

R7.6 During the period of initial segregation, an independent person should visit the centre on the second day and once every 48 hours after this. If the independent person does not speak the same language as the segregated detainees, an appropriate interpreter should accompany him or her on the visit. The role of this person should be clearly explained to detainees in the induction session. Detainees must have unrestricted access to this person and be able to speak to him or her in private.

Part 4

Services

8 Evaluation of services to detainees

The range and quality of services available at the four immigration detention centres vary according to the size and demography of the centre as well as its primary purpose. The services evaluated in this Part are

- interpretation and translation
- medical services
- education and training
- recreation
- religion and culture
- provision of legal advice.

There are no Migration Series Instructions on the provision of services.[1] Until late 1997, in addition to providing the custodial service, the Australian Protective Service managed the provision of a range of other services in the centres. All aspects of the management of services were handled by the APS including the selection and appointment of staff, the provision of necessary facilities to operate the services efficiently and responsiveness to detainee needs. All the immigration detention centres provide medical, education, recreation and translating and interpreting services to detainees. However, the range and quality of the services provided vary significantly among the centres.

8.1 Overview

Port Hedland

Port Hedland has the broadest range of services available on site for several reasons, including

- its remote location
- the limited services available in the Port Hedland township
- the historically high numbers of detainees held there
- the additional service needs arising out of the long-term nature of detention in Port Hedland.

1 Migration Series Instructions are temporary instructions prepared by the Department for ultimate incorporation into the Policy Advice Manual. Unless formally re-issued they lapse 12 months after issue. They are distributed to all departmental offices in Australia and all posts overseas. The instructions in Migration Series Instructions relate to the Migration Act, amended by the Migration Reform Act and subsequent amending Acts, the Migration Regulations and other related legislation.

The Commission was told by the centre manager and welfare officer at Port Hedland that the services available to detainees include medical and welfare services. At the time of the Commission's inspection in May 1997 the medical service included a mix of on-site and sessional nursing staff and medical practitioners. At the same time four full-time welfare officers provided basic counselling, supervised menus and arrangements for the clothing and other personal needs of detainees, access to interpreters and contact with lawyers, sports and social activities (including video hire and external excursions), access to religious counsel and cultural events and a work incentive scheme.

During the site visit to Port Hedland in May 1997, the Commission observed that there had been a significant improvement in the quality of the services provided to detainees since its last visit in January 1996. Staff had developed a number of initiatives which provide detainees with opportunities to use their time in a constructive manner. These initiatives also give people more control over their lives while in detention.

The work incentive scheme and the high level of detainee involvement in the preparation of meals as part of that scheme are two initiatives operating only at Port Hedland. The Commission was particularly impressed by these schemes. At the time of the May 1997 visit it was clear that the day-to-day running of these schemes required a great deal of planning, time and commitment by the welfare staff in the centre.

The work incentive scheme enables detainees to earn points on a rostered basis that can be converted to nominal dollar values up to $90 by undertaking work such as cleaning or cooking. The maximum that can be held in an 'account' is $300. Detainees have access to the scheme on a rotational basis which enables a detainee to earn $90 roughly every ten weeks. More can be earned if a detainee has dependants. The points can be used to purchase goods up to their nominal dollar values.

One of the areas of work available to detainees and included in the work incentive scheme is the preparation, cooking and serving of daily meals. The scheme enables Chinese and Vietnamese meals to be prepared by Chinese and Vietnamese detainees, Iraqi food by Iraqis and Algerian food by Algerians. Complaints by detainees during the Commission's site inspection in 1996 about the quality and range of food appear to have been due to problems associated with the introduction and management of a new scheme and restrictions on the variety of ingredients due to the greater number of detainees being catered for. The reduction in complaints about food in May 1997 is in large part due to the better management of the cooking program and reduced numbers of detainees at Port Hedland, allowing a wider variety of ingredients and the successful involvement of detainees in cooking their own meals.

While not without their problems both initiatives were considered by detainees to have improved the conditions of long-term detention. In a statement to the Commission a complainant from the 'Grevillea' said

> I like the work scheme and want to get more points through it. It is good to have something to do, it makes you feel a lot better. For such a long period of confining if you don't find anything to do your body will get weak a lot faster. I feel a lot happier with something to do.[2]

The main complaints were that there was insufficient work available for all the people wanting to participate in the scheme and the maximum accruable amount was too low. Some allegations were also made by detainees of points being deducted as a disciplinary measure and detainees being forced to buy essential goods with points earned from the work incentive scheme. It was alleged women with small children, for example, are required to buy infant formula, feeding bottles and teats and nappies with points they earn working.[3]

The main complaints about food in May 1997 came from detainees from ethnic minorities in the detainee population whose dietary preferences were subsumed by the closest larger ethnic group. Detainees in this position complained of their distaste for the food and the digestive problems they were experiencing as a result. The scheme does not appear to be creating problems relating to theft of goods purchased or jealousy in relation to savings.

Perth and Villawood

The cooking scheme successfully running in Port Hedland is in stark contrast to the arrangement at the Perth centre. The Commission noted during the site inspection of the Perth Immigration Detention Centre that no fresh food is prepared on site. The substantial meals of the day are all prepared off site, delivered frozen to the centre, defrosted and then heated in microwave ovens. Article 11.1 of the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to an adequate standard of living including adequate food. Standard Minimum Rule 20(1) provides that every person in detention shall be provided with food of nutritional value, of wholesome quality and well prepared and served.

At the Villawood Immigration Detention Centre food and cleaning services are contracted to Advanced Food Services. Meals are prepared off site and reheated in the immigration detention centre. The food is freshly prepared each day and is not frozen. During the Commission's site inspection in October 1997 the centre manager advised that welfare officers work closely with detainees to ensure that the range of food meets their cultural needs.

2 Evidence, Complainant PH55, statement dated 31 May 1997, page five, paragraph 2.

3 Evidence, Complainants PH49 and PH50, interview of 31 May 1997.

The Perth Immigration Detention Centre has the narrowest range of and nurses from the local medical centre are on call and attend when required. English classes are run by the Catholic Education Group or interpreters. The only welfare services available to detainees are provided by the Red Cross. An officer from the Red Cross visits members.[4]

Information handbooks

At the Perth centre an information handbook, 'Rules and Information August 1996, is provided to all detainees on the day they are taken into detention. In October 1997 when the Commission visited Villawood outlining the rules of that centre and the services provided. The Port Hedland 'Information Handbook for Residents at Port Hedland', 1996. However, the deputy centre manager advised the Commission in August 1997 that staff at Port Hedland use the handbook as a resource whenever relevant of the services available to detainees.

Finding and recommendation on the provision of information

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information handbook for detainees upon admission. The Perth handbook provides information about the rules of the centre, detention. The Port Hedland handbook includes the same categories of information, with the exception of information about the distributed to detainees since August 1996.

The Commission recommends

Each centre should provide a comprehensive information handbook to detainees upon admission. This handbook should advise detainees their rights and entitlements while in detention. Each handbook should be kept up to date and translated into the main community

4 Briefing from Officer in Charge, APS, and Officer in Charge of Detention Centre.

9 Interpretation and translation

The Migration Series Instructions state that whenever a detainee has difficulty understanding and/or speaking English officers should obtain the assistance of a qualified interpreter such as from the Department's Translating and Interpreting Service (TIS). The situations cited where it may be necessary to provide an interpreter include

- explaining to the detainee the nature of and reason for detention
- explaining the general facilities available to detainees
- seeking information on the detainee's health and/or need for medication
- informing detainees of their entitlement to seek legal advice
- informing detainees of their right of access to consular representation
- interviewing the detainee
- when providing the "Notice to Persons in Immigration Detention"
- whenever the detainee receives advice from the Department, the Refugee Review Tribunal and Immigration Review Tribunal.

The Port Hedland, Perth and Villawood Station Instructions do not provide any further direction on the provision of interpreters.[1] However, the Department's April 1996 version of the Information Handbook for Residents at Port Hedland states that on-site interpreters are available from Monday to Friday and are on call for emergencies over the weekend. It does not mention the existence or availability of TIS.

The Department's August 1996 version of 'Rules and Information for Detainees at the Perth Immigration Detention Centre' states that if people have difficulties with the English language they may request to use the TIS. It advises that staff at the centre will make the necessary contact and the service is provided free of charge.

In general, letters from the Department to a detainee will either be translated into the detainee's first language or be read to the detainee by an on-site or TIS interpreter.

9.1 Access to the Translating and Interpreting Service

The government-funded TIS is integral to the management of the detention regime. The Department formally bears the cost of the use of this service for any purpose in relation to preparing and progressing an application to stay in Australia.

1 Each immigration detention centre has its own Station Instructions which are produced by the APS Officer in Charge deployed to each centre, in consultation with the departmentally appointed Centre Manager, APS Headquarters and the APS Regional Commander. The Instructions govern the daily running of immigration detention centres, including the duties and responsibilities of custodial officers, and are reviewed on an annual basis.

Many detainees at Port Hedland who expressed distress at not

of the refugee determination process were not aware that TIS was available. Failure to explain clearly what the service is and how it

on. A case cited in Chapter 14 examining access to legal advice is a good example of this. A complainant from the ‘Grevillea’ claims that

while the person on the phone was the interpreter. In this case the detainee believed that the interpreter was the lawyer and the lawyer

by someone he thought was a departmental representative and so he did not provide full details about his situation.[2]

Even if detainees are aware of TIS, they may not know what rights they have to access it. They may also feel uncomfortable about asking centre staff if they can use this service. In a statement to the Commission the same complainant from the ‘Grevillea’ said

> I rely on my children to speak with my solicitor over the phone. I do not have the courage to ask the centre manager to provide me with the telephone interpreter service. I do not know what my rights are in relation to these services or what services are available.[3]

The Commission is aware that detainees at Port Hedland have experienced difficulties in obtaining access to an interpreter to assist communication with legal officers. The Commission was advised by a solicitor at the South Hedland Office of Legal Aid of Western Australia that there have been discussions between Legal Aid and officers of the Department about who should pay for the cost of an interpreter when Legal Aid provides advice to detainees over the phone or in person. Prior to October 1996 Legal Aid had been expected to meet the cost of this service. Since this time it has been agreed that the Department will meet the expense by allowing Legal Aid solicitors to use the on-site interpreters or paying for TIS. One detainee has advised the Commission that the Legal Aid Office had told him that it could not provide the services of an interpreter. Because of this, he uses his son to communicate with the Legal Aid solicitor.[4] A Legal Aid solicitor advised the Commission that this detainee was always provided with an interpreter by the Department during the period Legal Aid was representing him. However, once his case had been finalised the Department refused to fund an interpreter for follow-up calls to Legal Aid.

2 Evidence, Complainant PH2, statement dated 29 May 1997, page 4, paragraph 1.

3 Id, paragraph 5.

4 Ibid.

9.2 On-site interpreters

Due to the inconvenience, cost and delay involved in engaging the TIS, and the large number of detainees who do not speak any English, greater reliance is placed on the interpreters who work on site at Port Hedland. The Port Hedland centre employs two on-site interpreters. These interpreters assist in the day to day administration of the centre, as they attend meetings between detainees and centre staff, translate letters from detainees and attend disturbances. A sample of incident reports from the Port Hedland centre between January 1995 and March 1996 demonstrates that the on-site interpreters are frequently relied on in the resolution of conflicts involving detainees. The Villawood and Perth centres do not have any interpreters on staff.

The Commission was told that the association between the on-site interpreters and the Department and centre management tends to undermine the confidence of detainees in the interpreters' independence. Several detainees remarked on this during interviews and expressed relief at the Commission's use of an independent interpreter. A detainee from the 'Grevillea' recorded his concern in a statement to the Commission.

> Apart from the TIS, all interpretations have been done by the centre interpreter. I do not know whether the information I receive or give is interpreted accurately.[5]

An interpreter is crucial to appropriate treatment of detainees and to enabling them to exercise their legal rights including preparing an application to stay in Australia. The Department's placement of on-site interpreters at Port Hedland is welcome. This is a necessary response to the needs and rights of detainees. It is important that staff at the centre make use of the on-site interpreters when they are managing incidents and resolving misunderstandings. If custodial staff fail to use the on-site interpreters to assist in negotiating misunderstandings over ordinary everyday events, the consequences for the detainees can be devastating.

Escalation of a misunderstanding

A complaint to the Commission by a woman from the 'Pheasant' illustrates, in the Commission's view, that the absence of an interpreter can result in the escalation of a conflict. This case is discussed in detail in Chapter 6. In this complaint an interpreter was not available when the woman left the dining area on a Sunday with an extra piece of fruit. Because the woman only spoke Cantonese she could not explain to the APS officers who had stopped her why she had the extra piece of fruit. The incident led to the woman assaulting APS officers and being forcibly restrained. In a statement to the Commission she said

5 Id, paragraph 3.

> When I went out the door of the mess with the 2 pieces of fruit at least 5 APS officers held me there ... I tried to indicate with my hand that it is ok for me to take one piece of fruit ... I tried to explain to them that the 2 pieces of fruit were given to me by the person in the canteen ... At the time I asked for an interpreter so I could explain that I had been given the fruit. As there was no interpreter I thought they were making a joke of me ... Suddenly the two female APS officers attacked me from behind and got hold of my arm and twisted both my arms over my back.

The complainant alleged that incident resulted in her being pushed to the ground face first and being taken to the observation room. She also stated

> I again asked for an interpreter. The APS officer in charge of the shift then arrived. He asked me to go along with him to the office and asked me to come into the office. I stood outside the door and my intention was to wait there until the interpreter arrived, so that I could explain to him what had happened. However, he wouldn't wait and the other two APS officers who were there grabbed my hands and the head of the shift held both my legs and put me inside the observation room.[6]

The Commission commenced an inquiry into this complaint in July 1997 and in December 1997 a response was received from the Department. The Department confirmed that an incident took place on Sunday 18 May 1997 when the complainant tried to leave the dining area with two oranges. The response stated that it is general policy that if an interpreter is available he or she would immediately attend the site of a disturbance. However, as the incident took place on a Sunday an interpreter was not on site and only available on an on-call basis.[7]

The Department has supplied the Commission with incident reports from the APS officers involved. These reports record that the detainee was not able to communicate why she had the two oranges and made a number of requests for an interpreter to be called. The inability of the detainee to explain herself to the APS officers and the insistence by these officers that she leave the dining area before the interpreter arrived resulted in a minor incident escalating into a major conflict and security problem.

Inquiries by the APS officer in charge revealed that the complainant was in fact given the fruit by one of the people who worked in the kitchen but this was not known to the officers working in the dining area. If an interpreter had been present, the detainee could have told them that she had been given the fruit and the matter could have been resolved by the officers checking this with the kitchen worker.

6 Evidence, Complainant PH5, statement dated 1 June 1997, page 1.

7 Evidence, letter from the Secretary of the Department dated 28 November 1997 in response to a complaint by Complainant PH5, page 3.

In his report on the incident to the centre manager, the APS officer in charge stated

> It has been made quite clear that there was some difficulty in communication between the resident and the APS officers involved, this was one of the main factors which allowed the incident to grow to the proportions that it did.[8]

The incident reports record that an interpreter arrived after the complainant had been placed in an observation room. The documents do not record the time the interpreter arrived or when the interpreter was called. It is also not clear who was responsible for calling the interpreter.

At Port Hedland the absence of interpreters on the weekend leaves both detainees and staff at risk of situations escalating into conflict. The Commission realises that it is not always possible to have an interpreter on site. There is a need to develop arrangements to ensure that interpreters can attend disturbances within a short time. If the detainee is not at risk of injuring him or herself or others, no action should be taken to move or restrain the person until an interpreter arrives.

9.3 Translation services

The on-site interpreters translate letters from detainees to the centre manager. However, the Commission was told by detainees at Port Hedland that they often receive letters in English relevant to their application for refugee status and that these letters are not translated by the on- site interpreters. In his statement to the Commission a detainee from the 'Grevillea' said

> The manager and deputy manager also told me through an interpreter that my application had been refused. I asked the manager on what basis my application had been refused ... I requested that the manager have the document translated for me. The document is about nine pages. He did not get the statement translated ... I thanked the manager for giving me a document that I could not understand. The manager told me that over here, we did not have that sort of service. In the centre, it does not matter what sort of document it is, we do not get translations.[9]

8 Report from Officer in Charge, APS, Port Hedland Immigration Detention Centre dated 20 May 1997, page 1.

9 Evidence, Complainant PH2, statement dated 29 May 1997, page 4, paragraph 2.

The same detainee was told he had seven days to appeal the adverse decision that was the subject of the letter. The forms he was given were in English. He told the Commission

> I realised there was little time so I wrote a letter in Chinese to the court. The court did not understand it and they returned the letter to me. They suggested I get a translation into English. I requested the manager to supply a translation and I was told that that service was not provided by the centre.[10]

9.4 Human rights law relevant to interpretation and translation services

Very few asylum seekers arrive in Australia able to speak English sufficiently to conduct the basic transactions necessary for survival much less pursue the complex process of making an application for protection. As required by international law (the obligation of *non-refoulement* in the Refugee Convention article 33, ICCPR article 7 and CROC article 37(a)), Australian law makes available a procedure for the assessment of an asylum seeker's status. The ICCPR requires the provision of competent translation and interpretation services to the asylum seeker throughout the process in which his or her status and other rights and obligations are being determined. Without these services the asylum seeker will be unequal before the law contrary to ICCPR article 26 and will experience discrimination in the enjoyment of his or her human rights contrary to article 2.

ICCPR article 26 provides

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... language ...

ICCPR article 2 provides

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as ... language ...

Principle 14 of the Body of Principles emphasises the particular right to an interpreter in relation to the determination of the legal status of a detainee.

10 Ibid.

> A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands [any information relating to his arrest and associated rights] and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

To ensure humane treatment in detention, Standard Minimum Rule 51 recognises the need for the services of interpreters in the daily interactions between detainees and staff.

> ... the majority of the ... personnel of the institution shall be able to speak the language of the greatest number of prisoners or a language understood by the greatest number of them ... [w]henever necessary, the services of an interpreter shall be used.

The provision of on-site interpreters accords with human rights requirements but they must be available when required. The absence of interpreters on weekends and the failure of custodial staff to use interpreters during security incidents indicate the inadequacy of the present service.

The Standard Minimum Rules also address the detainee's need for full information about the services provided in the institution and his or her rights and obligations. Standard Minimum Rule 35.1 states

> Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorised methods of seeking information and making complaints and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.

9.5 Findings and recommendations on interpretation and translation services

The Commission finds

- Detainees are often unaware of the availability of the Translating and Interpreting Service. When they are aware of it, they often feel too intimidated to ask for the service.
- Detainees often feel inhibited in speaking freely through the departmentally-appointed on- site interpreters.

- On occasion on-site interpreters have not been requested to assist or have been unavailable to assist in the negotiation and resolution of many disputes involving detainees.
- The absence or unavailability of interpreters has contributed to the escalation of disputes involving detainees.
- Restricting the use of interpreters in the management of conflict and misunderstandings in the particular circumstances of immigration detention breaches the requirement for humane treatment in detention in ICCPR article 10.1 and human rights under the HREOC Act.
- While letters from detainees to centre management or the Department are translated by on-site interpreters, detainees who receive letters in English pertaining to their asylum status are often unable to have their letters translated. Failure to provide translations of documents specifically relevant to a detainee's refugee application or to provide access as of right to interpreters for the purpose of facilitating communication between detainees and their lawyers breaches ICCPR article 26, human rights under the HREOC Act and common law principles of equality before the law.

The Commission recommends

R9.1 Information handbooks at each of the detention centres should include a description of the Translating and Interpreting Service and advice about its availability including the circumstances in which and the means by which the service can be provided.

R9.2 Detainees should be told explicitly by the custodial officers or departmental officers that they will be provided with translation assistance where necessary to meet any requirement to put requests in writing.

R9.3 The detention service provider (currently Australasian Correctional Services) should ensure that at the Port Hedland centre on-site interpreters are available seven days a week for at least 16 hours a day. At the other centres the Department and the detention service provider should examine the feasibility of employing on-site interpreters. If this is not possible, due to the diversity of the languages spoken by detainees, the Department and the detention service provider should establish a list of TIS interpreters covering the main language groups in each centre. Ideally, these interpreters will live or work near the centre. These interpreters should be on call and able to attend the centre at short notice.

R9.4 The detention service provider's local instructions should require officers attending a dispute involving a detainee who cannot speak or understand English to obtain the assistance of an interpreter.

R9.5 The Migration Series Instructions should require all formal written communications to a detainee in relation to his or her immigration status to be translated into the first language of the detainee. This issue appears to be addressed by Immigration Detention Standard 2.4 which states that where a detainee has a non-English speaking background, written information should be provided in a language the detainee can understand.

10 Medical services

Overview of health care provision

The Migration Series Instructions on general detention procedures state that, where a detainee requests or appears to be in need of urgent medical attention, officers should seek medical attention for the detainee immediately. In general, detainees are told during their initial induction and medical screening what medical services are available on site.

The following services and facilities are provided at all four centres

- health screening within 24 hours of arrival
- a designated medical room
- medical officers either available on site or visiting the centre on a regular basis
- referral to a range of specialist services as required
- the cost of medical and dental care met by the Department.

No facility has a full-time doctor on staff or a regularly visiting psychiatrist. On-site nurses at centres other than Port Hedland are not required to have specialist mental health qualifications. No centre has a system of routine medical checks in place.

10.1 Medical services at the Perth centre

The Perth Station Instructions provide guidelines for the provision of medical and dental care. They cover areas such as the initial medical examination, accessing on-site care, requests to see private medical practitioners, transfers to hospital and medical record keeping. The ‘Rules and Information for Detainees at the Perth Immigration Detention Centre’ advises detainees of their rights to have medical and dental care and how they can access these services.

On-site medical services include a nurse from a local medical centre who visits on Monday, Wednesday and Friday mornings. Doctors at this medical centre are on call and attend when they are required. Referral to the hospital, dentists and psychiatrists is conducted on a needs basis. APS officers used to dispense medication to detainees.

An initial medical examination is conducted upon induction by a medical officer from the local medical centre within 24 hours of the person being placed in detention. This examination does not include blood tests or tests for tuberculosis.

Access to mental health services

In Perth the centre’s informal arrangement with the nearest 24-hour medical centre is not conducive to developing any insight into the psychiatric needs of detainees.

10.2 Medical services at Villawood

The Villawood Station Instructions do not include guidelines for the provision of health care.

Medical and dental care is provided on a needs basis. Nursing care is available during normal office hours and a doctor is on call. He conducts clinics daily from Mondays to Fridays and as required on weekends. The medical staff refer detainees as appropriate to a range of specialist medical services, such as ante-natal clinics, counsellors and psychiatrists. The services of an interpreter are provided for all outside medical appointments. Emergency services are provided by a nearby medical centre or at the local hospital.

All new arrivals at Villawood are given a medical examination by the nurse or the centre doctor within 24 hours of arrival. Medical histories are obtained and tests are carried out. These tests include a chest X-ray for tuberculosis. If the examination detects that a person has a medical condition, a complete medical history is sought and the centre doctor arranges follow-up care.

Access to mental health services

Officers of the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) which operates in NSW told the Commission about a number of barriers detainees at Villawood face in gaining access to their service. These include

- custodial officers not being available to escort detainees to therapy and assessment sessions
- medical staff at the centre not referring many detainees to their service, leaving most referrals to be made by people in the community who are concerned about a detainee's mental health
- detainees not knowing of the existence of STARTTS, so not requesting to be referred
- custodial officers not realising that a detainee who is exhibiting challenging or disturbed behaviour may need treatment for torture or trauma experienced in the past.

The Villawood centre has arrangements with psychiatrists or specialist counselling services on a strict needs basis when appointments are available.[1] The long delays and irregular consultation dates tend to inhibit the provision of specialist care for detainees suffering mental distress.

1 The same is true for Maribyrnong.

A Nigerian woman with a young child at Villawood started to suffer from depression in March 1997, following her husband's escape and her transfer to Stage One, the medium security detention facility. In April 1997 the visiting doctor at the centre made an appointment with a female psychiatrist for 28 May 1997. The follow-up appointment with the psychiatrist did not take place until 16 July 1997. The Department and the APS were waiting on this specialist advice to decide whether to move the woman back to the low security environment of Stage Two.

10.3 Medical services at Port Hedland

The Port Hedland Station Instructions include guidelines on the provision of medical and dental services. The Instructions cover procedures for

- accessing on-site medical staff
- seeking independent medical advice or second opinions
- transfers to hospital and custodial arrangements during hospital stays
- medical examinations
- provision of dental treatment
- dispensing of medication
- women's health
- medical record keeping and
- basic personal hygiene.

The 'Information Handbook for Residents at Port Hedland' sets out the rights and entitlements detainees have in relation to these procedures. The deputy centre manager advised the Commission that as the Handbook is no longer distributed to detainees the welfare officer is responsible for alerting detainees to medical services available to them as the need arises.

On-site medical services at Port Hedland include two full-time general registered nurses, one with mental health qualifications. In addition two general practitioners attend the centre four mornings a week. A psychiatrist is flown in from Broome once every fortnight. Services in the Port Hedland township are also used when necessary. They include mental health nurses, dental services, hospital in and outpatient care and the women's health centre. A detainee who wants to seek specialist or other independent medical advice or a second opinion must first see the on-site nursing staff who determine the detainee's need.

The nursing staff told the Commission that there had been less demand for external services since the drop in numbers at Port Hedland made the detainee population more stable and manageable.

The population is nevertheless generally larger at the Port Hedland centre than at any other and so it requires more on-site medical staff. The limited medical facilities available in the Port Hedland township also leads to a requirement for additional on-site care.

Health screening during induction

At Port Hedland all asylum seekers who arrive by boat are given a thorough medical examination, including blood, urine and stool testing upon arrival to determine whether any medical conditions may need treatment. They are required to cooperate with the authorities undertaking this comprehensive testing as a prerequisite to any application to stay in Australia. Detainees must be tested for a range of health conditions including tuberculosis, hepatitis B and C, rubella, syphilis and HIV infection. Detainees found to be infectious are isolated and usually transferred to hospital for treatment. All detainees are inoculated before they are permitted to join the main detainee population.

Thereafter, treatment is provided free of charge by on-site medical staff and doctors and specialists contracted to the centre on a needs basis. Detainees who make appointments with independent doctors or specialists are required to meet their own costs.

Access to mental health services

A large number of detainees experience mental health problems. This may be due to a number of reasons including being subjected to torture or other forms of persecution in their country of origin, stresses created by the length and conditions of detention, feelings of anxiety and desperation because their applications for refugee status have been rejected. The Commission is concerned that detainees with mental health problems are not always receiving medical care appropriate to their condition.

In discussions with nursing staff at the Port Hedland centre the Commission was told that depression is the most common health problem among the residents in the centre. Anxiety, stress, insomnia, stomach ulcers, bacterial stomach conditions, constipation and boredom are the usual things people present with.

The mental health nurse stressed that sleeping tablets and painkillers are given to detainees only as a last resort. Alternatives such as lavender oil, hot milk and instructions on relaxation techniques are preferred. The nurses also organise weekly excursions for long-term detainees and people who may be suffering from depression.

The on-site nurses at Port Hedland told the Commission that the most common drugs hoarded are antibiotics and headache tablets. They stated hoarding is not usually done for the purposes of planning self-harm, like suicide. Rather prescription items seem to be hoarded

like other items because detainees do not have much to call their own; they hoard what they can.

Suicide attempts by asylum seekers, however, are not infrequent. Numerous examples of detainees attempting suicide or serious self-harm are cited in the Port Hedland incident reports between January 1995 and March 1996. Over this period most people who attempted suicide did so by slashing their wrists or drinking cleaning fluid. Two weeks before the Commission undertook the site inspection in May 1997 a 26 year old man from the 'Vagabond' took an overdose of tablets he had hoarded. In an interview with the Commission he said

> Because of the long wait and because I do not know when I will get out of here and because I am scared of going back I tried to kill myself two weeks ago. I took tablets I had saved up. They made me feel very sick. When I became sick I became very scared of dying and so I am glad I was saved.[2]

The incident reports also show that detainees commonly exhibit aggressive behaviour that is considered a risk to themselves and others. The records indicate that depression, suicide attempts and disruptive behaviour are treated by

- transporting detainees to the local hospital to have their physical injuries treated
- physically restraining detainees with handcuffs
- arranging for detainees to see the on-site nurse or a doctor, who may prescribe medication which can include oral sedatives or, in cases involving very difficult behaviour, intra-muscular injections
- placing detainees in the observation room or transferring them to the local police lock-up.

While the physical injuries are treated either on site or at the local hospital, it is not clear what, if any, specialist medical treatment detainees received to help them address the problems underlying the attempt to harm themselves or others. The records provided no evidence that detainees who attempted suicide received professional counselling or were referred to psychiatric assessment or care. There are no formal procedures at any of the centres to detect detainees at risk of suicide or who are victims of torture and trauma and to ensure that they are provided with specialist care.

The prevalence of depression, anxiety and stress experienced by detainees should lead inevitably to considerable reliance on psychiatric services. This is not the case however. In Port Hedland a psychiatrist who practises in Broome visits once every two weeks. In addition, the mental health nurse told the Commission in May 1997 that she

2 Evidence, Detainee PH1, record of interview of 2 June 1997, page 1, paragraph 9.

experienced great difficulty in encouraging Chinese detainees particularly to seek treatment other than medication for their mental distress due to their cultural resistance to the notion of mental illness. There are no specialist torture or trauma counselling services available in Port Hedland. The closest counselling service of this type is the Association for Service to Torture and Trauma Survivors which is located in Perth.

Failure to make a psychiatric assessment

Medical records obtained by the Commission in the investigation of a complaint by a woman from the 'Pheasant' raise a number of serious issues about the medical care provided to people with mental health problems at Port Hedland.[3] During her detention at Port Hedland this woman

- exhibited continuing mental health problems
- attempted suicide on at least three occasions
- was prescribed anti-depressants at regular intervals
- was administered the anti-psychotic medication, Haloperidol, by intra-muscular injection on four occasions.

However, at no time during her detention at Port Hedland was she referred for a formal psychiatric assessment although this would have been possible.

Her mental health problems were primarily managed by the use of medication, even though in the assessment of the general medical practitioner she did not have a treatable psychiatric illness but rather a behavioural disorder. Her medical records indicate that she was prescribed various anti-depressants at regular intervals, although the reasons for their use and for changing the type of anti-depressant used are unclear.

The Commission is critical of the use of intra-muscular anti-psychotic medication on four separate occasions to manage her behaviour in the absence of any formal psychiatric assessment. The Commission questions the purpose of managing a detainee's behaviour with anti-psychotic medication when she had not been diagnosed as having a psychiatric illness. From the medical records it is not clear whether this detainee consented to these injections. As she had refused oral sedatives, it is likely that she would have refused an injection.

3 Evidence, Complainant PH5, statement dated 1 June 1997.

It is questionable whether the Department has the legal authority to sedate a detainee with intra-muscular medication against his or her will. The Port Hedland centre has a 'Protocol for the Management of a Disturbed Resident' in circumstances where a detainee becomes extremely agitated or disturbed and is in danger of harming him or herself or others. The Protocol authorises the general nurse and centre manager in consultation to administer an intra-muscular injection when counselling and oral sedation have failed or cannot be administered. Migration Regulation 5.35 authorises medical treatment to be given to a detainee if, on the advice of a Commonwealth Medical Officer or registered medical practitioner, the Secretary of the Department forms the opinion that

- the detainee needs medical treatment and
- if medical treatment is not given to that detainee, there will be a serious risk to his or her life or health and
- the detainee fails to give, refuses to give, or is not reasonably capable of giving, consent to the medical treatment.

In addition, the regulation authorises the use of reasonable force (including the reasonable use of restraint and sedatives) for the purpose of giving medical treatment to a detainee. Detainees who are given medical treatment as prescribed by the regulation are taken for all purposes to have consented to the treatment.

This Migration Regulation was not invoked in relation to the chemical restraining of this woman, as at no point did the Secretary authorise the treatment. To the Commission's knowledge, this Regulation has never been invoked. Its lawfulness has not been settled. Also, section 5(1) of the Migration Act gives the Department the authority to use reasonable force to take a person into detention and to keep him or her there. It does not relate to the use of force when a person is already in detention and not attempting to escape.

Following a serious security incident where both the woman and APS officers were injured, the centre manager requested that the woman be referred for a psychiatric assessment. The nurse referred the detainee to the visiting general practitioner. The assessment of this doctor was that the woman did not have a treatable psychiatric illness and no improvement in her behaviour could be expected. The doctor did not refer the woman to a qualified psychiatrist for a formal psychiatric assessment.

In the Commission's view the management of this woman's condition by centre staff was inadequate. In certain circumstances chemically restraining a detainee against his or her will can constitute inhuman and degrading treatment and assault. The reliance on chemical restraint as a means of regularly managing this woman's behaviour, in the absence of any formal psychiatric assessment, constituted degrading treatment and a breach of her human rights.

In 1995 the Commonwealth Ombudsman prepared a report on the transfer of immigration detainees to State prisons. This report documented two cases where detainees who were manifesting unstable and mentally disturbed behaviour were transferred to police lock-ups or State prisons before they had received any psychiatric assessment or care. Mr Z had been detained at the Maribyrnong Immigration Detention Centre for four weeks when he became uncontrollable and behaved irrationally. He was transferred to a police station where he was held for two days. He was then moved to the State prison system and admitted to the prison hospital.

Mr Z was later committed to a secure psychiatric facility. He remained in custody for four months until he was granted a protection visa and released. The Ombudsman found that even though the transfer was lawful it was unreasonable because Mr Z's behaviour suggested that he required psychiatric care rather than exposure to the criminal domain of the State prison system. She concluded that Mr Z should have been assessed at the immigration detention centre for admission to a psychiatric hospital.[4]

This case highlights the importance of custodial officers being able to recognise the signs of possible mental illness and being able to obtain the appropriate medical or psychiatric assessments. It is totally inappropriate to manage the behaviour of a mentally ill detainee by transferring the detainee to a State prison.

Barriers to access

The limited services available in the Port Hedland township also pose difficulties for accessing additional specialist advice. A complainant from the 'Melaleuca' who was in considerable pain from a suspected stomach ulcer told the Commission that an appointment with a specialist for which he had waited weeks had to be cancelled as it clashed with his Refugee Review Tribunal hearing. The nursing staff told the Commission that long delays in seeing specialists in Port Hedland were usual.

The procedure for detainees to access the nurses at the Port Hedland centre was considered discouraging for detainees wishing to seek medical advice. Detainees must present to a specific gate near the administration block and wait for a card to be issued to authorise their visit and place them in the queue. The internal fence which separates the main compound from the administration block where the nurses are located places a physical restriction on access to medical advice. These arrangements also make it difficult for detainees to keep private the fact that they are seeking medical care.

In discussions in May 1997 the on-site nurses told the Commission that they had received complaints from people having to wait at the gate for half an hour. They said that there was one person who did not come back for days. In these discussions the nurses acknowledged that it would be easier for detainees to access them if the fences were not there and people could walk straight in. However, it was felt that the removal of the fence may make appointments more difficult to manage.

4 Commonwealth Ombudsman, *Investigation of complaints concerning the transfer of Immigration detainees to State prisons*, 1995, pages 25-40.

The nurses' general view was that people tend to over-present rather than under-present for medical care. They felt that detainees have a more comprehensive and accessible health care service than the general community in Port Hedland.

Female detainees may be reluctant to ask for medical assistance if the services of a female nurse and doctor are not available to them. This is an issue at the Villawood centre. Although a significant number of female detainees are held there, only a male doctor provides services.

In discussions with centre managements the Commission was told that people can readily access on-site medical staff and referrals are made to address specific health care needs. During the site inspection the centre manager at the Perth centre provided examples of the type of health care provided to detainees. He said one detainee who was diagnosed with cancer received radio-therapy daily for a period of four or five weeks. He also stated that a young girl in detention with polio had five or six operations on her hips following which she was able to walk.

To encourage detainees to see them about medical problems, the nurses at Port Hedland take detainees on weekly excursions outside the detention centre. In background discussions the nurses advised that this has led to detainees getting to know them and as a consequence people are more likely to come to them if they have a medical issue.

10.4 Adequacy of medical care

Many detainees at Port Hedland told the Commission that their medical complaints were not taken seriously. In discussions the mental health nurse told the Commission that she did not think that people under-present. She said that it was her view that it was rare for someone to have a major illness and not tell the nurses about it.

Detainees were sensitive that they may be perceived in this way. A number who spoke to the Commission believed that if they presented too often they would be seen and treated as malingerers. A complainant from the 'Cockatoo' told the Commission

> When we were sick during the period we were here, sometimes the nurses did not really show their care of us ... I felt terrible pain from March until 8 October when I passed a [kidney] stone. I took the stone to show the nurse and told the nurse that the pain was still there ... I also had a haemorrhage and I was brought into the hospital. Before the passing of the stone, the nurse always said that I was pretending.

This same complainant stated that her attempts to seek treatment for numbness in her foot were not taken seriously. She told the Commission

> ... my right foot is getting numbness. It is getting quite bad and stopping me from sleeping. I have had this problem since January 1995. I have told them recently but I have not had any help this year. The nurse told me she could not get any medicine for me and I may feel better over time.[5]

In another case a complainant from the 'Grevillea' told the Commission that he repeatedly sought treatment for the superficial head injury of his son.

> I saw the nurses about the pain and each time they have given me one tablet.[6]

This matter has been formally investigated by the Commission. The report prepared by the nurses at Port Hedland records that the complainant and his son saw the nurses about the injury to the boy's head on only one occasion. The nurses' records do not support the father's claim. At this consultation the boy was given some Lasonil cream to rub on the bruise.[7]

A detainee from the 'Melaleuca' has alleged that his medical condition was neglected. This complainant was transferred to hospital for rehydration due to the effects of being on a hunger strike. He told the Commission that when he was discharged from the hospital the doctor at the hospital gave him medication to ease the pain from stomach cramps caused by an ulcer. He said that he was isolated in an observation room when he returned to the centre and that

> ... the APS took from me the medicine that the doctor had given me. The guard did not tell me why he was taking the medicine. I did protest about that but he said that I was not allowed to get the medicine so I did not complain any further. The nurse did not visit me as it was at midnight. The boss told me that I would be kept there until the manager saw me in the morning. In about one hour I experienced stomach cramps and called the APS to give me the medicine ... After 1 hour I was crying from the pain and they took me back to the hospital. They gave me another pint of fluid and then I was put into intensive care.[8]

These allegations indicate the perceptions of some detainees at Port Hedland that their concerns about their health are not being taken seriously and that they are not receiving sufficient care for their conditions. These perceptions may be the result of a number of factors, including

5 Evidence, Complainant PH50, record of interview of 31 May 1997.

6 Evidence, Complainant PH6, statement dated 1 June 1997, page 1, paragraph 3.

7 This is a cream used to reduce bruising.

8 Evidence, Complainants PH13-15, record of interview of 31 May 1997, page 5.

- the generally low educational levels of many boat arrivals that may make it difficult for them to communicate what is wrong and how they are feeling or to understand the medical advice provided
- cultural issues relating to different understandings of how the body works and what sort of medical treatment may be appropriate
- unreasonable expectations on the part of detainees about what can be done to improve their medical condition
- inadequacies in the medical facilities and services provided.

Some of these issues may be addressed by medical personnel in the immigration detention centres having a better understanding of cultural issues relating to the provision of health care to the major ethnic groups in the centre. The quality of the care provided would also be improved by medical officers being aware of and accommodating the educational background of detainees. Clear guidelines for detainees about the standard of health care that will be provided while in detention will help to address any unreasonable expectations.

Where a centre has a large group of detainees from the same ethnic or cultural background, employing medical personnel who speak the same first language as the group would go a long way towards addressing these cultural and communication issues.

The Commission is not qualified to assess the quality of health care provided by medical staff at the immigration detention centres. This is an issue of professional practice which is best dealt with by registration bodies and health care complaint organisations.

10.5 Access to medical services

The Commission has received a number of complaints from detainees relating to the difficulties they experience in getting an appointment with a doctor or specialist opinion on their medical conditions. Detainees have little power to initiate independent medical advice as the on-site nurses authorise any appointments with the visiting doctor or local specialists.

Aftermath of a suicide attempt

A complainant from the ‘Pheasant’ said that after attempting to commit suicide by slashing her wrists with a razor in January 1997 she was

> ... taken to the hospital. The wound required stitches. As I had severed the nerve they had to sew it back up. After the stitches I was returned to the centre. I requested further medical attention and all I got was further painkillers.

> I still feel numbness ... I have asked the manager and the deputy to see a specialist about the numbness in about April this year because the doctor here is just general. I have not seen a specialist yet.[9]

The Commission has investigated this allegation. The Department provided medical records which confirm that in January 1997 this detainee attempted to commit suicide by cutting her wrist and was taken to the hospital to have the injury sutured. The medical records indicate that this detainee experienced significant difficulties in obtaining an appointment with a doctor or specialist about her wrist. Following her suicide attempt, this woman saw the centre nurse on at least seven occasions complaining about numbness to her right thumb and wrist. When she saw the nurse about the pain in February 1997 the nurse told her that she may have some nerve damage from when she cut her wrist, but there was nothing that could be done. It was not until the woman demanded to see a doctor in April 1997 that an appropriate referral was made. In May 1997 the complainant was finally examined by the visiting doctor and tests were conducted.

The Commission is concerned that the woman had to see the nurse five times before an appropriate referral was made to treat the symptoms the woman was continually reporting. It is also possible that the nurse, in diagnosing that the woman had sustained irreparable nerve damage, was acting beyond her level of skill and outside her area of expertise.

Response to an alleged assault on a child

The father of a seven year old child allegedly assaulted by an APS officer in December 1996 told the Commission about his difficulty in getting a doctor to examine his son. He believed his son suffered continuing trauma from the incident. Five and a half months after the incident he told the Commission

> I have requested the manager, the APS and the two nurses for him to see a doctor but I have not yet seen a doctor about my son yet. He has not seen a doctor since the incident. It is not easy to see the nurse.[10]

The Commission initiated a formal inquiry into this complaint on 2 July 1997 and wrote to the Department to obtain a response to the allegations. The Department included in its 26 November 1997 response a report by the two registered nurses at Port Hedland, summarising the medical care provided to the child.

9 Evidence, Complainant PH5, statement dated 1 June 1997, page 3, paragraph 2.

10 Evidence, Complainant PH6, statement dated 1 June 1997, page 1, paragraph 4.

This report states that on 16 December 1996 the child presented with his father and was seen by one of the nurses. It records that the examination revealed swelling and bruising to the forehead approximately 2 x 3cm in size; all other observations were within normal limits. It also records that the child was in no apparent distress, either physically or emotionally, and was given cream to rub on the lump to reduce the bruising. The nurse's assessment was that no follow-up was required.

The Commission accepts that the statement provided by the nurses is an accurate summary of the medical records. Having examined this statement, the Commission is concerned that insufficient details of the child's injuries were recorded. No photograph of the injury was taken at the time and no mention is made of the cut which was observed by an APS officer. The statement does not record when the child sustained this injury or whether this information was sought.

Officers of the Commission spoke to the child during their visit to the centre in May 1997. At this time Commission staff observed that the child still had a significant lump in the centre of his forehead with a scar in the middle. That a sizeable lump was still present some five months after the incident suggests that the original injury was of a more serious nature than was recorded by the nurse. It also suggests that the appropriate medical care at the time may have included an X-ray of the swollen area and suturing of the wound.

The report by the nurses does not record that the father asked for his son to be seen by a doctor. It states that, following the initial visit on 16 December 1996, the father did not mention the injury again to the nurses. From April 1997 the child saw the nurses on a regular basis about bed wetting and sleep disturbances.

The records show that, at the time the father spoke to the Commission, the son had not seen a doctor or any medical specialists. This was due to the initial assessment by the nurse that no further medical treatment was required. After the Commission raised the father's concerns with the centre manager arrangements were made for both the father and the son to see one of the centre nurses and the visiting doctor. The doctor noted that the child was still wetting the bed but was happy with his general physical and mental condition.

From the documents obtained in this matter it is not clear when the child injured his head. The incident report records that around 7.30am on Monday 16 December 1996 the father told an APS officer that his son had been injured and arrangements were made for them to see the nurse. It does not record when the child sustained the injury. The father told the Commission and the Australian Federal Police that the child was injured at 3.00pm on Sunday but did not see the nurse until Monday morning. If it is the case that the child did not see the nurse until some 16 hours after he was injured, it may explain why he did not seem to be distressed.

The inadequacy of the reporting of this serious incident by the Australian Protective Service and the nurse makes it difficult for the Commission to make any findings on the adequacy of the medical care provided to the child. If the injury did come to the attention of APS staff on the Sunday, the appropriate course of action would have been to call in one of the nurses to see the child or take him to the local hospital.

A stillbirth

Many detainees who spoke to the Commission shared a perception that the lack of access to a doctor of choice contributed to serious medical conditions or crises. In one case involving a still birth at eight months a couple from the 'Cockatoo' said in a statement to the Commission

> We feel that if she was not in detention and was able to see a doctor of choice whenever needed, the [stillbirth] would not have happened.[11]

Her statement explains

> On the Friday night before my miscarriage I was feeling pain in the stomach. As I did not have any experience I did not know what it was. I did not ask to see the doctor as I did not know I could ask to see a doctor at the hospital and the usual system was to wait until Monday to see a doctor. On that Saturday or Sunday ... I was feeling bad again. Since it was my first pregnancy I did not know anything about pregnancy. I went to see the nurse on Monday who arranged for me to go to the hospital that day. I was told at the hospital that my baby had died.[12]

The medical records obtained by the Commission as part of its investigation into this complaint show adequate on-site and specialist care. On the basis of these records the Commission is satisfied that nothing could have been done to prevent the stillborn birth. It is also satisfied that the quality of the ante-natal care this woman received was above the minimum standard of humane treatment in the provision of health care required by ICCPR article 10.1. However, the Commission is concerned that the complainant did not appear to have any knowledge of the after hours medical care available to her and how she could access it. Other detainees who were interviewed during the May 1997 site inspection also appeared to have little knowledge of the procedures for accessing after hours medical attention.

11 Evidence, Complainants PH3 and PH4, statement dated 30 May 1997, page 2, paragraph 3.

12 Id, paragraph 4.

In a response to this complaint the Department advised the Commission that after hours medical services are provided by the hospital and that this information is provided to all residents. The Department also stated that pregnant women are closely monitored by nursing staff who are in a position to identify and react quickly if there are any health concerns.[13] However, the Department did not respond to the particular situation of this complainant.

10.6 Use of medical opinion

The Commission is concerned that departmental decision makers and centre managements fail to accept the advice or recommendations of medical staff in relation to the welfare of detainees even where management within the Department have discretionary powers. In one case that has been investigated by the Commission the visiting doctor recommended the transfer of a female detainee and her twelve month old child held in Stage One at Villawood to the low security section of the centre in the interests of the mental health of both mother and child. Although the Department received additional letters from the visiting doctor and independent specialists recommending the transfer, the mother and child were not transferred.[14]

In another case at Port Hedland, repeated requests by a couple from the 'Cockatoo' to be transferred to another centre following the stillbirth of their child were rejected by the Department. The Department refused the transfer on the basis that the move was not considered to be in the couple's best interests and that the medical care they were receiving was appropriate and adequate. Documents provided by the Department as part of the investigation show that both the treating doctor and nurse recommended the transfer. The woman claims she was being victimised by other detainees because of a superstition that the loss of a child made her evil. The couple were kept in Port Hedland until they were removed from Australia in July 1997.

10.7 Human rights law relevant to medical services

Adequate health care in detention is essential to humane treatment as required by ICCPR article 10.1. The universal health screening of detainees undertaken by the Department upon arrival accords with Principle 24 of the Body of Principles which states

> [A] proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

13 Evidence, letter from the Secretary of the Department dated 28 November 1997 in response to a complaint by Complainants PH3 and PH4, pages 2 and 3.

14 Evidence, Complainant V1, letter of complaint dated 7 April 1997.

Access to adequate medical care *after* the initial health screening, however, has been raised by complainants as an issue of concern. Although all centres provide some access to health care, including care and treatment on site and contracted and independent medical practitioners, the significant variation in the accessibility of health care available to detainees is a concern. The health care available to detainees should not be dependent upon which centre they are held at.

The absence of adequate psychiatric care for detainees exhibiting significant mental distress is a key concern of the Commission. Standard Minimum Rule 22 states that psychiatric care should be a standard service available to detainees.

> At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organised in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

Standard Minimum Rule 25(2) states

> The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.

Implicit in this Rule is the expectation that these reports will be appropriately responded to. Failure by the Department to accept the recommendations of medical practitioners in relation to the mental health of detainees or failure to provide clear reasons about the weight accorded the advice and the other factors considered breaches this important Rule. The recommendations of practitioners treating detainees exhibiting significant mental distress should be given serious consideration in departmental decision making.

Article 24 of CROC provides

> States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Detainees allege that children are being denied treatment requested by parents contrary to the requirements of article 24.

A child victim of torture or any other form of cruel, inhuman or degrading treatment has a right to assistance from the authorities which is 'appropriate' 'to promote [his or her] physical and psychological recovery and social integration' (CROC article 39). 'Appropriate' measures would be marked by timeliness and sensitivity to the child's age and cultural, religious and social background among other features.

Article 12 of the International Covenant on Economic, Social and Cultural Rights provides

> The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

This right is guaranteed without qualification to people in detention and to unauthorised arrivals.

10.8 Findings and recommendations on medical services

The Commission finds

- The range and quality of health services in immigration detention centres vary significantly.
- There are no prescribed standards for the delivery, range and quality of health care for detainees in immigration detention centres.
- The human cost of detention is such that more resources are required for medical services to meet the needs of the detainee population.
- Insufficient details are recorded of injuries sustained by adult and child detainees who claim to have been assaulted.
- Detainees have experienced delays in obtaining medical care after they have sustained injuries during security incidents.
- Detainees have a perception that they are not receiving adequate health care.
- Detainees at Port Hedland appear to have little knowledge of the procedures for accessing after hours medical attention.
- The pressures of detention are such that some detainees may over-present for medical treatment. However, detainees perceive the available health care staff to be so hostile to over-presenting patients that they may fail to seek assistance even when they require it.
- Restrictions on detainees accessing second or specialist opinions from doctors on their serious or continuing medical conditions may fail to meet the requirements of CROC article 24 and Principle 24 of the Body of Principles and therefore breach human rights under the HREOC Act.

- In some cases a second opinion would be beneficial to the peace of mind of a detainee even where the on-site nursing staff may be correct in their assessment that independent opinion is not necessary from a diagnostic point of view.

- Mental distress in varying degrees is a common manifestation in detained asylum seekers.

- Appropriate mental health care services are not readily available to detainees. Detainees experience difficulties in obtaining appropriate psychiatric care outside the immigration detention centres due to the remoteness of Port Hedland, difficulties in accessing the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, delays in being able to get an appointment with a psychiatrist and custodial officers not recognising that a detainee exhibiting disruptive behaviour may have a mental illness and not responding appropriately. This fails to meet the requirements of Standard Minimum Rule 22 and, in the case of a minor, would be in breach of CROC article 39. The failure to respond appropriately to the distress of a detainee may amount, in some cases, to a violation of ICCPR article 7 and/or CROC article 37(a) by inflicting treatment that is cruel, inhuman or degrading or even, in an extreme case, torture.

- There are no formal procedures to ensure that victims of torture and trauma or people at risk of suicide are detected and provided with appropriate specialist care.

- Chemical restraint is used to manage challenging and disturbed behaviour.

- Recommendations by medical practitioners in relation to detainees exhibiting mental distress may not be given sufficient weight in departmental decision making about the welfare of detainees. This fails to meet the implicit requirements of Standard Minimum Rule 25(2) and is therefore a breach ICCPR article 10 and of human rights under the HREOC Act.

The Commission recommends

R10.1 The Department should adopt a standard for the provision of medical services in all immigration detention centres for inclusion in the Migration Series Instructions. The local procedures of the detention service provider should adopt and implement the standard. It is noted that the Immigration Detention Standards address health care needs.

R10.2 The medical service standard adopted by the Department should provide that all immigration detention centres employ on-site medical officers, at least one of whom should have mental health qualifications.

R10.3 Information handbooks in major community languages provided to detainees and induction sessions should clearly outline the medical services available to them and the standard of service they can expect. Information should also be provided about how to access medical services outside the hours on-site staff are in attendance.

R10.4 On-site medical staff at immigration detention centres should be required by local procedures to consider arranging a second or independent medical opinion where there is a likelihood that the denial of such an opinion would in itself create undue and sustained mental distress.

R10.5 When a detainee tells a medical officer that he or she has been assaulted by a custodial officer or another detainee a photograph should be taken of the injury and detailed records taken on the nature of the injury sustained, when and how it occurred and the nature of the treatment provided. Medical examination and, if necessary, care should be provided immediately after the injury is brought to the attention of custodial or departmental staff.

R10.6 At the Port Hedland Immigration Detention Centre internal fencing between the main compound and the administration area should be removed or the gate kept open so that this physical restriction to access to medical advice is removed. Alternatively the medical office should be sited within the main compound.

R10.7 At the Villawood Immigration Detention Centre a clinic should be run by a female doctor at least weekly.

R10.8 On-site medical staff should receive training in cultural issues relating to the provision of health care to the major ethnic and cultural groups in the detention centre.

R10.9 Where there is a large group of detainees from a particular ethnic and cultural background, the detention service provider should look at employing a medical officer from this background who speaks the first language of this group.

R10.10 The initial health screening of detainees should include a psychiatric assessment.

R10.11 Detainees identified as a suicide risk or a victim of torture or trauma should have access to appropriate specialist care.

R10.12 Protocols should be developed between the Department and State health care agencies to allow custodial and departmental staff to obtain urgent psychiatric assessment and care for immigration detainees. For example, in NSW this may include developing a protocol with the NSW Department of Health and a Community Mental Health Team. The Commonwealth will need to ensure adequate funding to the State health agencies to implement this recommendation.

R10.13 Detainees who present with depression, have attempted self-harm or manifest psychiatric disturbances in aggressive behaviour that is considered a risk to themselves or others should not be transferred to State prisons or police lock-ups before they have had a psychiatric assessment.

R10.14 Custodial and departmental officers at the immigration detention centres should be provided with training in how to recognise and manage mentally disturbed behaviour and obtain appropriate medical and specialist care.

R10.15 The Department should seek legal advice on the lawfulness of chemically restraining detainees.

R10.16 Providing that there is a legal basis for this practice, the Department should only chemically restrain a detainee in an emergency situation where it is required to save the person's life or to prevent him or her from causing serious harm to him or herself or others. Following the use of this form of emergency psychiatric treatment, the detainee should be referred for a formal psychiatric assessment by a psychiatrist to determine whether the detainee can be cared for appropriately in an immigration detention centre and to develop a plan for the management of any further instances of disturbed behaviour.

11 Education and training

There are no policy, instructions or guidelines for the provision of school, adult or vocational education in immigration detention centres. Elementary and English tuition is provided on a minimal basis to immigration detainees. In Port Hedland in May 1997, for example, English classes were held three times a week for one hour for a detainee population of 166.

The APS managed the provision of education at all immigration detention centres and arranged for the appointment of teachers and the provision of necessary resources to conduct classes. These functions continue to be performed by the new detention service provider, Australasian Correctional Services. Arrangements for education services at the centres vary in accordance with the number of school-age children, the availability of elementary and English teachers and the motivation of adult detainees.

The Commission has been concerned with past delays in appointing teachers, causing lapses in the provision of education services to both children and adults. During site inspections at Port Hedland in 1991 and 1996 and Villawood in March 1997 the Commission was told by detainees, centre management and APS staff about delays of up to six months in appointing new teachers, insufficient resources and, in the case of Port Hedland, the closure of the school in 1994 when there were 200 children there. Historically, church groups have been very active in supplementing the provision of elementary and English classes at Port Hedland, Villawood and Maribyrnong.

11.1 Elementary education for children

Port Hedland

In May 1997 at Port Hedland the Commission inspected a newly refurbished building used specifically for pre-school classes. A qualified teacher was supervising the children daily from 8.30am to 2.30pm. That teacher spoke Cantonese which was the first language of the majority of children attending although emphasis was placed on learning English vocabulary and terms. Children were also taught life skills in relation to health and hygiene.

Classes for children aged seven to 18 years were conducted by a qualified teacher between 8.30am and 2.30pm daily. Although the numbers vary, the current staff to student ratio is about one to eight or nine children. Children are taught a modified Western Australian standard school curriculum with an English as a second language approach to learning. During the 1997 site inspection, the Commission was told that the curriculum included English, mathematics, social science, science, physical education, health and wellbeing, and creative arts. The Commission observed several children playing games on two donated computers set up in the school room as well as children learning to type on electric typewriters.

Classroom for 4-7 year olds,
Port Hedland detention centre, May 1997.

During the 1991 visit to Port Hedland, the Commission was concerned that children were being inculturated into the Australian way of life and had very little awareness of their own culture and language.[1] Although more than six years have passed, the situation remains unchanged. At Port Hedland teachers do not provide lessons in first languages to children or provide formal lessons in aspects of the children's own culture. The Commission was told by Chinese detainees that they organise their own classes to teach their culture to the children. They mentioned that a room had been provided for this purpose.

During the 1996 site inspection of Port Hedland several detainees expressed concern to the Commission about the quality of education of their children, especially the older children. The teacher at the time expressed concern about the difficulty of securing the resources needed to run the classes. She told the Commission she met continual resistance to her suggestions to centre management for improving the education facilities and services for child detainees at Port Hedland.

Villawood

The Villawood centre has two classrooms located in a portable building in Stage Two. During an inspection of Villawood in March 1997, the Commission was told that there had been no classes for children for approximately six months as the APS had difficulty replacing the teacher who had resigned the previous year. The centre manager confirmed this as the reason for the delay. The Department advised the Commission in a letter dated 2 May 1997 that there had been no teachers working in the centre between 8 November 1996 and 2 April 1997.[2] At this time a replacement teacher had been appointed to take both the adult English and primary classes.

1 Human Rights and Equal Opportunity Commission, *Detention of Asylum Seekers - Darwin and Port Hedland,* Report of the Acting Secretary's visits to Darwin and Port Hedland Detention Centres/Processing Areas, August and December 1991, 1992, page 11.

2 Evidence, letter from the Secretary of the Department, dated 2 May 1997, pages 1 and 2.

In May 1997 Villawood employed a primary school teacher who also had qualifications in teaching people with English as a second language. Classes are conducted between 9.00am and 2.00pm five days a week and are structured around the NSW school curriculum. At the time of the October 1997 site inspection the ages of the children attending the school ranged between five and 13 years.

Conclusion

In 1994 the Parliamentary Joint Standing Committee on Migration acknowledged in its report *Asylum, Border Control and Detention* that the nature of the detention environment will always place limits on the education services that can be delivered. The Committee found that in appropriate cases children in detention could be allowed to attend local schools during the day. The Committee considered that this would help to ensure that children are exposed to a full and comprehensive curriculum and to provide them with improved opportunities for recreation with other children. It stated that the Department should liaise with the appropriate State government agencies to secure access to local schools for detainee children. The Committee recommended that the Department consult with State government education agencies to determine whether children held in detention may be able to attend local schools and to consider whether education in a child's native language is viable and can be organised.[3]

It is now more than three years since that report was published. However, the Commission is not aware of any cases where children in detention have been able to attend the local State school. The evidence gathered in the site inspections also shows that children are not being provided with any formal education in their own language. Allowing children to attend local schools and having some lessons in the children's first language would greatly improve the quality of the education and recreational activities provided to children and would help Australia meet its obligations under CROC.[4]

11.2 English tuition for adults

Port Hedland

At Port Hedland one teacher conducts English classes for adults three times a week for one hour. The Commission was told by centre management in 1996 that these classes were very popular. There had been a reduction in the number of English classes offered since the Commission's visit in 1991. At that time the majority of adults participated in English classes on a daily basis.[5]

3 Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, Australian Government Printing Service, Canberra, 1994, pages 191-193.

4 See section 11.5 below.

5 Human Rights and Equal Opportunity Commission, *Detention of Asylum Seekers - Darwin and Port Hedland,* Report of the Acting Secretary's visits to Darwin and Port Hedland Detention Centres/Processing Areas, August and December 1991, 1992, page 10.

During the site inspection at Port Hedland in May 1997, several detainees who spoke to the Commission expressed lack of interest in or frustration with the classes. A woman from the 'Labrador' who had been in detention at Port Hedland for five years told the Commission she did not go to English classes because she felt demoralised and unmotivated by her lengthy detention.[6] This was also the reason given by two complainants from the 'Cockatoo' who told the Commission

> There are some adult English classes. Because we do not know what will happen with our application we do not have the motivation to study English.[7]

During visits to Port Hedland the Commission spoke to a large number of detainees from the People's Republic of China. Despite the provision of some English classes, detainees were entirely dependent on an interpreter during the interviews with the Commission, indicating that they had learnt very little English during the years they had been in detention.

In a letter to the Commission in May 1997 a detainee from the 'Vagabond' expressed his frustration with the high staff to student ratio in the English classes and the sporadic provision of classes.[8]

Villawood

As with elementary education, the provision of English tuition at Villawood had only resumed in April 1997, following a six month lapse while a replacement teacher was recruited by the APS. The centre manager advised in March 1997 that it had been very difficult to find a person with the appropriate skills for the detention centre context. This was confirmed by the Department in response to the Commission making a formal enquiry about the long delay. The location of this immigration detention centre in Sydney makes it difficult to understand why this was so.

During the October 1997 site inspection at Villawood, the Commission was advised that English classes for adults are now held twice a week in both Stage One and Stage Two for two hours.

Perth

At the Perth centre English classes are held once a week and last for an hour. At the Commission's site inspection in May 1997 no special facilities for holding classes were observed.

6 Evidence, Complainant PH49, record of interview of 31 May 1997.

7 Evidence, Complainant PH3 and PH4, statement dated 30 May 1997, page 4, paragraph 5.

8 Evidence, Complainant PH7, letter of complaint dated 15 May 1997, page 2.

11.3 Vocational training

No vocational or skills training is provided at any immigration detention centre. Following the Commission's site inspection of Port Hedland in January 1996 the centre manager provided a statement on the provision of vocational training at the centre.

> DIMA does not run a formal vocational program at Port Hedland. Centre residents, however, have an opportunity to assist in centre activities on a roster basis working as cooking attendants, dish washing assistants, cleaning assistants and ground and building attendants. Two residents have also worked as a teacher's aides on a rotational basis. A number of residents also assist welfare with film nights etc.

In the absence of formal training, skilled detainees at Villawood and Maribyrnong have requested access to technical books or magazines in English to familiarise themselves with professional terminology. Villawood's small collection of donated books includes a few technical books most of which are outdated textbooks. Maribyrnong's similarly small collection of donated books does not include any technical books. No technical books were observed at Port Hedland during the 1997 site inspection.

11.4 Additional educational resources

The Commission has received complaints from detainees about the lack of resources that would keep detainees informed and relieve boredom, such as newspapers, technical books and novels.

During site inspections the Commission was shown the 'libraries' at Port Hedland, Villawood and Maribyrnong. In each case the collection consisted of a small number of donated English language books, very few of which are of interest to educated adults. No library or books were sighted during the 1997 inspection of the Perth centre. In May 1997 the Port Hedland welfare officer told the Commission that some Chinese and Vietnamese books are available for borrowing but the collection consists mainly of children's books. In a statement to the Commission in May 1997, two complainants from the 'Cockatoo' who were held at Port Hedland said

> We have access to books, magazines and newspapers in our own language but this only started this year. There is a wardrobe in the mess and every Monday, Wednesday and Friday we can have access to them. The books are not interesting because they are old ones. The newspaper, the Chinese Post is not available here. There is a weekly newspaper available in Chinese but sometimes there are bits cut out. Someone cut out bits but we do not know who this is. We think sensitive bits are censored by the welfare officer and cut out.[9]

9 Evidence, Complainants PH3 and PH4, statement dated 30 May 1997, page 4, paragraph 8.

In a letter of complaint a detainee at Villawood stated that there is no library in Stage One and he does not have access to any books on the law.[10]

The Villawood collection is kept in a room in Stage Two. Detainees in Stage One are not able to visit the library themselves. However, they can borrow books from the library through the welfare officer. At Port Hedland the collection is kept in a locked cupboard in the dining area with access provided through the welfare officer. At Maribyrnong the collection is kept in the men's quarters with no immediate access for women.

The Commission was advised by centre management at all centres except Perth that Australian and some non-English language newspapers were available. At Villawood a designated room is provided for reading newspapers. However, there was no evidence of the availability of newspapers at the other centres. The main reading materials available to women at Maribyrnong are donated popular magazines.

11.5 Human rights law relevant to education and training

The Commission is pleased that, even in the absence of policy or instructions for the provision of education, the APS demonstrated a commitment to providing classes for school-aged children. Issues such as long delays in appointing new teachers, however, or the lack of interim arrangements while new teachers are sought lead to breaches of internationally agreed standards on the treatment of children in immigration detention.

The right to elementary education is a particularly important standard in relation to the treatment of children in detention. Article 28 of CROC provides

> States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular ... [m]ake primary education compulsory and available free to all ... and [m]ake educational and vocational information and guidance available and accessible to all children.

The absence of language classes other than English is a concern to the Commission, especially in relation to children. The majority of asylum seekers are repatriated to their countries of origin, often after years of detention in an Australian immigration detention centre. Article 29.1(c) of CROC recognises the risk of loss of culture of children who are born into detention or spend years of their early lives in detention without adequate education about their own culture and language. It provides that the education of the child shall be directed to

10 Evidence, Complainant V2, letter of complaint dated 8 May 1997, page 3.

> The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own.

Long-term detention can arrest a detainee's vocational development. The right to vocational training is prescribed in many international instruments in recognition of the basic human right to further education and professional development. Further education for detainees is prescribed in the Standard Minimum Rules.

> Provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible. The education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration (Rule 77(1)).
>
> Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners (Rule 71(5).

Article 3 of the Convention on the Elimination of All Forms of Discrimination Against Women provides

> States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

This should be read in conjunction with article 1 which extends the rights set out in CEDAW to all women irrespective of their status. The UNHCR has encouraged States Parties to the Refugee Convention to provide vocational training specifically for refugee women. In a 'Note' of 1990 the UNHCR stated that training programs should be promoted that provide refugee women with marketable and business skills in both traditional and non-traditional sectors, recognising that by becoming refugees their traditional role is likely to have changed. The Note specifies that programs should include skills training in agricultural and non-agricultural activities, functional literacy and numeracy and leadership and managerial fields.[11]

Principle 28 of the Body of Principles recognises the important role of education in providing necessary engagement and distraction for detainees who otherwise face frustrating and monotonous lives while in detention.

11 UNHCR, 'Note on Refugee Women and International Protection', submitted to the General Assembly on 28 August 1990, paragraph 52.

> A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Related to this is the provision of library resources. Standard Minimum Rule 40 provides

> Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

Article 22 of the Refugee Convention states

> The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

Unlike some other provisions of this Convention, the right to education is not confined to refugees lawfully present. The right must be accorded to all persons who are *in fact* refugees and is not contingent on that status having been confirmed by national authorities. The UNHCR's Guideline 5 elaborates on the Convention with particular reference to children in detention.

> During detention, children have the right to education which should optimally take place outside the detention premises in order to facilitate the continuance of their education upon release. Under the UN Rules for Juveniles Deprived of their Liberty, States are required to provide special education programs to children of foreign origin with particular cultural or ethnic needs.

Article 13 of the International Covenant on Economic, Social and Cultural Rights provides

> The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

11.6 Findings and recommendations on education and training

The Commission finds

- Providing educational opportunities for immigration detainees is complicated by the varying and uncertain lengths of detention. However, the fact that many detainees are detained for periods exceeding one year requires a more thorough response than currently exists.
- Insufficient resources are directed towards the provision of education services in immigration detention centres.
- There is no formal policy, instruction or standard for the provision of education services, including elementary, English or vocational tuition, in immigration detention centres.
- No languages other than English are taught in the elementary education of children in detention. In addition, children are not provided with formal lessons about their own culture. Parents of children organise these lessons in the absence of formal lessons. The absence of any lessons for children about their own language and culture breaches CROC article 29(c) and human rights under the HREOC Act.
- From November 1996 until early April 1997 there were no education facilities available to children at Villawood. This was in breach of CROC article 28 requiring that primary education should be provided to all children and human rights under the HREOC Act.
- School-aged children do not attend local schools.
- English classes are insufficiently resourced so that one teacher may be responsible for the instruction of over 30 detainees with diverse backgrounds and languages and with significantly varying degrees of English comprehension.
- At all of the immigration detention centres adult education is limited to an hour or two of English classes one to three times each week. This does not meet the requirements of Standard Minimum Rule 77 providing that further education is to be provided to all prisoners and is in breach of ICCPR article 10.1 and therefore of human rights under the HREOC Act.
- From November 1996 until early April 1997 there were no education facilities available to adults at Villawood. This did not meet the requirements of Standard Minimum Rule 77 and was in breach of ICCPR article 10.1 and therefore of human rights under the HREOC Act.

- There is no structured vocational training for detainees at any immigration detention centre despite detention periods of up to five years. This contrasts with the provision of vocational training to convicted criminal offenders. The absence of any vocational education or training at the centres is inconsistent with Standard Minimum Rule 71(5) and is in breach of ICCPR article 10.1 and therefore of human rights under the HREOC Act.

- In the absence of structured vocational training, detainees are interested in the provision of books and other educational resources for their personal instruction. The existing collections of books at Port Hedland, Villawood and Maribyrnong are not sufficient in range or quality to be of genuine recreational or instructional interest to detainees. These collections do not constitute reasonable quantities of educational, cultural and informational material as required by Principle 28 of the Body of Principles and therefore by ICCPR article 10.1 and human rights under the HREOC Act.

The Commission recommends

R11.1 The Department should develop a formal standard on the provision of education in immigration detention centres for inclusion in the Migration Series Instructions, Immigration Detention Standards and the local procedures of the detention service provider. Any contractual arrangement with a service provider responsible for the provision of education should require that the standard be met and provide adequate resourcing.

R11.2 Education services in immigration detention centres should be better resourced so that staff to student ratios are at least comparable to English as a Second Language or special needs classes.

R11.3 The elementary education provided at immigration detention centres, for children detained for more than four weeks, should include lessons in children's first language where possible and classes of cultural relevance to children. Elementary education should be compulsory for children.

R11.4 The Department, State government education agencies and local schools should develop a protocol for access by children in detention to classes at local schools to mitigate the effects of institutionalisation. The Department could conduct a pilot scheme to refine the protocol between the State and federal government agencies and develop criteria for deciding in what circumstances children should be able to attend local schools.

R11.5 If it is not possible for a child to enrol at the local school, a protocol should be developed to allow children in this situation to participate in a limited range of classes, such as music and sport.

R11.6 Where it is impractical or for other reasons not possible to develop a protocol for the attendance of detainee children at local schools, the standard of elementary education should be equivalent to that offered children who attend English as a Second Language or special needs classes.

R11.7 Some form of vocational training appropriate to the Australian labour market should be made available to longer term detainees, paying attention to the needs and interests of both men and women. The Department should liaise with the State government technical and further education agencies to develop a protocol for the delivery of classes either on site or through detainees attending educational institutions.

R11.8 In the absence of formal vocational skills training, the educational resources at immigration detention centres should be upgraded to include a wider range of recreational and instructional texts.

12 Recreation

There are no Migration Series Instructions or Station Instructions for the provision of recreation activities or facilities at any of the immigration detention centres.

12.1 Recreation at Villawood

The range of recreational facilities and activities available to detainees at Villawood depends on whether they are in Stage One or Stage Two.

Stage Two has indoor recreation rooms, including one for the sole use of female detainees, and outdoor sports fields. Recreational facilities and activities for the 173 detainees in Stage Two in October 1997 included

- the library and newspapers
- sports such as soccer, volleyball, table tennis, pool and cricket
- the children's playground
- televisions, videos and radios
- access to personal computers for games and writing
- special cultural and religious festivities
- English classes twice a week for two hours
- sewing and cooking classes, when requested by detainees.

Recreation room, Villawood Stage One, October 1997.

The recreational area in Stage One is made up of two rooms and a tarred exercise yard. One recreation room contains only a television set, an empty bookcase, a table and two chairs. Recreational activities and facilities for the 52 detainees in Stage One in October 1997 included

- a pool table
- a table tennis table
- a few pieces of sporting equipment
- a pinball machine
- televisions and a video
- newspapers
- English classes twice a week for two hours.

Villawood employs a full-time male welfare officer and a part-time female welfare officer. The welfare officers' roles include providing phone cards, clothing, toiletries, sporting equipment and toys. There are excursions outside for child detainees but not for adults.

During the Commission's site inspection in October 1997 APS managers told the Commission that the recreation facilities at Villawood are inadequate for the number of detainees being held there. The officer in charge advised that he had prepared a number of submissions to the Department requesting more funds for recreational facilities. For example, in April 1997 he wrote to the Department to request two or three additional televisions in Stage Two, as people were fighting over programs. He said that he had not received a reply. He also said that the APS had waited 18 months for repairs to be carried out on the pool tables. The APS advised that the centre is not designed for the long term detention of people as there is nothing for them to do.

12.2 Recreation at the Perth centre

Recreational facilities and activities are even more limited at the Perth centre. In May 1997 the following facilities and activities were provided for the 22 adult male detainees

- an enclosed concrete exercise yard where ball games such as volleyball and basketball can be played in the evenings
- a few pieces of exercise equipment
- an indoor recreation room containing a table tennis table and a television
- a second recreation room containing a television, a few chairs and an empty bookcase
- newspapers
- English classes once a week for one hour.

Detainees were not taken on excursions outside the Perth centre.

12.3 Recreation at the Port Hedland centre

The Information Handbook for Residents at the Port Hedland centre which was distributed to detainees up until the second half of 1996 described a range of recreational activities, facilities and resources available to detainees, including

- televisions and video recorders in each accommodation block common room
- movie nights scheduled twice a week in the residents' mess area
- volleyball, basketball and soccer facilities for use by all residents
- a newspaper in various languages and other periodicals provided by the Department and available through the welfare officers.

The Handbook also referred to additional activities.

- When circumstances and staffing levels permit, excursions may be arranged for residents who are interested. Welfare Officers will ensure that each accommodation block has the opportunity to participate in organised excursions.
- Residents may volunteer for extra activities around the centre, for example, taking part in cooking teams preparing meals for the residents on a daily roster basis, cleaning public areas, washing vehicles or assisting the handyman or the gardener.

Welfare officers also maintain a list of residents who wish to be considered as volunteers. The welfare officer told the Commission in May 1997 that, while the Handbook was no longer provided to detainees, the range of recreational services had not substantially changed. Additional activities for the 213 detainees in May 1997 included

- special excursions for unaccompanied minors
- special excursions for unpartnered females
- mothers' and toddlers' group
- fitness classes
- skincare group
- sewing classes.

At Port Hedland in May 1997 excursions occurred every Tuesday and Thursday and included crabbing, fishing, shopping, picnics or barbeques. Detainees were scheduled for excursions according to the alphabetical order of their names. Any crabs or fish that were caught could be cooked and eaten by the detainees who catch them. Access to

the kitchen for this purpose was provided after the midday meal.

The welfare officer told the Commission that 20 English language videos a week are borrowed from the local video store at a cost of $400 a month. Each of the six accommodation blocks receives three videos. Arabic and Chinese films are borrowed as well but must be borrowed from Perth. Every Tuesday and Thursday night a Chinese movie is screened in the dining area. Children's videos are screened to groups.

Changes at Port Hedland

The earliest complaints to the Commission about the lack of recreation activities were from Villawood in 1992. The Commission has received complaints about the lack of recreational facilities in Port Hedland since 1995. Recreation activities and facilities at that time were dramatically reduced due to the high numbers of detainees held there. As the detainee population has reduced, recreation facilities have increased. It is apparent from this that the problem is one of resourcing. The centre manager told the Commission in May 1997 that there were no more core APS or departmental staff employed to manage the centre when the detainee population was 800 than the number employed in May 1997 when the population was 166. This necessarily means that the higher the detainee population the fewer staff can be deployed to assist in providing or coordinating recreation activities.

During the site inspection in January 1996 several detainees complained to the Commission about the lack of recreation activities. A detainee from the 'Labrador' told the Commission that, while children were able to leave the centre for excursions, there had been no excursions for adults outside the centre for seven to eight months. A detainee from the 'Wombat' told the Commission that weekly screenings of movies had increased to twice a week in anticipation of the Commission's inspection. Several detainees claimed that they had been fishing only two or three times in the previous twelve months and that some people had not been out at all. Centre management acknowledged the accuracy of these complaints. They pointed to the large numbers in the centre as the reason.

The frustration of detainees at the lack of relief from the monotony of long-term detention is evident in the incident reports between January 1995 and March 1996. The most common incident recorded is the discovery of detainees fishing on the beach without permission. Very few actually attempted escape. The majority found a way past the perimeter fence in the morning and returned to the centre in the evening. Those discovered on unauthorised excursions were dealt with harshly then, however, as they are now. The usual form of discipline after a warning is to place detainees in the observation room and in extreme cases transfer them to the local lock-up for a few days.

During the May 1997 site inspection, the Commission observed a

noticeable improvement in the range and quality of recreational activities available to detainees.

Recent complaints

In January 1996 the total number of detainees at Port Hedland was 277. By May 1997 the number had dropped to 166. This drop in numbers played a significant role in the reduction in dissatisfaction expressed by detainees. Resources were freed for use in the organisation of recreational activities. The more positive mood towards the level of recreation activities and facilities was expressed in a statement by two complainants from the 'Cockatoo' who told the Commission

> Recreational activities are organised outside the centre. They are done on a rotational basis according to the alphabet. Until recently there had only been a total of 4 or 5 excursions. Now they are done on a more regular basis. The centre has started trips into the town to go shopping for the single women. The nurse has organised us to go.[1]

Dissatisfaction with the restrictions on recreation activities was nevertheless expressed. A detainee from the 'Vagabond' told the Commission in a letter that, compared to the conditions of detention in Galang camp in Indonesia, the level of control surrounding excursions outside the Port Hedland centre was frustrating.

> We are not [able] to take excursion normally. Inside the camp, fences are everywhere [so] that we cannot go back and forth comfortably. In Galang camp [Indonesia] I had been on the beach every Sunday and public holiday for the whole day without police watching.[2]

Common room, I block (segregated detention), Port Hedland detention centre, May 1997.

1 Evidence, Complainants PH3 and PH4, statement dated 30 May 1997, page 4, paragraph 5.

2 Evidence, Complainant PH7, letter of complaint dated 15 May 1997, page 1.

Detainees who had been segregated from the rest of the detainee population for several months by the time the Commission inspected the Port Hedland centre were less enthusiastic about the level of recreation activities. With less interaction with other detainees, no working television and no access to radio or newspapers, excursions outside the centre did not occur frequently enough. North African detainees who had been segregated told the Commission

> We have only been on 5 excursions outside the centre since our arrival four months ago. One of us who has been here 6 months has only been outside the centre 8 times. When we return from our outside excursions the guards record that we are happy but this is not true.[3]

12.4 Human rights law relevant to recreation

The current efforts at Port Hedland to provide detainees with recreation activities and facilities accord with Standard Minimum Rule 78 which provides

> Recreational and cultural activities shall be provided in all institutions for the benefit of the mental and physical health of prisoners.

The Commission is concerned, however, that the staff to detainee ratio limits the availability of recreation activities available to detainees. The severely limited nature of the recreational facilities available at the Perth centre and Stage One at Villawood is also of concern. Additional resources are required to maintain an adequate and appropriate level of recreation activities and facilities to meet the requirements of Rule 78.

Recreation, cultural activity and stimulation is particularly important for children in the detention setting. Article 31 of CROC provides

> States Parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts ... [and] ... promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

3 Evidence, Complainants PH8, PH9, PH10, PH11 and PH12, statement dated 1 June 1997, page 3, paragraph 7.

12.5 Findings and recommendations on recreation

The Commission finds

- There are no Migration Series Instructions or Station Instructions for the provision of recreation activities or facilities in immigration detention centres.
- The range of recreational activities available to detainees varies significantly among the centres.
- The Port Hedland centre has the most extensive range of recreational activities. These include excursions, videos, film nights, fitness classes, skincare group, sewing classes and informal sporting matches.
- The Perth centre has the most limited range of recreational activities. Activities were limited to an enclosed exercise yard, two television sets, a table tennis table and newspapers.
- The recreational facilities in Stage One at Villawood and the Perth centre are inadequate to satisfy Standard Minimum Rule 78 and breach ICCPR article 10.1 and human rights under the HREOC Act.
- The level, quality and range of recreation activities and facilities are determined effectively by the staff to detainee ratio and the level of funding provided by the Department for recreational activities.

The Commission recommends

R12.1 The Department should develop guidelines in the Migration Series Instructions, Immigration Detention Standards and the detention service provider's local procedures for the provision of a guaranteed level of recreation activities with specific reference to the provision of opportunities to participate in excursions. The Immigration Detention Standard 4.4 goes part of the way towards addressing this recommendation. It provides that all detainees shall have access to education, recreation and leisure programs and facilities which provide them with an opportunity to utilise their time in detention in a constructive and beneficial manner. However, it does not supply details of the types of programs that should be provided or how frequently detainees should have access to them.

R12.2 The level, quality and range of recreation activities and facilities should not be determined primarily by the staff to detainee ratio. The funding of centres should be sufficient to ensure staff to detainee ratios and other resources sufficient to enable the provision, coordination and supervision of recreation activities.

R12.3 As a matter of priority, recreational facilities at the Perth centre should be significantly upgraded by the Department and the new service provider. At a minimum

* a library should be established, including recreational and educational texts
* a video player should be purchased
* appropriate shade should be constructed in the exercise yard
* a range of magazines and newspapers should be purchased on a regular basis
* excursions should be arranged on a regular basis.

R12.4 Recreational facilities at Villawood, and in Stage One in particular, should be upgraded by the Department and the new service provider. Repairs to equipment should be undertaken as a matter of priority. In Stage One a library should be established, appropriate shade constructed in the exercise yard and arrangements made for detainees in Stage One to use the recreational facilities and outdoor areas in Stage Two. Excursions should also be arranged on a regular basis.

13 Religion and culture

13.1 Provision for religious expression

The Commission has received a small number of complaints about the ability to observe and practise religious beliefs and customs. The complaints relate either to access to religious counsel and the facilities to practise, allegations of restrictions on practice and observance, poor management of religious difference between detainees and insensitivity towards religious or cultural belief.

Villawood

The Villawood Station Instructions do not include any guidelines in relation to detainees practising their religious beliefs and customs.

Perth

The Perth Station Instructions provide that a detainee is to be given a reasonable opportunity to practise his or her faith and to receive visits associated with that practice. The handbook 'Rules and Information for Detainees' provides information on how detainees can request access to a minister of religion and use a room in the centre for religious services.

Restrictions on religious or cultural observance

Although there is no bar to detainees practising their beliefs to the extent possible, the provision of facilities which are integral to practice and observance is an important issue. In a complaint to the Commission, a Muslim detainee held at the Perth centre claimed that the religious needs of Muslims were not being adequately catered for as the timing of meals and switching off lights prevents them from praying. In addition, despite requests, water jugs for cleaning as required by Muslim custom were not being provided.

> They turn the TV and the lights off at [a time in the evening] which prevents us from practising our religious duties represented in praying and reciting from the Holy Quran. The jugs we use for Ablution are the ones used for cleaning the toilets. When the ... people from other nationalities use those toilets [they must be] cleaned before we can use them. On the night of 8.6.1997 the police took those jugs from us and said that this is in accordance with the law. He also said that "I am not concerned about your religion, I have rules that I have to apply". We asked him [police] what shall we do? His answer was that it is not his problem. He shouted at us and left.

This complaint continues

> In the morning of 9.6.97 we were praying our noon prayers so we were late to lunch. When my friend went to eat, the police told him "I am not going to give you your meal because you did not come during Lunch time". My friend told him that he was praying, to which the police said "that is not my problem". Later he gave him the meal without the fruits and told him, this is because you were late to lunch. We are facing a religious and psychological war and on top of that we live in a prison.[1]

After the Commission initiated an investigation into this complaint the Department provided the Commission with an outline of the initiatives introduced at the Perth centre to cater for the special needs of Muslim detainees.[2] The Department indicated that the new arrangements balance the needs of Muslim and other detainees and operational and security matters. The initiatives include

- a special room for Muslim detainees to use as a prayer room which is available from 5.30am to 11.00pm each day, since May 1997
- arrangements to provide lunch to detainees beyond the standard 12.00-13.00 lunch period
- the provision of water jugs, given to the group on 11 June 1997.

Port Hedland

At Port Hedland the on-site welfare officers are responsible for the management of requests for religious and cultural observance and access to religious representatives. The Station Instructions state

> Religious visitors may visit at the request of a resident or group of residents and through the permission of the officer in charge APS or DIMA Centre Manager. Residents are to be given reasonable opportunity to practise their faith and to receive visits associated with that practice.

The April 1996 version of the Information Handbook for detainees advised that

- weekly religious services are held in the Centre for those who wish to attend
- private religious visits are catered for
- the use of a room for religious services at the request of a group of detainees may be arranged through the centre manager.

1 Evidence, Complainant P1, letter of complaint dated 16 June 1997, page 1.

2 Evidence, facsimile from the Department dated 29 July 1997.

Access to counsel and practice

The remote location of Port Hedland presents problems in providing access to non-Christian religious counsel. The local non-Christian communities are small and themselves have limited access to religious personnel. There are no local religious personnel for many non-Christian religions and for smaller Christian denominations. This is not so great a concern at Perth, Villawood or Maribyrnong which, due to their location in capital cities, are accessible to a broad range of religious representatives.

The problem of providing access was apparent to the Commission as far back as the 1991 inspection of Port Hedland. At that time the Commission investigated complaints from Buddhist detainees about the lack of access to a Buddhist monk and the lack of opportunity to practise their religious customs such as celebrating their new year and the festival of the moon.

During the 1997 site inspection, the Commission was told that the observance of culturally significant festivals was broadly encouraged, especially since the detainee population had reduced so dramatically from 1994. Festivals that had been celebrated over the past year included Chinese New Year, Easter, full moon festivals and Vietnamese New Year. Other religious ceremonies included christenings, weddings and a funeral earlier in the year. There were regular Christian services but no regular services for non-Christians.

Restrictions on religious or cultural observance

In May 1997 a detainee from the 'Vagabond' wrote to the Commission extensively about the conditions at Port Hedland including restrictions on religious gatherings such as prayer meetings. The example he provided was that a group of 20 Christian detainees was not permitted to meet to pray independently of the church service that was provided to detainees.[3]

In 1996 a Catholic priest, who regularly attended at the Port Hedland centre for mass and other pastoral duties, wrote to the Commission claiming that he was initially forbidden to enter the centre on Christmas Day 1995. He was admitted only after substantial protest on his part.

13.2 Management of religious difference

There has been an increase in Arab asylum seekers detained in immigration detention centres. Centre management has been required to address tensions that have arisen between Muslim and non-Muslim detainees, particularly between Muslim and Christian Arabs.

3 Evidence, Complainant PH7, letter of complaint dated 15 May 1997.

A Christian Iraqi being held at Villawood wrote to the Commission that the lack of appropriate facilities for Muslim worshippers meant that non-Muslims were woken by prayers at 4.00am every morning. This particular complainant had been accommodated in the male dormitory with Muslim Iraqis on the basis of his Arab ethnicity.[4]

A Christian detainee from Pakistan at the Villawood centre stated that Muslim detainees mock him and try to pick fights.[5]

Centre managements are accommodating the increased numbers of Muslim detainees as closely as possible together. However, the cramped living conditions, particularly in Stage One at Villawood and in the Perth centre, offer little privacy either to Muslims wishing to observe their religion or to non-Muslims whose sleep is disturbed by early morning prayers. Service providers in contact with detainees told the Commission that considerable tensions have arisen between detainees at Villawood and Perth over the poor accommodation of Muslim religious practice.

Insensitivity to religious belief or custom

In a complaint lodged in 1997 about cultural insensitivity, the Commission was told by detainees from the 'Melaleuca' how they felt offended at being required to be strip-searched by APS officers after being brought to shore from Ashmore Reef. Their record of interview states

> This was embarrassing for us. It is against our religious commandment to appear naked in front of others ... being naked in front of each other is not allowed by our religion.[6]

In a similar complaint, a detainee from the 'Pheasant' told the Commission that after she was strip-searched in an observation room by two female APS officers she was given two red blouses from the storeroom and a red skirt. Her record of interview states

> This was really offensive to me as Chinese people wear red before they die.[7]

The medical records and incident reports obtained in the investigation of this woman's complaint show that her clothes were searched by APS officers. However, these documents do not record that she was strip-searched or given red clothes to wear.

4 Evidence, Complainant V2, letter of complaint dated 8 May 1997, page 3.

5 Evidence, Complainant V25, letter of complaint dated 23 April 1997, page 8.

6 Evidence, Complainants PH13-15, record of interview of 31 May 1997, page 1, paragraph 2.

7 Evidence, Complainant PH5, statement dated 1 June 1997, page 3, paragraph 4.

It may not be reasonable to expect custodial officers to be aware of the nuances of all cultural and religious beliefs and traditions. However, the number of different cultural and religious backgrounds of asylum seekers who arrive by boat is not so great. Since 1989 there have been four identifiable cultural groups of boat arrivals: Vietnamese, Cambodians, Chinese and now Arabs. The cross-cultural training provided to service providers should ensure the necessary understanding to anticipate or identify cultural sensitivities as they arise.

To some extent additional briefings to improve cultural awareness where required are proving effective. The APS officer in charge at Port Hedland told the Commission in May 1997 of tensions between APS guards and a group of Iraqi detainees who arrived in October 1996 and were initially segregated from the main detainee population. These tensions were resolved by providing the APS guards with information that assisted them in being more culturally sensitive.

13.3 Human rights law relevant to religion and culture

Human dignity requires that individuals be free to observe and practise religious or cultural beliefs or customs. The risk of loss of culture increases when the freedom to express or observe religious or cultural beliefs is denied. Lack of appropriate and adequate access to religious counsel and representation or facilities to observe religious belief or custom constitutes a serious denial of cultural expression and breaches the ICCPR and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief* (the Religion Declaration).

Article 18.1 of the ICCPR and article 1 of the Religion Declaration state

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Similarly CROC article 14 provides

> States Parties shall respect the right of the child to freedom of thought, conscience and religion.

ICCPR article 18 requires the provision of reasonable facilities for religious observance and practice. Withholding water jugs from Muslim detainees, for example, interferes with their ability and right to religious practice.

Article 18 obliges custodial authorities to protect as far as possible the religious freedom of individuals whose religious beliefs are in the minority within an ethnically homogeneous group. This may arise, for example, in the case of Christian detainees

who are accommodated with a large number of Muslim detainees and in some cases feel coerced into Muslim religious observance. The same is true in circumstances which are reversed. Article 18.2 of the ICCPR affirms the right not to be subject to religious coercion.

> No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

The failure to provide access to religious representatives, especially on significant days of religious calendars, breaches the Refugee Convention as well as the Standard Minimum Rules. Article 4 of the Refugee Convention provides

> The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

The Standard Minimum Rules stipulate

> Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected (Rule 41(3)).
>
> So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination (Rule 42).

ICCPR article 27 provides

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This guarantee clearly applies to all unauthorised arrivals in detention in Australia.

13.4 Findings and recommendations on religion and culture

The Commission finds

- The remote location of Port Hedland is a barrier to providing access for detainees to non-Christian religious representatives. This makes it difficult to protect the rights recognised in ICCPR article 18 and article 1 of the Religion Declaration.

- The ability to observe significant dates in the religious calendars of detainees has improved in recent years. The significant reduction in the number of detainees in detention appears to be a primary determinant of this change.
- Religious representatives have experienced difficulty on occasion gaining access to the Port Hedland centre. This unavailability is incompatible with ICCPR article 18 and Standard Minimum Rule 41.
- There are tensions between Muslim and non-Muslim detainees and between Muslim detainees and APS custodial staff in some centres because of inappropriate accommodation arrangements, the lack of privacy and failure to provide appropriate facilities for the observance of Muslim custom (such as water jugs and alternative meal times). This constitutes a breach of ICCPR article 18, article 1 of the Religion Declaration and human rights under the HREOC Act.
- Despite some cross-cultural training for APS officers, detainees consider that practices and attitudes of some APS staff offend their religious or cultural beliefs.

The Commission recommends

R13.1 The Migration Series Instructions, Immigration Detention Standards and the local procedures of the detention service provider should require the provision of reasonable opportunity and facilities for detainees to practise their faith and to receive visits associated with that practice. Immigration Detention Standard 4.2 states that detainees have access to spiritual, religious and cultural activities of significance to them.

R13.2 The Migration Series Instructions, Immigration Detention Standards and the local procedures of the detention service provider should define 'reasonable facilities to practise' as including the provision of private areas, modification of menus or meal times and the provision of low risk household items such as water jugs where their use is required to observe religious or cultural belief.

R13.3 The Migration Series Instructions and the Station Instructions should require centre managements to accommodate detainees, to the extent possible and where this is desired by detainees, with others of the same or sympathetic religious or cultural background.

R13.4 ACS officers should be required to receive cross-cultural training relevant to the ethnic, cultural and religious backgrounds of the detainees held or likely to be held at the centre where they are deployed.

14 Provision of legal assistance

14.1 Interpretations of the Migration Act

Section 256 of the Migration Act provides

> where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

The Migration Series Instructions follow this directive with a qualification.

> As a matter of policy, each detainee should be informed as soon as practicable of their entitlement to seek legal advice, except those detainees referred to in s193(1) of the Act.

The detainees referred to in section 193(1) of the Migration Act include those who are seeking asylum and arrive by boat. Section 193(2) inserts a second qualification by not requiring any officer to provide access to legal advice in relation to visas to a person covered by section 193(1).

> (2) Nothing in subsection (1) requires the Minister or any officer to
>
> (a) advise a person covered by subsection (1) as to whether the person may apply for a visa or
>
> (b) give a person covered by subsection (1) any opportunity to apply for a visa or
>
> (c) allow a person covered by subsection (1) access to advice (whether legal or otherwise) in connection with applications for visas.

The combined effect of sections 256 and 193(1) is that all detainees in immigration detention have the right to legal advice and the right to be advised of their right to legal advice unless they arrive in Australia unlawfully by boat. The combined effect of sections 256 and 193(2), however, is that detainees who arrive unlawfully by boat have the right to legal advice if they request it but not the right to be advised of their right to legal advice. There is no statutory prohibition on advising boat people of their right to legal advice but equally no obligation to tell them.

In response to complaints from detainees at Port Hedland the Department has advised that boat arrivals at this centre are not advised of the right to request access to legal advice on being detained. The Department states that this is consistent with its obligations under sections 193 and 256 of the Migration Act.

The Department considers that the Migration Act places the onus on unauthorised arrivals to trigger Australia's protection obligations and to seek access to lawyers if they so wish. The Department states that section 193 of the Migration Act makes it clear that officers of the Department are under no obligation to advise unauthorised boat arrivals of their options for making applications or obtaining advice. However, the Department states that section 256 of the Migration Act makes it clear that all reasonable facilities are to be provided to a detainee who makes a request for legal assistance in connection with an application for a visa or his or her detention.[1]

These statutory provisions contrast with the Information Handbook (April 1996) for detainees at Port Hedland[2] which stated

- During the period you are held in custody you have the right to seek legal advice.
- If you wish to obtain legal advice, you should request to see the Centre Manager. The Senior Welfare Advisor will arrange for you to speak by telephone to your legal adviser.
- Your legal adviser may visit you in the centre at a time agreed between your legal adviser and the Centre Manager. Your legal adviser can arrange a convenient time for the visit by contacting the Centre Manager. A room will be made available to you to have discussions with your legal adviser.

There is a similar section in the Rules and Information booklet still being distributed to detainees at the Perth centre. The Commission was advised by the deputy centre manager at Port Hedland in August 1997 that the Handbook has been revised and no longer includes the first statement about the right to seek legal advice. In any case, the revised Handbook has not been distributed to detainees in the revised form as the method of advising detainees of their rights and providing other information relating to their detention is currently under review.

The Station Instructions for Port Hedland, Villawood and Perth do not provide any additional guidance in relation to legal advice. In discussions in May 1997 the centre manager at Port Hedland advised the Commission that requests for legal advice are treated in accordance with section 256 regardless of how soon after arrival they are made. He said that if someone asks for a lawyer his or her request is handled in accordance with section 256 of the Migration Act. He or she is provided with reasonable facilities for that purpose including a private room, telephone, fax, pencil and paper.

1 Evidence, letter from the Secretary of the Department dated 26 November 1997 in response to a complaint by Complainant PH55, page 5; letter from the Secretary of the Department dated 28 November 1997 in response to a complaint by Complainants PH8-12, page 6; and letter from the Secretary of the Department dated 1 April 1997 in response to a complaint by Complainant PH2.

2 The Information Handbook for Residents was distributed to detainees at Port Hedland until the latter part of 1996. The Commission obtained the edition which was last revised in April 1996. The deputy centre manager advised the Commission in August 1997 that the Handbook was distributed to detainees only once they had lodged an application to stay in Australia. It was, however, only available in English. The Commission was advised that there are no plans to revive the Handbook and have it translated into the first languages of asylum seekers held at Port Hedland.

He said that, when someone asks him for a lawyer, he provides the person with entries in the telephone book of lawyers in the local area. He said he draws to the person's attention the specialisations of lawyers as well as those lawyers whose initial consultation is free of charge. He said that all detainees will choose Legal Aid. He said that he also explains how to use the Telephone Interpreter Service and provides detainees with its phone number.

During the Commission's site inspection in May 1997, the officer in charge of detention at the Perth centre advised that if people request legal assistance they get access to the phone and can call Legal Aid of Western Australia. He said that, if detainees indicate to either him or other officers that they fear for their life if returned to their country of origin, they are provided with Part A of the form 'Application for a Protection Visa' as well as the form requesting legal assistance. These forms are then faxed through to the refugee section of the Department in Melbourne. The Commission was told that it usually takes two weeks from the time the person fills in the form until he or she sees a lawyer about the application.

Both the Operations Manager and the Detention Manager at Villawood advised the Commission in October 1997 that, if someone tells them that they want to stay in Australia, this is sufficient for that person to be given an application form for a protection visa. They said that when people are taken into detention they are given a copy of the document 'Notice to Persons in Immigration Detention' which tells them about their rights to obtain legal advice and speak with a consular representative. This document also gives information about how to apply for a bridging visa and a substantive visa. During the October 1997 site inspection the Commission saw notices advising detainees of the phone number for legal aid and the timing of regular legal clinics in the centre.

Detainees at the Perth and Villawood centres have much better access to legal advice and assistance than detainees at Port Hedland. This is primarily due to the location of these centres in capital cities and centre staff informing detainees of their right to obtain legal advice.

Additionally, detainees in all the immigration detention centres who make applications for protection visas are provided with 'Application Assistance' by the Department. The Department contracts registered migration agents to assist detainees in making primary applications and applications for review. Migration agents are selected through a tendering process.

Application Assistance covers assistance in preparing, lodging and presenting applications for protection visas to the Department. It also covers preparing, lodging and presentation of applications for review of the Department's decision to the Refugee Review Tribunal.

After the initial application for review, no funding is provided to cover any further presentation of claims to the Refugee Review Tribunal. Similarly, no funding is available to cover judicial review of Refugee Review Tribunal decisions.[3]

14.2 Complaints

The right to be advised of the right to legal advice

Detainees at Port Hedland told the Commission of difficulties in accessing lawyers. In large part this is due to the failure of legislation and policy to provide the right to be advised of the right to legal advice. While the right to a lawyer if requested is ensured by section 256 of the Migration Act, there is no obligation under law or policy to advise a detainee of the right to a lawyer.

The Department considers that section 256 does not oblige any officer to inform a detainee of the right to legal advice. This view was upheld by the Full Federal Court's majority decision in *Wu Yu Fang*.[4] Justice Nicholson for the majority in the Federal Court confined himself to examining the domestic law and found that unlawful non-citizens who had entered the country unlawfully pursuant to section 193(2) were not entitled to be advised that they may apply for a visa. In addition he found that section 256 did not place an obligation on any officer to advise detainees of their entitlement to seek legal assistance. He held that Parliament had chosen to take a tough stand on the provision of information to non-citizens and that the Court was bound by this enactment, although it may arguably be contrary to Australia's international obligations.

Section 256 however does not preclude advising boat arrivals of their right to seek legal advice. Apart from some superficial changes, section 256 has remained more or less the same as in its original form as section 41 in the 1958 Act. Until late 1994, even though the legislation did not oblige the Department to advise detainees of their right to obtain legal assistance, officers exercised their discretion to do so. New boat arrivals were advised of their rights and were routinely allocated independent lawyers. The Information Handbook that was distributed to detainees at Port Hedland until late 1996, the Perth centre's current Rules and Information for Detainees and the procedures at Villawood and Perth demonstrate that there is nothing in sections 256 and 193(2) of the Migration Act to prevent the Department and its officers advising boat arrivals of their right to seek independent legal assistance.

The law therefore leaves to administrative discretion whether or not to advise, or allow third parties to advise, asylum seekers who arrive by boat of their right to legal advice.

3 Letter from the Secretary of the Department dated 26 November 1997 in response to a complaint by Complainant PH55, page 5; letter from the Secretary of the Department dated 28 November 1997 in response to a complaint by Complainants PH47, PH49 and PH50, page 5; Department of Immigration and Multicultural Affairs, *Request for tender for the provision of immigration advice, application assistance and training in migration procedure*, RFT No:97/02/001.

4 *Wu Yu Fang and 117 others v Minister for Immigration and Ethnic Affairs and Anor* (1996) 135 ALR 583.

Third party advice

The Commission has received three complaints from third parties, one from an individual lawyer and two from refugee case work organisations. Each complaint alleged that detainees at Port Hedland were being denied access to legal advice, even though there were lawyers available and willing to provide advice to them. They also alleged that detainees were being held incommunicado.

The issue of detainees learning through a third party of their right to legal advice was the subject of dispute between the Commission and the Department in 1996. The Commission received a complaint in March 1996 from the Victorian Refugee Advice and Casework Service (RACS) alleging the Department refused access to RACS to communicate with detainees from the 'Teal' who were segregated at Port Hedland following their arrival in Australia on 6 February 1996. RACS was seeking access to the group to provide legal advice and assistance on a 'pro bono' basis. The Department refused RACS's request for access in a letter dated 13 March 1996 stating that none of the detainees from the 'Teal' had requested legal advice and therefore, pursuant to section 256 of the Migration Act, there was no obligation to provide access.

RACS alleged the 'Teal' people were detained incommunicado in breach of Australia's human rights obligations under the ICCPR. On 21 March 1996 the Human Rights Commissioner wrote to the Secretary of the Department informing her of the complaint and seeking her response to the allegations. On 19 March 1996 the Commission wrote to the manager of the Port Hedland centre, enclosing a sealed letter for members of the 'Teal' group and requesting that this letter be delivered unopened pursuant to section 20(6)(b) of the HREOC Act.[5] The Department refused to comply with the request stating that it had no obligation to pass on the correspondence. The Department claimed it was only required to deliver a sealed envelope to a detainee who had made a complaint directly to the Commission. The Department was concerned that correspondence from the Commission might alert the detainees to their right to request a lawyer.

When attempts to resolve the matter failed, the Commission initiated action in the Federal Court against the Department in April 1997. On 7 June 1997 the Federal Court found in favour of the Commission and ordered the Department to deliver the correspondence.[6]

In response the Government introduced into Parliament legislation to amend the Migration Act to ensure that the Commission and the Commonwealth Ombudsman (who has a similar authority to correspond with detainees) cannot initiate communication with boat people held in detention. With the support of the Government and the Opposition at that time, the *Migration Legislation Amendment Bill (No.2) 1996* (Cth) was debated in the Senate on 27 and 28 June 1996. However, the Senate rose for the 1996 Winter recess without passing the Bill.

5 HREOC Act section 20(6)(b) authorises confidential communication between the Commission and individuals held in any form of custody.

6 *Human Rights and Equal Opportunity Commission and Anor v Secretary of the Department of Immigration and Multicultural Affairs* (1996) 137 ALR 207.

Representatives of the Department and the Commission have since met and agreed informally to a draft protocol as an alternative to the proposed legislation. Rather than preventing the Commission from making contact with detainees who have had complaints made on their behalf as intended by the proposed legislation, the protocol provides for greater consultation between the Commission and the Department in relation to those complaints. The draft protocol has been operating since October 1996 to the satisfaction of both parties.

The right of third parties to make a complaint about the treatment of a detainee is also set out in Principle 33(2) of the Body of Principles which states

> ... where neither the detained or imprisoned person nor his counsel has the possibility to exercise his [right to complain about his or her treatment], a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

Requests for legal advice

In statements to the Commission several detainees described their difficulty in accessing a lawyer, particularly during their period of initial isolation at Port Hedland which for some detainees lasted almost six months. The Commission was told frequently by detainees at Port Hedland that repeated requests to see a lawyer were not responded to within a reasonable time. Five detainees from North Africa experienced initial isolation lasting four to five months without access to a lawyer. They told the Commission

> On the 3 April 1997 and 14 April 1997 we wrote to the Department of Immigration in Canberra. The centre manager sent these letters for us. These letters asked for refugee status and for us to be given a lawyer. We have waited and waited.[7]

The Commission initiated a formal inquiry into this complaint in July 1997. In December 1997 a response to the allegations was received from the Department. Copies of all letters the complainants had written requesting assistance were included in the response. These documents show that in an undated letter which was written in April 1997 the complainants made an unequivocal request for legal assistance to help them in making an application for refugee status. However, arrangements were not made for them to speak to a lawyer until they made a verbal request to the assistant centre manager at Port Hedland on 14 May 1997. Application Assistance was not appointed until the end of May 1997.

The detainees the Commission spoke to during site visits expressed considerable stress, anxiety and uncertainty about the delays in obtaining legal advice. A large proportion of detainees, particularly those from the People's Republic of China, did not have a clear understanding of the role of lawyers in democratic societies. Detainees were confused about what rights they had and what they had to do to make an application to stay and commonly thought that their requests

7 Evidence, Complainants PH8-12, statement dated 1 June 1997, page 1, paragraph 8.

for assistance constituted an application for refugee status.

A complainant from the 'Grevillea' told the Commission he made a written request for legal assistance in early July 1996 and did not get a response or see a lawyer until September 1996. During the months he waited for a reply to his letter he

> met with the Manager now and then but was advised that he was waiting for the response from the Department. He told me his role was to pass on letters to the Department. I did not know what else I had to write to get legal assistance. I did not know what I was entitled to ask for. Nothing else happened after this.[8]

This complaint has been investigated by the Commission. In its response the Department provided copies of all letters written by the complainant requesting legal assistance and seeking asylum. In this case the Department provided the complainant with an opportunity to apply for a protection visa six months after he first expressed a desire to seek asylum. Legal assistance was provided on the first occasion more than two months after he first wrote to request it and on the second occasion seven months after he first wrote to request it. In total this complainant wrote four letters to the Department expressing his desire to apply to become a refugee and be provided with legal assistance before receiving any effective assistance.

The Department stated that these delays occurred because the translation of and response to the complainant's letters was given a lower priority as arrangements were in place to provide the 'Grevillea' group with reasonable facilities to access legal advice.[9]

In a response to a complaint from another member of the 'Grevillea' group the Department has advised that the management at the Port Hedland centre refers all requests, whether written or oral, relating to questions of immigration status to the central office for translation and advice. Requests are responded to as soon as possible and requests from people in detention are given priority. Delays may occur due to the volume of correspondence received on a range of matters which require translation into English.[10] Overall the Department considers that the picture outlined is one of 'appropriate response to requests for legal advice'.

8 Evidence, Complainant PH2, statement dated 29 May 1997, page 3, paragraph 2.

9 Evidence, letter from the Secretary of the Department dated 26 November 1997 in response to a complaint by Complainant PH2, page 3.

10 Evidence, letter from the Secretary of the Department dated 26 November 1997 in response to a complaint by Complainant PH55, pages 5 and 6.

> The [Commission's draft report] makes several assertions that letters from detainees requesting access to legal advice were ignored, when the letters clearly make no such request or, where the delay in providing reasonable facilities resulted mainly from delays in the translation of correspondence.[11]

While the Commission accepts that it may take several days to translate correspondence from detainees, the delays of weeks and in some cases months in responding to people's written requests for legal assistance and to apply for a protection visa are unacceptable. In Australia an untried prisoner charged with a criminal offence would not have to wait weeks or months for legal advice and/or legal assistance in the preparation of a defence.

The effect of delay

Excessive delay in providing legal advice to detainees results in the arbitrary detention of asylum seekers. It is arbitrary because the bureaucratic delays in responding to requests for legal advice cannot be justified. In *A v Australia* the Human Rights Committee stated that 'arbitrariness' cannot be equated with 'against the law' but must be interpreted more broadly to include elements such as inappropriateness and injustice.[12] The Committee also stated that remand in custody should be considered as arbitrary if it is not necessary in all the circumstances of the case.

Under the Migration Act the right to legal advice is an absolute right under Australian law if requested. There is no discretion to be considered and exercised and therefore no justification for any delay. Many applications for asylum require complex investigations of allegations of experiences and claims of identity. One of the major contributing factors to the length of detention is departmental officers in Canberra failing to 'afford all reasonable facility' for legal advice and assistance within a reasonable time frame.

In addition, the Commission was repeatedly told by detainees that they were dissuaded by centre management from formally requesting legal advice on the basis that their situation was unlikely to be resolved by a lawyer. In some cases, months may pass before a detainee repeats an attempt to seek legal advice, thus unnecessarily prolonging initiation of an application to stay in Australia.

At Port Hedland detainees are required to put requests relating to applications for refugee status to the centre manager in writing. The Commission became aware of illiterate detainees during site inspections. The requirement to put requests in writing in these circumstances is not reasonable and may be discriminatory.

11 Letter from W J Farmer, Secretary of the Department, dated 27 March 1998, page 2.

12 560/1993: UN Doc. CCPR/C/59/D/560/1993, 30 April 1997.

While the Migration Act places a positive obligation on officers of the Department to facilitate detainees' requests for legal advice, the practice at Port Hedland does not always conform with this. The Commission is aware that on a number of occasions detainees who have discovered that they have a right to request legal advice and asked for legal assistance have not been provided with reasonable facilities to obtain that assistance within a reasonable period or at all. This breaches section 256 of the Migration Act, the Migration Series Instructions and human rights under the HREOC Act.

14.3 Access to lawyers at Port Hedland

Access to lawyers for detainees at the Port Hedland centre has been greatly reduced over the six years the centre has been in operation.

The Port Hedland detention centre was established in October 1991. At this time six boat groups were transferred from Darwin to the centre. The Refugee Council of Australia (the Council) was funded by the Department to provide legal assistance to all members of these boat groups. In October 1991 a small group of lawyers went to the centre. They stayed for a few months and dealt with outstanding applications. In early 1992 a group of five lawyers and four or five interpreters from the Council went to Port Hedland to assist boat arrivals make applications for refugee status. During 1992 lawyers from Australian Lawyers for Refugees Inc. worked at Port Hedland alongside the lawyers from the Council.

Council lawyers had a permanent presence in the Port Hedland centre throughout 1992 and for the first half of 1993. Initially, these lawyers worked in the centre and later adjacent to the centre. In the second half of 1993 there were fewer boat groups arriving and lawyers from the Council would travel to Port Hedland as and when a new group arrived. During 1992 and 1993, when a boat arrived, the Department would automatically arrange for all the people on the boat to have legal assistance appointed within a matter of days. It appears that during this period the Department assumed that if a person came to Australia by boat from a refugee producing country that person was seeking protection from Australia.

In late 1993 the Refugee Advice and Casework Service (RACS) took over the provision of legal advice for the centre from the Council. RACS solicitors went to Port Hedland for weeks at a time to assist new boat arrivals prepare applications for primary decisions and review. In 1994-95 RACS received a large number of referrals from the Department to provide Application Assistance. During this period Legal Aid of Western Australia and a private law firm were also awarded tenders to provide Application Assistance to detainees at Port Hedland. Since July 1995 Application Assistance has been provided only by a private law firm and Legal Aid of Western Australia.

Since late 1994 detainees' access to legal advice at Port Hedland has been curtailed. A complainant from the 'Wombat' confirmed that access to lawyers is becoming increasingly difficult for newly arrived detainees. Reflecting on her own experience, she told the Commission that shortly after she arrived in Port Hedland in 1994

> I told the manager I wanted to see the solicitor. I saw the solicitor in about two weeks. In 1994 it did not take too long to see a solicitor as it does now.[13]

In November 1994 RACS wrote to the manager of the Port Hedland centre asking that its lawyers be granted access to all people who arrived on the 'Albatross' so that they could be provided with legal assistance. The Department wrote back to RACS stating that their lawyers could not have access to the people from this boat as they had not requested reasonable facilities. From this time detainees at Port Hedland have only gained access to legal assistance if they are aware that they have a right to request legal advice and ask for it or if in the initial compliance interview with officers of the Department it is decided that the detainee is seeking to engage Australia's protection obligations. If it is determined that Australia's protection obligations have been invoked, Application Assistance will be appointed by the Department.

In February 1995 the Commission received its first complaint alleging that legal services were being denied to detainees at Port Hedland. In this complaint a RACS lawyer working in the centre stated that about five female detainees told him that on several occasions they had tried to see lawyers but they had not had any success and legal services had been denied them. They had not been able to see a lawyer, even though they had requested to see one. He also stated that staff at the centre would not allow him to talk with these detainees and give them legal advice.[14]

Before 1995 the Commission did not receive any complaints from detainees at Port Hedland. Since the start of 1995, 23 complaints have been received from or on behalf of detainees at Port Hedland. Twenty-one of these complaints have been received since the start of 1996. Almost 70 per cent of the complaints received from Port Hedland raise the issue of the accessibility and/or quality of legal advice.

The Commission regards this as a very high level of complaints. It provides evidence that since the start of 1995 detainees at Port Hedland have experienced significant difficulties in gaining access to legal advice.

Eleven detainees at Port Hedland claimed that the Department did not respond to their verbal and written requests for legal assistance to apply for protection visas. In six of these cases Application Assistance was provided only after the complainants had made contact with the Commission. Six of these complainants have been granted refugee status.

13 Evidence, Complainant PH47, statement dated 1 June 1997, page 1, paragraph 1.

14 Evidence, Complainant PH58, statutory declaration dated 2 February 1995.

The Commission was also told by detainees in May 1997 that requests to the centre manager or deputy centre manager for legal assistance were sometimes questioned. This was confirmed by the centre manager who told three officers of the Commission in discussions that in a recent case where a female detainee from the People's Republic of China asked him verbally for legal assistance he handled this by asking her why she wanted to stay and why she wanted to get legal assistance. He said he advised her to put her request in writing and he would refer it to the Department. At the same time he told the Commission that he facilitates all requests for legal assistance as he is divorced from the decision making process on immigration issues.

During the interview a translation of this letter was received by the centre manager and parts of it were read to officers of the Commission. This letter outlined why the woman wanted to stay in Australia but did not repeat her request for legal advice. The centre manager advised that he would handle this request by faxing it to the Department in Canberra.

Failure to respond to requests

On 2 July 1997 the Commission received a complaint from this detainee. Her complaint states she wants the assistance of a lawyer and that, although she had lodged applications to stay in Australia on many occasions, she had not received a reply from the Department.[15] Documents provided by the Department as part of the Commission's preliminary inquiries into this matter show that this woman wrote to the Department on at least three occasions to seek assistance to stay in Australia. In her letter of 14 September 1996 she stated that she believed that the Australian government would handle every case according to the law and hoped the government would give her protection. In her letter of 28 May 1997 she stated that she was anxious to get protection from Australia and hoped that the Department would allow her to remain in Australia. On 16 June 1997 the complainant met with the assistant centre manager and told him she wanted to stay in Australia on humanitarian grounds and she was frightened to return to China as she would be executed.

This woman was removed from Australia on 14 July 1997. She did not receive a formal written response to her letters until that date when she received a letter from the Department stating that the matters she had raised were of a personal nature and did not engage Australia's protection obligations. The Department advised the Commission on 18 August 1997 that at the time of her removal she had not spoken personally to a lawyer nor had she made an application for a protection visa.

15 Evidence, Complainant PH48, letter of complaint dated 17 June 1997.

A formal inquiry was initiated into the complaint by the Commission in September 1997. In its response dated 17 December 1997 the Department advised that it had no record of the complainant wishing to seek or expressing a desire to seek asylum.[16] In her correspondence she raised matters of a personal nature. It also had no record of her seeking legal assistance.

In this response the Department also advised that the centre manager whom the officers of the Commission spoke with does not agree with the Commission's account of discussions with him. His recollection is that he had a wide ranging discussion about the policy and legal requirements covering the provision of legal assistance and handling requests to stay in Australia. He states that in this discussion he made it clear that verbal and written requests for legal assistance are handled in accordance with section 256 of the Migration Act.

According to the Department the centre manager at the time agrees that he discussed the complainant's case with officers of the Commission. He also agrees that the complainant asked to stay in Australia and that he asked her to put her reasons in writing. The centre manager states that the complainant never asked him for legal assistance either orally or in writing. Had she made such a request it would have been acted on immediately.

However, this statement is not consistent with the information the centre manager provided to three officers of the Commission during a meeting which took place the day after he met with the complainant. Clearly, there are two versions of events which are in dispute. Due to the return of the complainant to the People's Republic of China, the Commission has not been able to obtain her account of discussions with the centre manager. On the basis of the evidence available, the Commission finds that it is more likely than not that the complainant made a verbal request for legal assistance.

The Commission has also considered the letters the complainant wrote to the Department and records of meetings she had with officers of the Department and finds that the complainant was expressing a desire to seek asylum and engage Australia's protection obligations. The complainant should have been admitted to the formal refugee determination process to have the merits of her application properly determined. It appears that in this case an informal screening process was applied to the complainant's request for protection and she was not provided with the facilities to make a formal application.

This complaint raises a serious issue, that is, the removal of an asylum seeker without permitting him or her to access legal advice and/or the refugee determination process even though she had explicitly requested both. The consequences for a genuine refugee who is returned to his or her country of origin are very serious. It appears that this complainant requested protection from Australia and access to legal assistance.

16 Evidence, letter from the Secretary of the Department dated 17 December 1997 in response to a complaint by Complainant PH48.

However, the Department did not provide her with legal assistance or an opportunity to apply for a protection visa. Instead, she was removed from Australia before she could exercise these basic rights.

Other complaints

In a letter of complaint to the Commission a member of the 'Grevillea' group wrote

> Though we have mentioned that we would like to apply for refugee status, yet to date the manager in the centre has not given us any opportunity to lodge the application. The manager always says something to shirk the responsibility, placing obstacles in the way and setting up barriers to prevent us from putting in the refugee application. So far we are not yet allowed to lodge the application.[17]

Preliminary inquiries were conducted into this complaint. The Department advised the Commission on 18 August 1997 that the complainants had received legal assistance and protection visa applications had been lodged.

The Commission has been told that the informal screening of requests is not limited to requests for legal advice. Five North African detainees wrote to the Department in January, April and May 1997 to request assistance to make applications for refugee status. In their statement to the Commission the group alleged that, due to the lack of response from the Department, they approached the centre manager in early May to ask

> ... for the address of the Human Rights and Equal Opportunity Commission and the United Nations High Commissioner for Refugees and also about the United Nations. We said that as the Department had ignored us it is better that we go to the United Nations to help us with our case. He said this information is not important for you. He said if you need them I will give them to you but he did not give them to us.[18]

Documents provided by the Department record that during a meeting with the assistant centre manager the complainants asked him for the address of the 'Human Rights and Refugee Commission'. The manager told them that, if they meant this Commission, this organisation does not decide immigration cases, but he would give them the address if they wanted it. The Commission's address was not given to the complainants at this meeting or on any other occasion. These detainees finally received a reply to their letters of January, April and May 1997 in a letter from the Department dated 26 May 1997.

17 Evidence, Complainants PH5, PH52 and PH53, letter of complaint dated 8 July 1997.

18 Evidence, Complainants PH8-12, statement dated 1 June 1997, page 1, paragraph 8.

14.4 Quality of assistance

The right to legal advice includes a right to advice that is correct and proper. The right to effective legal representation is set out in Principle 2 of the United Nations Basic Principles on the Role of Lawyers.

> Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

Detainees have expressed to the Commission concerns about the quality of assistance provided by legal advisers appointed by the Department to handle their applications for refugee status. The Department objected to the Commission that it is 'not responsible for the quality, timeliness or responsiveness of legal advisors retained by detainees'.[19] The Department is responsible, as the agency which contracts for legal services to be provided to detainees, for the overall quality control of those services. An appropriate oversight role would include regular surveying of the users of legal services.

A key concern is the failure of lawyers appointed by the Department to communicate effectively with detainees lodging applications for protection visas. An asylum seeker who is not effectively represented can face deportation when actual claims to refugee status are genuine. Poor quality legal services can mean protracted delays or poor outcomes in the determination of refugee status, increasing financial costs for the Department and psychological costs for the detainee.

Application Assistance Scheme

Through the Application Assistance Scheme the Department contracts registered migration agents to assist detainees in making primary applications for protection visas and applications for review by the Refugee Review Tribunal. Migration agents can be private legal practitioners and government funded law firms, legal aid lawyers and non-legal agents. They are selected through an open tendering process. Tenders are evaluated in terms of the following criteria

- capacity to deliver the service
- compliance with appropriate staffing requirements
- knowledge of migration procedure, refugee policy and protection visa processing procedures of the Department
- skills and experience in delivering a similar service.

19 Letter from W J Farmer, Secretary of the Department, dated 27 March 1998 page 2.

All Application Assistance Scheme contractors must be registered migration agents and comply with a code of conduct. The code imposes the overriding duty to act at all times in the interests of the client. It aims to improve the standard of professional conduct and quality of service in the industry. It also provides a mechanism for dealing with complaints against individual agents.

Migration Agents Registration Board

Until 21 March 1998 the code was administered and enforced by the Migration Agents Registration Board. All migration agents were required to be registered with the Board. If a breach of the code was found to have occurred, the Board could impose an administrative sanction. Sanctions ranged from a warning to a suspension of registration or deregistration.

If a client believed that an agent has acted in a way that breaches the code of conduct, he or she could make a complaint to the Migration Agents Registration Board.[20]

Migration Agents Registration Authority

From 21 March 1998 the Migration Agents Registration Authority (the Authority) replaced the Migration Agents Registration Board. The Migration Institute of Australia was appointed by the Minister for Immigration and Multicultural Affairs to establish and run the Authority. The Migration Institute of Australia is a private organisation. All migration agents must now be registered with the Authority.

Like the former Board, the Authority is responsible for administering and enforcing the code of conduct for all registered migration agents. The existing code of conduct is to be expanded to bring it into line with the codes of conduct and ethical standards which govern other professions, such as accountants and legal practitioners.

Clients of migration agents can make complaints to the Authority if they feel that the code has been breached. The Authority has a disciplinary panel to investigate complaints against registered migration agents. Disciplinary measures include cautions or the cancellation or suspension of registration. The Authority also tries to resolve complaints through conciliation.

From late March 1998 an agent will only be re-registered if he or she has participated in continuing education activities which develop his or her practice as a migration agent. This was not a requirement in the previous system of re-registration.

The Commission is not in a position to assess the quality of legal assistance provided to asylum seekers. If a detainee is not happy with the quality of assistance received, he or she can request a change of lawyer. In practice this would be extremely difficult to do,

20 Evidence, letter from the Secretary of the Department dated 28 November 1997 in response to a complaint from Complainant PH47; *Code of Conduct for Migration Agents*, 1 August 1996; Department of Immigration and Multicultural Affairs, *Request for tender for provision of immigration advice, application assistance and training in migration procedure*, RFT No:97/02/001.

as a detainee would either have to find a legal adviser who would handle his or her case on a pro bono basis or be able to meet his or her own legal expenses. Detainees could also make complaints or initiate legal proceedings against their lawyer. This could result in lawyers who do not meet the professional standards in their handling of refugee applications being disciplined.

However, it may be unreasonable to expect asylum seekers in detention with little knowledge of the Australian legal system, who may face language and literacy barriers and who are waiting for their status to be determined and who are dependent on the legal adviser or representative appointed, to complain against their lawyers for misconduct or negligence. To enhance their rights in this area, detainees should be given information about the level of service they should expect from their legal adviser and what they can do if they are not satisfied with the quality of the legal assistance received. The Department should develop its own internal complaints mechanism for addressing these concerns at the first instance.

The tendering and migration agent registration processes are the main mechanisms to ensure that detainees receive good legal advice. The Department should survey detainees who have had legal assistance appointed for refugee applications to determine whether they are satisfied with the quality of the assistance they are receiving under the current tendering arrangements.

The Department should also review the terms of the agreements, performance standards and levels of funding to ensure that the tendering arrangements are delivering application assistance that is of a consistent nature and a high quality. Detainees who receive Application Assistance should be told of the existence of the Migration Agents Registration Authority and how they can make a complaint to it.

Poor communication

During site inspections and in the investigation of complaints the Commission heard numerous allegations of poor communication by legal representatives and the Department. A common experience is that detainees are unaware of the stages in the refugee determination process, including the appeal rights available or the option to apply for asylum on humanitarian grounds if their claims are strong but fail to meet the strict definition of a refugee. The Commission has been told repeatedly by detainees that they had no idea where their applications were up to, they had made repeated requests to their representatives to explain the status of their applications or they had failed to comprehend the explanation given by their representatives.

A complainant from the ‘Grevillea’ told the Commission that when he finally saw his lawyer, three months after requesting legal advice, he

> did not know she was a solicitor. She did not introduce herself. I thought the person talking through the phone [the interpreter] was the solicitor ... because I did not realise that [she] was my solicitor I kept asking the manager for legal advice ... [the solicitor] gave me a form to complete

> ... on 26 January 1997 ... it was at this meeting that I realised [she] was my solicitor.[21]

In a letter to the Commission detainees from the 'Melaleuca', 'Lambertia' and 'Nandina' complained of the lack of response from their lawyer to repeated attempts to seek information about their cases, including dates set down for appeal of unfavourable primary decisions. They told the Commission that when the lawyer finally responded it was to advise them that he would only respond to very specific requests and would not accept phone calls or faxes or any other communication on any other matter. The complainants were extremely distressed by the additional advice from their lawyer that he had also requested members of the Refugee Review Tribunal not to respond to any contact made by the detainees. Members of the 'Melaleuca' group told the Commission that when the lawyer visited them at the detention centre

> ... he just wanted us to sign the form. We asked him to wait for a while but he would not. We do not know how to contact him.[22]

These detainees eventually dismissed the legal advisers appointed by the Department. Refugee Advice and Casework Service took over their case on a pro bono basis and represented them at the Refugee Review Tribunal. The Tribunal overturned the Department's decision and they were granted protection visas.

The remoteness of Port Hedland creates a significant barrier for detainees wanting legal assistance. A Melbourne law firm won one tender to provide legal advice to detainees at Port Hedland. With modern communications this distance may be insignificant for some types of clients. But detainees need regular face to face contact because of language and literacy barriers and their sense of desperation and isolation. The obvious disadvantage for clients at Port Hedland was reflected in the frustration expressed by detainees from the 'Melaleuca' over the inaccessibility of their lawyer.

In 1992 the Commission found that the legal services available in Port Hedland were unable to provide adequate assistance to detainees.[23] Although more than five years have passed, this is still the case. The Pilbarra Region does not have sufficient lawyers to meet the needs of the local community. A solicitor at the South Hedland Legal Aid Office advised that there are currently five lawyers for a population of 45,000 people. The South Hedland Legal Aid Office only employs two solicitors. Resources in the office are stretched and are not sufficient to cover the numerous requests from detainees for legal assistance. Many of these requests are dealt with by telephone advice from Legal Aid solicitors in Perth.

21 Evidence, Complainant PH2, statement dated 29 May 1997, pages 4 and 5.

22 Evidence, Complainants PH13-15, record of interview of 31 May 1997, page 3, paragraph 5.

23 Human Rights and Equal Opportunity Commission, *Detention of Asylum Seekers - Darwin and Port Hedland,* Report of the Acting Secretary's visits to Darwin and Port Hedland Detention Centres/Processing Areas, August and December 1991, 1992, page 29.

After the rooftop protests at Port Hedland in June 1995, Legal Aid of Western Australia wrote to the Department proposing that a legal advice bureau be established in the centre to answer any legal, refugee or migration enquiries which detainees may have. It was proposed that a lawyer from the Port Hedland Legal Aid Office attend for half a day each fortnight, with the Department meeting the cost of this service. Legal Aid considered at the time that, if asylum seekers are to be kept for lengthy periods, it may assist them if they are provided with regular access to a solicitor or migration agent who may be able to explain their current plight and deal with their questions and frustrations. A solicitor from Legal Aid of Western Australia told the Commission in December 1997 that the Department did not respond to the proposal.

The Commission considers a regular legal advice bureau or another form of on-site legal clinic would greatly improve the ability of detainees to access legal assistance.

14.5 Human rights law relevant to the provision of legal assistance

As outlined in Chapter 3, ICCPR article 9.4 requires that all detainees have an opportunity to challenge their detention in a court of law. Article 14.1 requires the court to be 'competent, independent and impartial' and the hearing to be 'fair and public'. Fairness is not defined in the Covenant.[24] 'Fairness' must at least require that the individual has an opportunity to present his or her case effectively by reference to Australian law and in accordance with Australian procedures. For unauthorised arrivals with little or no understanding of Australia's Migration Act and, typically, very little English language comprehension, effective presentation requires the assistance of an independent advocate with expertise in migration and refugee law. In other words, compliance with ICCPR articles 9.4 and 14.1 requires that detainees have ready access to independent legal advice and assistance.

Standard Minimum Rule 94 states that people in administrative detention shall be accorded treatment which is *not less favourable* than that of untried prisoners. Rule 93 states that a detainee

> ... shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions.

This access should not be dependent on the detainee initiating a request for assistance without being advised of the right to make such a request. All detainees must be advised of the right to apply for assistance. It is even arguable that independent legal advice

24 Article 14.3 'elaborates on the requirements of a "fair hearing" in [criminal cases]', setting out minimum guarantees which are *necessary*, but not necessarily *sufficient*, to ensure fairness: Human Rights Committee, General Comment No. 13 (1984), paragraph 5. Among these are to have legal assistance in the preparation and presentation of one's case and to have the free assistance of an interpreter if needed.

and assistance should be provided as a matter of course. The Body of Principles make explicit the right to be advised of the right to request legal counsel. The failure to inform unauthorised arrivals of this right, therefore, also breaches ICCPR article 10.1 in that it is a failure to treat the detainee with humanity.

Principle 13 of the Body of Principles provides

> Any person shall at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

In addition, Principle 17 provides

> (1) A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after his arrest and shall be provided with reasonable facilities for exercising it.
>
> (2) If a detained person does not have a legal counsel of his own choice, he shall be entitled to have legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18(1) provides

> A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

The Body of Principles also prescribes the right to have undue delays in requesting legal advice brought before a review body. Principle 33(4) states in part

> Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority.

The importance of legal advice to the fair treatment of asylum seekers is also recognised by the Refugee Convention. Article 32.2 takes an unequivocal stand on due process in the determination of refugee status.

> The expulsion of ... a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

14.6 Findings and recommendations on the provision of legal assistance

The Commission finds

- Detainees have experienced unjustifiably long delays in obtaining legal advice on request. Because detention is a serious act that severely restricts the freedom of the detainee, it is unconscionable that a detainee who requests legal advice according to his or her rights under international and Australian law should experience any delay whatsoever in the provision of that advice. Detainees should not be disadvantaged when it was the Department's choice to locate its largest detention centre in a very remote region.
- Delays in obtaining legal advice have contributed to the length and arbitrariness of detention in breach of ICCPR articles 9.1 and 10.1 and human rights under the HREOC Act.
- The remoteness of Port Hedland creates a significant barrier for detainees wanting to obtain legal advice.
- The Department is in breach of section 256 of the Migration Act by failing to provide all reasonable facilities to detainees at Port Hedland to obtain legal advice on request.
- No Australian law prohibits any departmental or custodial officer or third party from advising detainees of their right to legal advice. Section 256 of the Migration Act is silent as to whether a detainee must be advised of his or her right to request legal advice and section 193(2) only relates to legal advice in connection with applications for visas.
- In light of the clear statements in the Body of Principles and the Standard Minimum Rules concerning advising people of their rights to legal assistance, the Department's practice of not informing boat arrivals at Port Hedland of this right breaches ICCPR article 10.1 and is a breach of human rights under the HREOC Act.

The Commission recommends

R14.1 The Migration Act should be amended to require that, where a person is in immigration detention under the Act, the person responsible for the detention shall advise him or her of the right to have access to legal assistance and at the request of the person in immigration detention afford him or her all reasonable facilities for receiving legal advice in relation to his or her immigration detention no more than 72 hours after the request is made.

R14.2 The Migration Series Instructions and all local procedures of the detention service provider should require that, where a person is in immigration detention under the Act, the person responsible for the detention shall advise him or her of the right to have access to legal assistance and at the request of the person in immigration detention afford him or her all reasonable facilities for receiving legal advice in relation to his or her immigration detention.

R14.3 The Department's Migration Services Instructions and all local procedures of the detention service provider should specify a period of time not exceeding 72 hours within which all requests for legal advice must be responded to and who is responsible for handling requests. A departmental officer on site would be the preferable person with this responsibility.

R14.4 The Department should fund the provision of independent on-site legal assistance at the Port Hedland centre. This should include the provision of a regular legal advice bureau to give legal advice to detainees. All detainees should have access to this service.

R14.5 When legal assistance is appointed by the Department for protection visa applicants, detainees should be given written information about the level of service they should expect from their legal adviser and what they can do if they are dissatisfied with the service they receive.

R14.6 The Department should survey asylum seekers in the immigration detention centres and those recently granted entry to Australia to determine their level of satisfaction with their legal advisers.

R14.7 The Department should review tendering arrangements to ensure that the terms of the agreement, funding and performance standards will deliver legal assistance of a consistent nature and of a high quality.

Part 5

Accountability

15 The human cost of detention

This report has analysed specific detention practices and procedures. It has described the effect of these on detainees. Specific detention experiences, however, also have a cumulative effect on the mental, physical and social well being of detainees. For those detainees who have spent considerable periods in detention the effect can be devastating.

The human cost is apparent in the evidence of mental distress such as depression, boredom, sleeplessness, psychotic episodes, self harm and suicide attempts. The high level of physical complaints such as headaches, body numbness, dizziness and stomach and digestive disorders also reflects the degree of mental distress experienced by detainees. In addition, evidence of violence between detainees, especially within families, as well as between detainees and custodial officers suggests considerable tension created by the regime of control necessary to implement the policy of mandatory detention.

The evidence suggests that the indeterminacy of detention makes detention considerably more difficult to endure. Convicted criminal offenders almost always have a defined period of detention imposed on them by law. This provides certainty and assists detainees to pace themselves through the time they serve their sentence. Asylum seekers, however, may be detained for anywhere between six months and five years without actually having breached Australian law. They have no idea when, or even if, they will be released.

15.1 Case study

Two Cambodian brothers aged 16 and 18 arrived in Australia in 1990 on the ‘Collie’. They were released on bridging visas more than five years later in October 1995 pending the determination of their applications to stay in Australia on humanitarian grounds. They arrived as unaccompanied minors. They told the Commission in August 1997 about their experience of being in detention and the uncertainty they still face as the Minister has still not made a decision on their status. The record of interview with the younger brother sketches the impact that their prolonged detention had on their mental health. Reflecting on when they first arrived in Port Hedland, he said

> Port Hedland is a very isolated place. The detention centre is near the ocean and there are high fences all around the outside of the building, separating the centre from the rest of the world. It is a very quiet place with dead trees and grass ... When we first got to Port Hedland we did enjoy it a bit, as it was a big place and we could see the big blue sky. This was much better than the small building we were locked in at Darwin.

Later

> After the first few months at Port Hedland my brother and I started to feel bored and nervous. We were nervous as we didn't know what would happen to us in the future.

After five years in detention they still did not know what would be the result of their application to stay in Australia.

> In the last year of my detention at Port Hedland I was in a bad state emotionally. Most nights I would lie in bed feeling nervous wondering about what would happen to us. We had not heard anything for a long time about our court case and felt that we could be deported any day. Our sleep was also disturbed by the guards checking on us every night. They would open the door and make sure that everyone was asleep in their rooms.
>
> During the last couple of months of the five and a half years we spent in detention we were really depressed as we heard that the Australian Government was going to send us back to Cambodia. Mentally we felt sick and we had no lawyers and no one else we could talk to about how we felt. I was so depressed at that time that I had nightmares every night. I also had headaches from worrying about what might happen to us and these would last for days. Things would upset me very easily, I could not control my emotions and my anger. I took medicine like sleeping pills and anti-depressants for my problems, but this didn't help me. I took medication every night for the last few months I was in detention. I was bored and nervous as I didn't know what would happen. I had no one to talk to. I would spend a lot of my time just looking around and looking up at the sky.

The brothers were granted bridging visas only after the Indochina Refugee Association initiated legal proceedings against the Department in the Federal Court on the basis that the brothers were being detained unlawfully. The matter was settled out of court by the issuing of bridging visas. It is important to recall that the brothers were children when their ordeal began.

Subject to satisfying health and security checks, the brothers will be granted a protection visa by the Minister in 1998.

Classroom wall, 8-18 year olds, Port Hedland detention centre, May 1997.

15.2 Prolonged detention

When the Commission inspected the Port Hedland centre in May 1997 there were more than 80 detainees who had been in detention between two and five years. The reasons for the prolonged detention of these asylum seekers are complex. Essentially the combined effect of several sections of the Migration Act and the particular vulnerabilities of asylum seekers leads to their prolonged detention. Some of these factors include

- mandatory detention of asylum seekers who arrive by boat (section 189)
- no right for asylum seekers who arrive by boat to be advised of their right to legal advice (section 193) and a departmental policy that they not be so advised
- the requirement under the Migration Act to hold asylum seekers in detention until they are either deported or granted a visa (section 196)
- the necessity of legal advice to lodge a sound application for a protection visa due to the complexity of the refugee determination process and language, cultural and education barriers

- the large number of asylum seekers who are not aware or do not understand that they must ask for asylum in specific terms to engage Australia's protection obligations
- the time taken to exhaust all legal processes.

Detention is also prolonged by

- lengthy delays by the Department in responding to detainees' requests
- the requirement that entry on humanitarian grounds cannot be considered by the Minister until all avenues under the refugee determination process are exhausted (section 417)
- delays in voluntary and involuntary repatriation caused by bureaucratic requirements and political demands imposed by the country of origin.

The impact of prolonged detention

Detainees told the Commission repeatedly of the anguish they suffered as a result of the length of their detention. A husband and wife from the 'Cockatoo' told the Commission in a letter in June 1997

> In the detention centre we pass a day as if it were a year, all our hopes dashed to pieces, despaired, puzzled, and can only rely on the love between us husband and wife, encouraging and comforting each other.
>
> During the miserable detention, we have both been sad, despaired and helpless, and have continuous nightmares.[1]

Boredom is a major problem for detainees. The same complainants from the 'Cockatoo' told the Commission

> Boredom is a big problem. We do not get any answers during detention and we do not know what our future is. In detention you get to the point where you feel you are going insane and you cannot control yourself.[2]

The statement of interview with five North African detainees recounts

> The process is too slow and we do not believe we need to be held in detention. It is like a jail and it is very boring.[3]

1 Evidence, Complainants PH3 and PH4, letter dated 1 June 1997, page 1, paragraphs 2 and 3.

2 Evidence, Complainants PH3 and PH4, statement dated 30 May 1997, page 4, paragraph 1.

3 Evidence, Complainants PH8-12, statement dated 1 June 1997, page 3, paragraph 6.

For some detainees the indeterminacy and monotony of their detention and the lack of control over their asylum claims are too much to bear. The frequency of suicide attempts indicates the level of distress among those detainees who have been detained for long periods of time. A detainee from the 'Vagabond' told the Commission in May 1997

> Because of the long wait and because I do not know when I will get out of here and because I am scared of going back I tried to kill myself two weeks ago. I took tablets I had saved up. They made me feel very sick. When I became sick I became very scared of dying and so I am glad I was saved.[4]

A detainee from the 'Grevillea' told the Commission

> During periods of deportation [of others] or when I or other people get bad news, I have troubles sleeping. It took me months to get a form to apply to stay here and during this time I had trouble sleeping. Having troubles sleeping is a common problem for people here.[5]

Violence

The boredom and frustration of prolonged detention is apparent in the frequency of violence. The incident reports record a high level of violence amongst detainees and between detainees and APS officers. Domestic violence appears to be a particular problem. While domestic violence is not necessarily precipitated by detention, the specialist counselling required to assist families to cope with their circumstances in detention are not available. The incident reports record violence between men and women and between adults and children.

A woman from the 'Wombat' told the Commission

> I am concerned about the length of detention. My husband used to be very kind to us but because of the length of detention he has turned nasty. He is not sleeping till 3.00-4.00am and he is very short tempered with us. He cannot sleep because of the boredom. There is not much room to walk very far from here. I am also worried about children education and their future. My husband reckons that we will just die here in detention. We have lost hope.[6]

4 Evidence, Detainee PH1, record of interview of 2 June 1997, page 1, paragraph 9.

5 Evidence, Complainant PH55, statement dated 31 May 1997, page 5, paragraph 5.

6 Evidence, Complainant PH47, statement dated 1 June 1997, page 2, paragraph 2.

During the May 1997 inspection of the Port Hedland centre, the Commission was shown examples of manufactured weapons confiscated from detainees during room searches. They included sharpened pieces of metal and plastic, modified and unmodified kitchen implements, slingshots and tools manufactured from pieces of wood, metal and wire. The APS officer in charge told the Commission that in most cases the weapons are not manufactured with the intention of using them or planning violence. They are often made in secret and hoarded as a way of expressing some control in a context where detainees feel powerless. Weapons are nevertheless used in violence. The officer in charge showed Commission officers a piece of steel piping taken from the arm of a chair which had been modified and used in the non-fatal stabbing of eight people.

Incident reports obtained by the Commission for the period between January 1995 and March 1996 record several attempts at self harm, including self-mutilation, drug overdoses and drinking toxic fluids.

Voluntary repatriation

The effects of indeterminate detention are reflected also in the frequency of requests from detainees to return voluntarily to their countries of origin. Indeed many choose to return to their countries of origin despite strong beliefs that they face probable persecution, imprisonment, torture or execution. They prefer that to enduring long-term confinement in Australian immigration facilities.

Despair over the decision to volunteer for repatriation was often expressed during interviews with the Commission in May 1997. A detainee from the ‘Grevillea’ who showed physical scarring claimed he had been imprisoned in China for ten years and tortured prior to his release and journey to Australia. Despite this he had volunteered for repatriation because the twelve months he and his young son had been detained at Port Hedland had totally demoralised him. He had not made an application to stay in Australia, being unaware that he was entitled to make such an application. He told the Commission

> I would prefer to stay in Australia but it has taken so long to get a response from the department I have lost heart. That is why I requested to go back to China. I don’t want to go back to China because of what happened to me there and because my son would have to be cared for by someone else as I will be imprisoned ... I have been in detention for one year and still do not know what is happening.[7]

The Commission inquired into this detainee’s allegations. Documents provided by the Department show that from November 1996 until his removal in July 1997 the complainant made numerous requests to be returned to China as his wife was seriously ill. In October 1996 the Department received a letter from what appeared to be the

7 Evidence, Complainant PH6, statement dated 1 June 1997, page 2, paragraph 4.

complainant requesting legal assistance and to apply for refugee status. In November 1996 the complainant denied writing this letter and asked to be returned to China. In light of these claims by the complainant, legal assistance was not provided.

Another detainee from the 'Grevillea' told the Commission

> Others on my boat have recently seen the manager and have asked to be sent back, because they are sick of the waiting and do not know what to do.[8]

A detainee from the 'Toto' told the Commission

> I have been told many times that I just have to wait but I am tired of waiting. I do not want to see any more mutinies [referring to security incidents].[9]

Voluntary repatriation does not occur automatically, however. The Commission spoke to detainees who were frustrated at the delay involved in returning to their countries of origin once they had made a decision to volunteer for return. The centre manager told the Commission that delays are often due to the stringent bureaucratic requirements of some countries, such as positive identification of detainees, before they will accept a national back.

Prolonged detention and minimum standards

The policy of mandatory detention leads to prolonged detention. Many of the conditions of detention criticised in this report are unacceptable because the period of detention is so long. They would not raise the same concerns if detention was for a short time only.

Services such as education, welfare and recreation, for example, may not be necessary on the scale required now if detainees were released from detention within a month. In addition, appropriate facilities to observe religious or cultural practice may also not be so fundamentally important if detainees could access these facilities within the community within a month.

A policy of mandatory detention must accommodate the likelihood of prolonged detention and its impact on detainees. It must do this by accommodating the particular needs of asylum seekers such as access to legal advice, interpreters and specialist medical services.

8 Evidence, PH55, statement dated 31 May 1997, page 5, paragraph 5.

9 Evidence, Detainee PH56, interview of 1 June 1997.

15.3 Conclusions and relevant human rights law

A number of the issues raised in this Part could be resolved by better communication between detainees and centre staff and more openness and accountability in the management of the centres. In its 1998 report *The Management of Boat People*, the Australian National Audit Office suggested that one strategy for reducing self-harm in detention and mental problems occasioned or aggravated by detention 'would be ensuring a greater understanding among boat people of the decision-making processes being applied to them and encouraging detainees to become even more involved in the operation of the [centres]'.[10]

The Perth and Port Hedland centres already have programs that allow for consultation with representatives of detainees in some aspects of the running of the centre. At Port Hedland each accommodation block has a leader. Block leaders meet regularly with centre management to discuss issues such as food, recreation activities and clothing. The Perth centre has an advisory council constituted by centre management, two detainees and an Anglican minister. The Council is used to resolve local problems and has addressed issues such as food wastage and the purchasing of board games. Advisory committees do not operate at Villawood or Port Hedland.

An advisory committee

The Joint Standing Committee on Migration in 1994 recommended that an Immigration Detention Centre Advisory Committee be established in each centre. It recommended that the committee be made up of APS and departmental staff, centre residents, community service providers and local community representatives. It was felt that the these committees would

- provide a forum in which concerns regarding particular services or events could be addressed in a cooperative manner
- provide a means of identifying and resolving problems before they impact on detainees
- provide an opportunity to assess the provision of some services
- provide an opportunity to make suggestions for improving conditions within the centres or the delivery of services
- consider complaints and comments about the involvement of legal representatives and community groups in the centres
- consider how issues related to the refugee determination process impact on the level of services that should be provided.[11]

10 *The Management of Boat People* Auditor-General Report No. 32, Canberra, 1998, page 48.

11 Joint Standing Committee on Migration, 1994, *Asylum, Border Control and Detention,* Australian Government Publishing Service, Canberra, pages 190-193.

The Commission supports the Joint Standing Committee's recommendation about the establishment and operation of Immigration Detention Centre Advisory Committees. Following this report by the Joint Standing Committee, all the centres established advisory committees. However, only the Perth centre still has an advisory committee in operation.

The re-establishment of advisory committees at each centre would provide an appropriate forum for resolving problems with the conditions of detention and the delivery of services. It would also improve the involvement of detainees in the management of the centre and would make its running more transparent to members of the local community.

A complaints process

The development of a complaints process for detainees would also help to resolve issues about the conditions of detention at the local level.

Standard Minimum Rules 35 and 36 provide

> Rule 35
>
> (1) Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.
>
> (2) If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.
>
> Rule 36
>
> (1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.
>
> (2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. This prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of staff being present.
>
> (3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.
>
> (4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.

The Perth and Port Hedland centres have a clear process for detainees to make complaints about the conditions under which they are detained. The pamphlet 'Rules and Information for Detainees' at the Perth centre gives information about the complaints process to detainees. The Villawood centre does not have a complaints process for detainees. Standard Minimum Rules 35 and 36 provide that detainees must be given information about how to make complaints when they are taken into detention. They also provide that detainees have a right to make complaints to the inspector of the institution, without staff of the centre being present. Most importantly, they state that complaints are to be dealt with without undue delay.

As a matter of priority the Villawood centre should develop a procedure for making complaints in accordance with Rules 35 and 36. The other centres should review their current complaints procedures to ensure they comply with all the requirements of Rules 35 and 36.

Processing of requests

This report has documented a number of cases where the Department has taken long periods of time to respond to requests from detainees. At the Port Hedland centre detainees have experienced significant delays in receiving responses to their written and oral requests to apply to stay in Australia and to obtain legal assistance. Because detainees are not receiving timely responses to requests, they are writing to external agencies such as the Commission for assistance.

As a matter of urgency the Department needs to establish better procedures for handling requests from detainees. Improved procedures would allow the Department to comply with Standard Minimum Rule 36(4) which requires that all requests or complaints be dealt with promptly. Requests for day to day needs such as food, clothing and recreational activities are handled by custodial or welfare on staff. Requests about immigration status and legal assistance are handled by the departmental officers located both in the centres and in Canberra. When a written request for assistance is received by staff in a detention centre, it is faxed to the Protection and Family Residence Branch of the Department in Canberra for the preparation of a response.

In the case of complaints from detainees to the Commission it is clear that the Department has taken weeks and in some cases months to respond to these requests. Since departmental officers in Canberra cannot be contacted directly by detainees to discuss their situation, detainees follow up their requests with centre staff. However, the only advice that centre management can give detainees is that their letters are being considered 'by Canberra' and that they will have to wait for a response. Detainees are thus confronted with a faceless bureaucracy.

The current system for handling written requests creates work for centre managements in responding to inquiries from detainees about when the Department will answer their letters. It also creates a lot of stress and anxiety for detainees, as there is no-one who can tell them what is happening with their request or when it will be answered.

These delays and the associated frustrations could be reduced if each detainee had a case manager responsible for the overall management of his or her dealings with the Department. A key function of the case manager would be to ensure all complaints, inquiries and requests are responded to in an appropriate and timely manner. Case managers should be located within the detention centres. They would be the contact person for complaints about treatment in detention and requests for legal assistance or to apply to stay in Australia. The case manager would be the appropriate person to handle requests for legal assistance and arrange for reasonable facilities to be provided. When a detainee expresses verbally or in writing the wish to seek protection, the case manager would be the appropriate person to provide the detainee with a protection visa application form and to arrange for Application Assistance.

There appears to be no reason for these requests to be handled in Canberra. Most requests should be amenable to a response within the centre. However, in cases where requests are forwarded to Canberra for a response, the case manager should keep track of them and make sure they are answered without undue delay.

It is difficult to get a clear overall picture of how detainees are being treated in immigration detention centres. In this report the Commission has relied upon information gathered through site inspections, through detainees who make complaints to the Commission or request to speak to officers of the Commission during site inspections and through information provided by the Department in response to individual complaints. The remoteness of Port Hedland makes it difficult for community organisations and independent statutory authorities to visit. Commonwealth agencies such as this Commission and the Commonwealth Ombudsman do not have the resources to visit Port Hedland on a regular basis and must rely on contact by phone and in writing.

Human rights complaints

Immigration detainees face significant barriers to making complaints to the Commission. These include

- language and literacy barriers created by detainees not being able to speak English or not being able to read or write
- detainees not knowing about the existence of the Commission and how to make a complaint to it
- many detainees waiting for their immigration status to be determined and therefore being reluctant to make complaints about the treatment they are receiving.

Despite these significant barriers, over the last few years the Commission has received a large number of complaints from immigration detainees. The number of complaints and the nature of the issues raised indicate that there are significant problems in the centres particularly in the way force is being used, the use of observation rooms and transfers to manage behaviour, the handling of requests for legal assistance and the treatment of new arrivals at Port Hedland.

People in detention are deprived of their liberty and freedom and are in a position of relative powerlessness. The Migration Act establishes a regime of mandatory detention under which almost all people who arrive in Australia without valid travel documents are detained. The Commonwealth Government has given the Department the authority to detain these people. The Commonwealth needs to establish mechanisms for accountability which will ensure that officers of the Department exercise their power and duty of care to detainees in a way that respects the inherent dignity of the human person.

An independent monitor

The operation and management of centres is not transparent. The Commission and the Commonwealth Ombudsman have authority to conduct inquiries and investigate individual complaints. However, there are no systems for independent and regular inspection and review of the centres. This is in breach of Standard Minimum Rule 55 which states

> There shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority. Their task shall be in particular to ensure that these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services.

Standard Minimum Rule 94 extends the coverage of Rule 55 to people in administrative detention. As outlined above, Rule 36 provides that detainees must be able to make requests and complaints to the inspector during his or her visit and detainees must have the opportunity to talk to the inspector without centre staff being present.

Sections 3.1 to 3.3 of the *Standard Guidelines for Corrections in Australia* establish a system of accredited community representatives. These representatives must visit the prisons regularly and prisoners and staff must have access to them.

As a matter of priority, the Department must establish a mechanism for the independent monitoring of immigration detention centres. One part of this mechanism should be modelled on the official visitors programs in operation in most correctional systems in Australia. The creation of such a program would help to ensure that there is accountability and transparency in the management of the centres. It would also provide a safeguard against breaches of human rights.

This program would help resolve minor disagreements and misunderstanding, improve communication at the local level and bring complaints to the attention of centre management.

In addition, the Commonwealth Ombudsman and this Commission should undertake regular inspections of and interviews at the centres. These visits might most usefully be conducted jointly.

15.4 Findings and recommendations on accountability

The Commission finds

- Only one of the four immigration detention centres has an advisory committee.
- The creation of advisory committees at each of the centres would provide an appropriate forum for resolving problems about services and the conditions of detention.
- Not all centres have a clear process for detainees to make complaints about the conditions of detention.
- None of the existing complaints processes complies with Standard Minimum Rule 36(2) as there are no regular inspections or visitors to the centres to whom detainees can make complaints.
- There are no systems for independent and regular inspection and review of immigration detention centres. This is in breach of Standard Minimum Rule 55.

The Commission recommends

R15.1 The Department should establish an Immigration Detention Centre Advisory Committee at each centre, consisting of representatives from custodial and departmental staff, detainees from the major ethnic and cultural backgrounds in the centre, representatives from the local community, community-based service providers and legal representatives and representatives of government and non-government sectors. The role of each Committee should be to monitor the conditions and services provided within the centre, including health care, torture and trauma counselling, education, interpreting services, access to legal advice, complaint handling, recreational and pastoral care and general welfare.

R15.2 Each immigration detention centre should develop a process for detainees to make complaints about the conditions of detention, provision of services and security issues. Detainees should be advised of this process in writing during their induction into the centre. All complaints should be treated seriously and responded to in a fair and timely manner.The complaints process must comply with the requirements of Standard Minimum Rules 35 and 36.

R15.3 A case manager should be appointed to each detainee with responsibility for overall management of the detainee's dealings with the Department, including in seeking prompt resolution of requests, inquiries and complaints.

R15.4 The Department should agree to independent monitoring of departmental and local policy and practice in relation to the detention of asylum seekers. Independent monitoring should be modelled on the official visitors programs operating in most correctional systems in Australia. Official visitors should visit immigration detention centres twice a month and receive and deal with complaints either at the local level or through making appropriate referrals and examine the conditions of detention. After each visit, official visitors should prepare a report on any complaints and inquiries and the actions taken to resolve them to the Secretary of the Department and the Minister for Immigration and Multicultural Affairs. Official visitors should have direct access to the Secretary and the Minister. All detainees must be able to make requests of and complaints to the visitors and be able to speak to them in private.

R15.5 The Commonwealth Ombudsman and the Human Rights and Equal Opportunity Commission should undertake regular inspections of and interviews at all immigration detention centres.

Part 6

An Alternative Model

16 Alternatives to detention

In addition to the recommendations set out in this report, the Commission proposes two changes to the current refugee determination and detention regimes to bring Australian law and practice into conformity with its human rights obligations. They are

- the transfer of the refugee determination process and of immigration detention from the immigration portfolio to the Attorney-General and Justice portfolios respectively
- adoption of an alternative model for the detention of asylum seekers pending determination of their status.

16.1 Transfer of responsibility for refugee determination

Immigration policy is an expression of sovereignty of the nation state over its territory. States retain exclusive competence to regulate entry to and exit from their territory and to determine which non-citizens may remain in their territory. Refugee policy, however, derives from obligations under international refugee law which have been incorporated into Australian domestic law. It recognises that external factors beyond the control of the state will determine whether certain individuals can enter or remain in the territory of the state.

Accommodating the refugee determination process within the immigration portfolio blurs this distinction. Refugee policy comes to be perceived as a sub-set of immigration policy. The two have distinct legal bases, however, with distinct and divergent consequences.

The difference between refugee and immigration policy is reflected in the fact that an international organisation, the United Nations High Commissioner for Refugees, has a mandate for the international protection of refugees. There is a tension, however. Actual responsibility for protection lies with individual states which have the power to control the integrity of their borders and therefore entry and continued residence.

The convergence of border control on the one hand and protection obligations under the Refugee Convention and Protocol on the other gives rise to policies of mandatory detention as a deterrent. The impact of this convergence is disproportionately felt by asylum seekers who arrive by boat and claim refugee status on-shore. Some may be illegal immigrants and some refugees. On the surface, however, they are often indistinguishable and are treated as such.

Yet refugees, whether or not determined to be refugees, have rights to other, better treatment. Article 31 of the Refugee Convention states that refugees should not be subjected to any penalties on account of their illegal entry.

The argument that an unauthorised arrival is an illegal entrant until proven otherwise cannot be sustained in law. Asylum seekers who arrive by boat have in numerous cases been determined to be refugees. They became refugees not when their claims were accepted but when they developed a well-founded fear of persecution on one of the grounds prescribed by the Refugee Convention and for that reason could not remain in or return to their country of origin.

There is a fundamental difference between immigration decisions and determinations of refugee status. Immigration is properly a matter of government policy. Subject to human rights considerations, including the principle of non-discrimination, each state is entitled to decide its own approach to immigration and each government to set its own policy and expect it to be implemented.

Determination of refugee status, however, is a matter of law, not policy. Whether or not someone is a refugee depends on whether the person meets the definition of refugee set out in the Refugee Convention, which is incorporated in Australian law. This is not a matter on which a Minister should be able to issue policy directions. The task of deciding a claim for refugee status is a difficult one. Courts and tribunals are often divided on whether an applicant meets the legal definition. Individual asylum seekers then cannot be criticised if they seek determination of their status by a competent court or tribunal.

The essential difference between immigration and refugee law, policy, practice and decisions leads the Commission to conclude that deciding a refugee application is not properly an immigration matter at all. Refugee determinations therefore should be transferred to the Attorney-General's Department which is better placed to manage a legal process which should not be constrained by immigration policy.

The federal justice portfolio within the Attorney-General's Department deals with the administration of the courts, the police and related matters. Justice Ministries at State and Territory levels are generally responsible for the administration of correctional facilities. Immigration detention centres would be more appropriately administered with the justice portfolio.

The Commission recommends

R16.1 The refugee determination process and responsibility for immigration detention should be transferred from the immigration portfolio to that of the Attorney-General and Minister for Justice respectively.

16.2 Alternative detention model

In 1994 the Commission and a number of peak organisations in Australia endorsed a *Charter of Minimum Requirements for Legislation Relating to the Detention of Asylum Seekers*.[1] The Charter is an important statement of agreed principles relating to the detention of asylum seekers.

- Detained asylum seekers should be provided with unrestricted access to independent legal advice and representation and to free independent and qualified interpreters to assist with the provision of such advice.
- All detained asylum seekers should have a right to apply for a bridging visa. Where an application for a bridging visa has been refused, asylum seekers should have a right to apply for review of the decision to an independent, impartial and competent tribunal or court.
- In every case where a detained asylum seeker applies for a bridging visa, there should be a presumption in favour of the granting of such a visa, unless the Government can show good reason for the continued detention of the asylum seeker.
- The following may be grounds for the continued detention of asylum seekers

  i) where the identity and expressed intention of the person have not been established to a reasonable degree of certainty

  ii) where the person poses a demonstrable threat to national security and public order

  iii) where there is a demonstrable likelihood that the person will abscond

  iv) where a person who has been granted a bridging visa breaches any conditions of release and fails to show good reason for such breach.
- Where detention of an asylum seeker is continued, such detention should be subject to regular review by an independent, impartial and competent tribunal or court, with leave to apply for release where there has been a relevant change in prescribed circumstances.
- Centres used for the detention of asylum seekers should be located in or near major metropolitan centres to ensure proper access for detainees to support services and facilities.

1 The Charter was endorsed by the Australian Council of Churches, Australian Council of Social Service, Australian Red Cross, Federation of Ethnic Communities Councils of Australia, Human Rights and Equal Opportunity Commission, Immigration Advice and Rights Centre (NSW & Victoria), International Commission of Jurists, International Social Service, Legal Aid Commission of NSW, Migration Institute of Australia, National Legal Aid, Refugee Advice and Casework Service (NSW & Victoria), Refugee Council of Australia, Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (NSW), South Brisbane Immigration and Community Legal Service, St Vincent de Paul Society and Uniya.

- There should be an Immigration Detention Advisory Committee, consisting of representatives from the government and non-government sectors and detainees, to monitor the conditions and services provided within immigration detention centres, including health care, torture and trauma counselling, education, interpreting services, access to legal advice, recreational and pastoral care and general welfare.

Background

A Detention Reform Co-ordinating Committee was established following the endorsement of this Charter to develop an alternative detention model as a basis for public debate. In September 1996 the Committee submitted a draft alternative detention model to the Minister for Immigration and Multicultural Affairs. The alternative model proposes a system of refugee determination practices and procedures that is more humane and more consistent with Australia's responsibilities as a state party to the ICCPR and CROC. It rejects mandatory detention as a deterrent and means of immigration control at any stage of the refugee determination process. The alternative model takes into account the government's stated reasons for detaining asylum seekers but also addresses the concerns of practitioners with expertise in refugee law and policy about the existing regime of mandatory detention.

The alternative detention model provides a legislative and regulatory framework for a more flexible and more appropriate detention regime consistent with human rights requirements. It proposes a four-stage determination process. Stage I includes provisions for the arrival and reception of asylum seekers and consideration of their release. Stage II deals with the release of asylum seekers from detention. Stage III is concerned with the grounds for return to detention. Stage IV involves review options. The stages represent a linear progression ranging from high level restrictions on personal liberty to increasingly liberal provisions.

The alternative model emphasises the importance of determining matters relating to refugee determination on a case by case basis, taking into account the individual circumstances of each applicant.

Cost of the alternative model

The Commission acknowledges that there will be some costs associated with the implementation of the alternative model, including costs to the Commonwealth in relation to the support and monitoring of applicants released into the community. However, the present policy of mandatory detention is very expensive. The alternative model will require little or no additional government expenditure. Rather, the emphasis will be on the reallocation of resources currently directed to detention of unauthorised arrivals to programs designed to facilitate the transition of asylum seekers from detention to the community.

Areas into which resources will be redirected include funding for community sector organisations working in the area of refugee settlement. Resources should also be provided for the establishment of a designated unit within the responsible department to manage and monitor the operation of the community release scheme which is central to the alternative model.[2] Given the high cost of detention, the Commission is confident that resource implications of the transition from the current regime to an alternative model which emphasises non-custodial options will not be prohibitive. Indeed, there may well be cost savings.

Available statistics on the comparative costs of detention and community release of asylum seekers indicate a significant margin in favour of community release. Information provided by the Department in September 1997 indicated that the cost of accommodating detainees at Port Hedland was $161.77 per person per day. At other detention centres the cost was $111.11.[3] This compares with figures in the Joint Standing Committee on Migration's 1994 report *Asylum, Border Control and Detention* of $55.64 per day at Port Hedland, $58.49 per day at Villawood and approximately $200 per day at other immigration detention centres.[4] In a dissenting report, Senator Christabel Chamarette compared the figures relating to detention to figures provided by the Society of St Vincent de Paul for the cost of a community-based release scheme. It was estimated that the cost of boarding style accommodation would be approximately $14 per person per day.[5] This figure does not include capital or legal costs or ongoing maintenance, medical, counselling, education or recreation expenses.

Some further data is provided in *The Management of Boat People*, the 1998 report of an efficiency audit undertaken by the Australian National Audit Office.[6] It was noted that total administrative and property operating costs for the detention of unauthorised boat arrivals in the 1994-95 and 1995-96 financial years were $14.45 million and $21 million respectively. This translated into an increase in the average daily cost per detainee from $69 in 1994-95 to $105 in 1995-96.[7] The report concluded that the detention of boat people is resource intensive.

2 The responsible department is currently the Department of Immigration and Multicultural Affairs. However, implementation of the Commission's recommendation R16.1 will transfer responsibility to the Attorney-General's Department.

3 Information provided by the Office of the Minister for Immigration and Multicultural Affairs in response to a question on notice by Senator Stott Despoja on 1 September 1997 - Question No.803.

4 *Asylum, Border Control and Detention*, Joint Standing Committee on Migration, Australian Government Publishing Service, February 1994, pages 41-43. These figures do not include capital costs, legal expenses or departmental travel and accommodation.

5 Id, pages 208-209.

6 Australian National Audit Office Performance Audit *The Management of Boat People* The Auditor-General Audit Report No. 32, Canberra, 1998.

7 Id, page 39.

Advantages of the model

In its submission to the Minister the Detention Reform Co-ordinating Committee listed the advantages of the alternative model as

- greater flexibility by being able to move applicants from one detention stage to another as their circumstances change
- financial savings by significantly reducing the use of closed detention which is the most costly regime
- enhanced equity by reducing the present disparities in treatment between those applicants who are immigration cleared and those who are not (under the current provisions usually only the non immigration cleared asylum seekers are subject to detention)
- bringing Australia into line with international obligations and standards, including the ICCPR, CROC, the UNHCR Guidelines on the Detention of Asylum Seekers and ExComm Conclusion 44 on the Detention of Refugees and Asylum Seekers[8]
- a more humane regime which reduces individual suffering and hardship by providing for alternative detention mechanisms that can be matched to individual circumstances
- less domestic and international criticism for immigration detention practice.

Under this model restrictions of the current type on the liberty of Protection Visa applicants are kept to a minimum, usually less than 90 days. After the initial period in closed detention most applicants would move to a more liberal regime appropriate to the individual's circumstances. Regular review of each applicant's detention status is recommended so as to improve the ability to match the restrictions imposed on an applicant's liberty to his or her circumstances.

It has been argued that the alternative model may reward people who lodge appeals for the purpose of frustrating the system and delaying the resolution of their case. The Department has pointed out that under the current regime lengthy periods in detention are due in part to the backlog in the processing of applications made pursuant to section 417 of the Migration Act. Section 417 confers on the Minister discretion to grant a Protection Visa in exceptional circumstances to applicants who do not meet the requirements for refugee status, but who would face hardship or persecution in their country of origin. There is no evidence, however, that lengthy detention in fact deters people from making an application under section 417.

8 The discord between current practice and relevant international instruments was widely canvassed in submissions to the Joint Standing Committee on Migration by the Attorney-General's Department, the Human Rights and Equal Opportunity Commission, the Department of Foreign Affairs and Trade and other agencies.

While the Commission acknowledges that fraudulent claims may contribute to the inefficiency and unfairness of the current refugee determination system, it is crucial that Australia's obligations to bona fide refugee claimants are not subsumed by a focus on containing fraudulent claims. A system which reduces opportunities for dishonest claims must operate within the parameters of prescribed and binding international human rights law.

The Commission endorses this model with two amendments that are incorporated into the model set out in this report. These amendments provide

- that the alternative processing regime presumes the release of asylum seekers from detention within 90 days after arrival, subject to the grounds for detention outlined in Stage I below, and
- additional mechanisms for review of adverse decisions relating to the detention of asylum seekers at Stages II and III.

Alternative Model Stage I - Arrival, reception and consideration for release

All 'unlawful non-citizens' who have not been immigration cleared may be held initially in closed detention. During this initial period of detention a decision is made about the form of release most appropriate to the applicant's circumstances.

Grounds for denial of release

Asylum seekers are to be released from detention within 30 days after arrival, although this may be extended by a further 30 days on no more than two occasions if additional time is needed to consider grounds for possible denial of release. Accordingly, the maximum period which can precede release from detention is 90 days.

Release from detention may only be denied where

- the identity of the applicant cannot be verified
- an application for a Protection Visa has not been lodged for processing
- the applicant is considered on reasonable grounds to pose a threat to national security or public order or public health or safety
- there is a strong likelihood that the applicant will abscond or
- the applicant refuses to undertake or fails the health screening.

Priority processing

Priority is to be given to processing for release from detention any applicant who

- is less than 18 years of age or is a close relative of another detainee who is less than 18 years of age
- is older than 75 years of age
- is an unaccompanied minor
- is a single woman
- requires specialist medical attention that cannot be provided in detention
- requires specialist medical attention due to previous experience of torture or trauma and which cannot be provided in detention.

Alternative Model Stage II - Release from detention

An applicant who is not denied release on one or more of the prescribed grounds must be released within 90 days of arrival in Australia. Applicants who qualify for release from detention are to be granted a bridging visa which matches the appropriate form of release. The form of bridging visa granted is determined by the case officer.

Statement of reasons and review

An applicant who is not released is to be provided with a statement of the reasons for his or her detention. Where the applicant remains in detention, the case officer must review the applicant's detention every 30 days with independent review at the end of 90 days. Stage IV sets out provisions for review.

Priority processing of asylum claims

An applicant who is not released is to be given priority in processing of his or her application for a Protection Visa.

Forms of bridging visa

Two forms of bridging visa are available for applicants who meet the requirements for release from detention.

- Open detention bridging visa.
- Community release bridging visa, which allows
  - family release
  - community organisation release or
  - release upon own recognisance.

The elements of the open detention bridging visa are

- accommodation and daily requirements are provided by the Department
- the visa holder can leave the centre between the hours (for example) 7.00 am and 7.00 pm
- the visa holder must sign out and in to the hostel when departing and returning
- eligibility for permission to work is available on the terms contained in Bridging Visa E
- a visa holder who obtains employment must pay a fee for accommodation and board
- eligibility for Asylum Seekers' Assistance[9] terms currently available to other asylum seekers and if granted a fee for accommodation is deducted prior to

The elements of the community release bridging visa are

- in the case of family release, the visa holder resides at a designated address with a nominated close family member or member of the community offering family-like support; or, in the case of community organisation release, the visa holder resides at a designated address nominated by a recognised community organisation; or, in the case of release on own recognisance, the visa holder resides at a designated address
- the visa holder must notify the Department of any change of address within 48 hours
- the visa holder must report to the Department at regular intervals specified by the case officer
- the visa holder or the nominated close family may be required to pay a bond to the Department or sign a recognisance with the Department
- if called upon to do so, the visa holder shall present to the case officer within 24 hours
- the visa holder is required to sign an undertaking in writing that he or she shall comply with the conditions of the visa and, in the event that a condition of the visa is breached, may be returned to detention

9 The Asylum Seekers' Assistance Scheme was established in 1992 for the purpose of providing basic financial assistance and limited health care for needy applicants awaiting a decision on their primary applications for Protection Visas. The scheme is funded by the Federal Government and administered by the Red Cross on behalf of the Department. The Minister's consent is required to continue the scheme each year.

- eligibility for permission to work is available on the terms contained in Bridging Visa E
- eligibility for Asylum Seekers' Assistance is on the terms currently available to other asylum seekers.

Reporting requirements are an important element of bridging visas. In this regard, it is noteworthy that in the financial years 1996-97 and 1997-98 (year to date) there have been no unauthorised arrivals released on bridging visas who have failed to meet their reporting obligations to the Department.[10]

In making decisions regarding release from detention, no special distinction is to be made between initial applicants and applicants for review of refugee status. The Commission does not favour a less sympathetic release method for review applicants. The risk with such a system is that genuine refugees may be penalised because the initial determination was incorrect. In 1996-97 twelve per cent of applicants at the review stage were determined to be refugees.[11]

If an applicant is assessed as having some risk of absconding, this should not automatically preclude release from detention. The risk may instead be adequately addressed through additional conditions being applied to their release such as more rigorous reporting and residential requirements.

The Commission does not accept that release of the applicant into the community, in accordance with the proposed procedures, is unworkable in terms of ensuring adequate support for the applicant and monitoring his or her whereabouts. A central tenet of the community release scheme is determining the most appropriate form of release (open detention, family release, community organisation release or release upon own recognisance) based on the viability of the proposed support. In addition, a bond may be required if additional security is deemed appropriate. This is similar in many respects to the system which operates with significant success in Australia's criminal justice system. Nonetheless a degree of Government commitment will be needed to make community release viable. To ensure a feasible alternative to mandatory detention, consideration will need to be given to access to health care, employment registration, work permits, education and basic support such as that provided by the Asylum Seekers' Assistance Scheme. It will also require adequate funding of the community sector so that it can meet the additional demands placed on it by a comprehensive community release scheme. In particular, community organisations should not be required to pay a bond or sign a recognisance with the Department as these organisations are likely to support the greatest proportion of applicants and many would not have the funds to meet this requirement.

10 Information provided by the office of the Minister for Immigration and Multicultural Affairs in response to a question on notice by Senator Stott Despoja on 1 September 1997 - Question No.803.

11 Refugee Review Tribunal *Annual Report 1996-97*.

Alternative Model Stage III - Return to detention

Breach of conditions

If the applicant breaches any of the conditions set for his or her release, and fails to show good reason for the breach to the case officer, he or she may be returned to detention and should not be eligible to re-apply for release for a period of 30 days from the time of return to detention.

Where the applicant remains in detention, the case officer must review the applicant's detention at the completion of the 30 day period. Release can only be granted where the applicant complies with all the requirements set out in Stage I. Stage IV sets out further provisions for review.

Change in circumstances

If any of the grounds for detention set out in Stage I become relevant to the circumstances of a bridging visa holder, the applicant may be returned to detention and should not be eligible to re-apply for release for a period of 30 days from the time of return to detention.

Where the applicant remains in detention, the case officer must review the applicant's detention at the completion of the 30 day period. Release can only be granted where the applicant complies with all the requirements set out in Stage I. Stage IV sets out further provisions for review.

Alternative Model Stage IV - Review

By case officer

- The case officer may review the applicant's detention at any time.
- Where the applicant remains in detention, the case officer must review the applicant's detention at the end of every 30 days.
- The case officer must review the detention and/or release status of the applicant upon request by the applicant, except that the case officer is not required to consider any such request more than once every 30 days.
- In determining whether there should be a change in the detention and/or release status of the applicant, the case officer must take into account any change in circumstances since such status was last set.
- The case officer has a non-enforceable discretion to review the detention and/or release status of an applicant at any time should there be a change in the circumstances of the applicant.
- If the detention status of the applicant is to be changed, the case officer must provide a statement of reasons for the decision.

By an independent review tribunal

- Upon request by the applicant the independent review tribunal may review a decision of a case officer with respect to
  - the detention status of an applicant
  - the conditions of release imposed on the applicant
  - an alleged breach of any condition of release imposed on the applicant.
- The independent review tribunal is not required to consider any such application more than once every 90 days.
- If no decision is made by the case officer as to the detention status of an applicant within 90 days of the applicant's arrival in Australia, the independent review tribunal must review the detention status of that applicant as a matter of priority.
- Any review by the independent review tribunal under this provision is a review *de novo* on the merits of the application. The independent review tribunal may in its discretion grant any of the available bridging visas to the applicant, regardless of the status of the applicant at the time of application or of the type of bridging visa originally sought by the applicant.

By the Federal Court of Australia

The Federal Court of Australia may review decisions on points of law relating to the detention status of an asylum seeker. The review should be able to consider the reasonableness of the original decision.

The Commission recommends

R16.2 The Commonwealth should adopt the model alternative to detention of unauthorised arrivals outlined in this chapter.

Appendices

1 Boat arrivals since 1989 - alphabetical

2 Boat arrivals since 1989 - chronological

3 Participants in the Inquiry

Appendix 1 Boat arrivals since 1989 - alphabetical

Key

*	baby born after boat's arrival
children	under 18 at time of arrival
refugee	entry granted through refugee status
humanit	entry granted on humanitarian grounds
entry	entry granted on other grounds
bridging visa	granted visa giving temporary lawful status
release	release into community pending appeal
departure	departure from Australia
detained	in detention (that is, under investigation/awaiting repatriation to safe third country/having been refused refugee status/with application, appeal or litigation pending)

Arrivals by boat codename

Acacia	9 May **1996**, at Christmas Island, 55 passengers (31 adults, 24 children), Chinese: 55 departures.
Albatross	13 November **1994**, at Darwin, 118 passengers (65 adults, 53 children, plus 6 babies*), Sino-Vietnamese: 124 departures.
Banksia	10 May **1996**, at Christmas Island, 66 passengers (46 adults, 20 children), Chinese: 66 departures.
Beagle	31 March **1990**, at Broome, 119 passengers (92 adults, 27 children, plus 16 babies*), 34 Chinese, 9 Vietnamese, 92 Cambodians: 32 refugees, 3 humanit, 18 entry, 2 bridging visas, 80 departures.
Brolga	18 November **1994**, at Darwin, 89 passengers (50 adults, 39 children, plus 4 babies*), Sino-Vietnamese: 93 departures.
Cockatoo	22 November **1994**, at Darwin, 84 passengers (61 adults, 23 children, plus 4 babies*), 76 Chinese, 12 Sino-Vietnamese: 32 refugees, 3 humanit, 1 entry, 2 escapees, 4 detained, 46 departures.
Collie	1 June **1990**, north of Darwin, 79 passengers (46 adults, 33 children, plus 2 babies*) 15 Chinese, 66 Cambodian: 8 refugees, 12 humanit, 12 entry, 2 bridging visas, 47 departures.

1 The information contained in this appendix comes from the Department's Fact Sheet No. 81, Public Affairs Section, Department of Immigration and Multicultural Affairs, Canberra, 9 September 1997.

Correa — 19 May **1996**, at Ashmore Reef, 6 adult passengers, Sri Lankan: 6 departures.

Dahlia — 26 May **1996**, at Christmas Island, 40 passengers (31 adults, 9 children), Chinese: 40 departures.

Dalmatian — 4 March **1991**, at Darwin, 33 passengers (22 adults, 11 children, plus 3 babies*), 11 Chinese, 11 Sino Vietnamese, 13 Macau citizens, 1 Hong Kong citizen: 18 refugees, 2 bridging visas, 16 departures.

Duck — 22 November **1994**, at Darwin, 13 passengers (12 adults, 1 child), Vietnamese, ex-Galang: 13 departures.

Eagle — 11 December **1994**, at Darwin, 89 passengers (51 adults, 38 children), Sino-Vietnamese: 89 departures.

Echo — 6 March **1991**, at Darwin, 35 passengers (18 adults, 17 children, plus 2 babies*), 1 Vietnamese, 36 Cambodians: 26 refugees, 1 humanit, 2 entry, 8 departures.

Erica — 31 May **1996**, at Darwin, 23 passengers (16 adults, 7 children), Chinese: 23 departures.

Falcon — 12 December **1994**, at Broome, 27 passengers (24 adults, 3 children), Vietnamese, ex-Galang: 27 departures.

Foxtrot — 24 March **1991**, at Darwin, 3 adult passengers, 2 Indonesians, 1 Bangladeshi: all departed Australia April 1991.

Freesia — 5 June **1996**, at Christmas Island, 86 passengers (58 adults, 28 children), 85 Chinese, 1 Sino-Vietnamese: 86 departures.

Galah — 22 December **1994**, at Darwin, 71 passengers (54 adults, 17 children, plus 3 babies*), Sino-Vietnamese: 74 departures.

George — 26 April **1991**, at Darwin, 77 passengers (48 adults, 29 children, plus 8 babies*), 2 Chinese, 15 Vietnamese, 68 Cambodian: 35 refugees, 6 humanit, 8 entry, 2 bridging visas, 34 departures.

Grevillea — 15 June **1996**, at Darwin, 67 passengers (45 adults, 22 children, plus 1 baby*), 29 Chinese, 39 Sino-Vietnamese: 11 detained, 57 departures.

Hakea — 30 June **1996**, at Darwin, 30 passengers (24 adults, 6 children), Chinese: 30 departures.

Harry — 9 May **1991**, at Darwin, 10 passengers (9 adults, 1 child, plus 1 baby*), Vietnamese: 11 refugees.

Heron — 23 December **1994**, at Darwin, 90 passengers (51 adults, 39 children), Sino-Vietnamese: 90 departures.

Iris — 7 September **1996**, at Ashmore Reef, 7 adult passengers, Iraqi: 7 refugees.

Isabella	31 December **1991**, at Montague Sound WA, 56 passengers (55 adults, 1 child, plus 2 babies*), Chinese: 34 refugees, 23 humanit, 1 departure.
Jabiru	25 December **1994**, at Darwin, 82 passengers (46 adults, 36 children, plus 3 babies*), Sino-Vietnamese: 85 departures.
Jeremiah	10 May **1992**, at Darwin, 10 passengers (8 adults, 2 children), Chinese: 2 refugees, 8 departures.
Juniper	9 September **1996**, at Ashmore Reef, 5 adult passengers, Iraqi: 5 refugees.
Kelpie	21 May **1992**, at Saibai Island in the Torres Strait, 12 passengers (6 adults, 6 children, plus 1 baby*), Polish: 13 departures.
Kerria	25 September **1996**, at Tudu Island, 21 passengers (11 adults, 10 children), Irian Jayan: 21 departures.
Kookaburra	28 December **1994**, at Darwin, 72 passengers (46 adults, 26 children), Sino-Vietnames: 72 departures.
Labrador	23 August **1992**, at Christmas Island, 68 passengers (65 adults, 3 children, plus 3 babies*), Chinese: 22 refugees, 3 humanit, 2 entry, 2 escapees, 42 departures.
Lambertia	3 October **1996**, at Ashmore Reef, 8 adult passengers, Iraqi: 8 refugees.
Lorikeet	18 January **1995**, at Christmas Island, 65 passengers (46 adults, 19 children, plus 4 babies*), Sino-Vietnamese: 1 refugees, 68 departures.
Mastiff	28 October **1992**, at Dauan in the Torres Strait, 11 passengers (9 adults, 2 children, plus 1 baby*), Romanian: 2 refugees, 10 departures.
Melaleuca	8 October **1996**, at Ashmore Reef, 24 passengers (23 adults, 1 child), 16 Iraqi, 8 Pakistani: 16 refugees, 8 departures.
Mudlark	9 March **1995**, at Darwin, 52 passengers (34 adults, 18 children, plus 1 baby*) Sino-Vietnamese: 53 departures.
Nandina	11 December **1996**, at Ashmore Reef, 12 adult passengers, 10 Iraqi, 2 Algerian: 10 refugees, 1 departure, 1 detained.
Nightingale	13 March **1995**, at Darwin, 54 passengers (31 adults, 23 children), 49 Sino-Vietnamese, 5 Vietnamese: 49 departures, 5 detained.
Norwich	30 October **1992**, at Christmas Island, 113 passengers (102 adults, 11 children), Chinese: 113 departures on 7 Nov 1992.
Oleria	15 January **1997**, at Saibai Island, 4 adult passengers, Iraqi: 4 refugees.
Oriole	17 March **1995**, at Ashmore Reef, 5 adult passegers, Afghani: 5 refugees.

Otter	3 November **1992**, at Torres Strait, 2 adult passengers, 1 Somali, 1 Nigerian: 2 departures.
Pender Bay	28 November **1989**, at Broome, 26 passengers (20 adults, 6 children, plus 1 baby*), 8 Chinese, 10 Vietnamese, 9 Cambodian: 18 refugees, 1 humanit, 2 entry, 6 departures.
Pheasant	11 May **1995**, at Darwin, 37 passengers (32 adults, 5 children), 2 Chinese, 35 Sino-Vietnamese: 35 departures, 2 detained.
Pilliga	10 February **1997**, at Ashmore Reef, 7 adult passengers, 2 Iraqi, 1 Iranian, 4 Algerian: 4 refugees, 3 detained.
Pluto	24 November **1993**, at Darwin, 53 passengers (30 adults, 23 children, plus 2 babies*), 54 Sino-Vietnamese, 1 Chinese: 47 refugees, 7 humanit, 1 entry.
Quail	29 May **1995**, at Darwin, 18 passengers (16 adults, 2 children), East Timorese: 18 bridging visas.
Quercus	6 March **1997**, at Darwin, 70 passengers (54 adults, 16 children), Chinese: 70 departures.
Quokka	5 December **1993**, at Broome, 24 passengers (20 adults, 4 children, plus 3 babies*), Chinese: 2 refugees, 2 humanit, 9 bridging visas, 2 detained, 12 departures.
Red Gum	23 March **1997**, at Christmas Island, 9 adult passengers, Iraqi: 9 detained.
Roger	20 December **1993**, at Troughton Island WA, 4 adult passengers, Turkish nationals: 4 refugees.
Rosella	25 August **1995**, at Ashmore Reef, 6 adult passengers, Kurdish: 6 refugees.
Sandpiper	17 January **1996**, at Ashmore Reef, 4 adult passengers, Iraqi: 4 refugees.
She Oak	30 April **1997**, at Darwin, 44 passengers (36 adults, 8 children), Chinese: 44 departures.
Sting	1 February **1994**, at Cape Talbot WA, 4 adult passengers, Bangladeshi: 2 refugees, 2 departures.
Teal	6 February **1996**, at Christmas Island, 46 passengers (34 adults, 12 children), Chinese: 46 departures.
Telopea	13 June **1997**, at Thursday Island, 139 passengers (132 adults, 7 children), Chinese: 135 departures, 4 detained.
Toto	28 May **1994**, at Christmas Island, 58 passengers (49 adults, 9 children, plus 1 baby*), 35 Chinese, 24 Sino-Vietnamese: 22 refugees, 1 bridging visa, 1 escapee, 35 departures.

Unicorn	4 June **1994**, at Darwin, 51 passengers (29 adults, 22 children), Sino-Vietnamese: 51 refugees.
Urtica	3 July **1997**, at Coral Bay WA, 15 adult passengers, Sri Lankan: 15 departures.
Vagabond	7 July **1994**, at Broome, 17 adult passengers, Vietnamese, ex-Galang: 4 refugees, 2 entry, 1 escape, 10 detained.
Viola	25 July **1997**, at Christmas Island, 15 adult passengers, 8 Iraqi, 7 nationality to be determined: 15 detained.
Waratah	4 September **1997**, at Christmas Island, 25 passengers (18 adults, 7 children), nationality to be determined: 25 detained.
Wattle Bird	14 March **1996**, at Christmas Island, 37 passengers (25 adults, 12 children), Chinese: 37 departures.
Wombat	13 July **1994**, at Darwin, 25 passengers (17 adults, 8 children, plus 3 babies*), Chinese: 13 refugees, 1 entry, 14 departures.
Xenon	9 September **1994**, at Cape Leveque WA, 31 passengers (27 adults, 4 children), Vietnamese, ex-Galang: 30 departures, 1 escapee.
Yabbie	29 September **1994**, at Darwin, 10 adult passengers, Vietnamese, ex-Galang: 10 departures.
Yellow Bird	6 May **1996**, at Christmas Island, 61 passengers (48 adults, 13 children), Chinese: 61 departures.
Zebra	26 October **1994**, at Broome, 22 adult passengers, Vietnamese, ex-Galang: 22 departures.
Zebra Finch	7 May **1996**, at Christmas Island, 62 passengers (36 adults, 26 children), Chinese: 62 departures.

Summary - status at 9 September 1997	
Arrivals (2,124 adults, 789 children)	2,913
Australian births	75
Total boat people	2,988
Granted refugee status	455
Entry on humanitarian grounds	61
Entry on other grounds	49
Total granted entry	565
Released on bridging visas	36
Escaped from custody	7
In custody	91
Total awaiting a decision	134
Total removed from Australia	2,289

Appendix 2 Boat arrivals since 1989 - chronological[1]

Key

*	baby born after boat's arrival
children	under 18 at time of arrival
refugee	entry granted through refugee status
humanit	entry granted on humanitarian grounds
entry	entry granted on other grounds
bridging visa	granted visa giving temporary lawful status
release	release into community pending appeal
departure	departure from Australia
detained	in detention (that is, under investigation/awaiting repatriation to safe third country/having been refused refugee status/with application, appeal or litigation pending)

Arrivals by year

1989

1 28 November 1989, Broome (Pender Bay) 26 - 20 adults, 6 children - plus 1 baby* (8 Chinese, 10 Vietnamese, 9 Cambodian). 18 refugees, 1 humanit, 2 entry, 6 departures.

1990

2 31 March 1990, Broome (Beagle) 119 - 92 adults, 27 children - plus 16 babies* (34 Chinese, 9 Vietnamese, 92 Cambodians). 32 refugees, 3 humanit, 18 entry, 2 bridging visas, 80 departures.

3 1 June 1990, north of Darwin (Collie) 79 - 46 adults, 33 children - plus 2 babies* (15 Chinese, 66 Cambodian). 8 refugees, 12 humanit, 12 entry, 2 bridging visas, 47 departures.

1991

4 4 March 1991, Darwin (Dalmatian) 33 - 22 adults, 11 children - plus 3 babies* (11 Chinese, 11 Sino-Vietnamese, 13 Macau citizens, 1 Hong Kong citizen). 18 refugees, 2 bridging visas, 16 departures.

1 The information contained in this appendix comes from the Department's Fact Sheet No. 81, Public Affairs Section, Department of Immigration and Multicultural Affairs, Canberra, 9 September 1997.

5 6 March 1991, Darwin (Echo) 35 - 18 adults, 17 children - plus 2 babies* (1 Vietnamese, 36 Cambodians). 26 refugees, 1 humanit, 2 entry, 8 departures.

6 24 March 1991, Darwin (Foxtrot) 3 adults (2 Indonesians, 1 Bangladeshi). All departed Australia April 1991.

7 26 April 1991, Darwin (George) 77 - 48 adults, 29 children - plus 8 babies* (2 Chinese, 15 Vietnamese, 68 Cambodian). 35 refugees, 6 humanit, 8 entry, 2 bridging visas, 34 departures.

8 9 May 1991, Darwin (Harry) 10 - 9 adults, 1 child - plus 1 baby* (Vietnamese). 11 refugees.

9 31 December 1991, Montague Sound, WA (Isabella) 56 - 55 adults, 1 child - plus 2 babies* (Chinese). 34 refugees, 23 humanit, 1 departure.

1992

10 10 May 1992, Darwin (Jeremiah) 10 - 8 adults, 2 children (Chinese). 2 refugees, 8 departures.

11 21 May 1992, Saibai Island, Torres Strait (Kelpie) 12 - 6 adults, 6 children - plus 1 baby* (Polish). 13 departures.

12 23 August 1992, Christmas Island (Labrador) 68 - 65 adults, 3 children - plus 3 babies* (Chinese). 22 refugees, 3 humanit, 2 entry, 2 escapees, 42 departures.

13 28 October 1992, Dauan, Torres Strait (Mastiff) 11 - 9 adults, 2 children - plus 1 baby* (Romanian). 2 refugees, 10 departures.

14 30 October 1992, Christmas Island (Norwich) 113 - 102 adults, 11 children (Chinese). 113 departures on 7 Nov 1992.

15 3 November 1992, Torres Strait (Otter) 2 adults (1 Somali, 1 Nigerian). 2 departures.

1993

16 24 November 1993, Darwin (Pluto) 53 - 30 adults, 23 children - plus 2 babies* (54 Sino-Vietnamese, 1 Chinese). 47 refugees, 7 humanit, 1 entry.

17 5 December 1993, Broome (Quokka) 24 - 20 adults, 4 children - plus 3 babies* (Chinese). 2 refugees, 2 humanit, 9 bridging visas, 2 detained, 12 departures.

18 20 December 1993, Troughton Island, WA (Roger) 4 adults (Turkish nationals). 4 refugees.

1994

19 1 February 1994, Cape Talbot, WA (Sting) 4 adults (Bangladeshi). 2 refugees, 2 departures.

20 28 May 1994, Christmas Island (Toto) 58 - 49 adults, 9 children - plus 1 baby* (35 Chinese, 24 Sino-Vietnamese). 22 refugees, 1 bridging visa, 1 escapee, 35 departures.

21 4 June 1994, Darwin (Unicorn) 51 - 29 adults, 22 children (Sino-Vietnamese). 51 refugees.

22 7 July 1994, Broome (Vagabond) 17 adults (Vietnamese, ex-Galang). 4 refugees, 2 entry, 1 escapee, 10 detained.

23 13 July 1994, Darwin (Wombat) 25 - 17 adults, 8 children - plus 3 babies* (Chinese). 13 refugees, 1 entry, 14 departures.

24 9 September 1994, Cape Leveque, WA (Xenon) 31 - 27 adults, 4 children (Vietnamese, ex-Galang). 30 departures, 1 escapee.

25 29 September 1994, Darwin (Yabbie) 10 adults (Vietnamese, ex-Galang). 10 departures.

26 26 October 1994, Broome (Zebra) 22 adults (Vietnamese, ex-Galang). 22 departures.

27 13 November 1994, Darwin (Albatross) 118 - 65 adults, 53 children - plus 6 babies* (Sino-Vietnamese). 124 departures.

28 18 November 1994, Darwin (Brolga) 89 - 50 adults, 39 children - plus 4 babies* (Sino-Vietnamese). 93 departures.

29 22 November 1994, Darwin (Cockatoo) 84 - 61 adults, 23 children - plus 4 babies* (76 Chinese, 12 Sino-Vietnamese). 32 refugees, 3 humanit, 1 entry, 2 escapees, 4 detained, 46 departures.

30 22 November 1994, Darwin (Duck) 13 - 12 adults, 1 child (Vietnamese, ex-Galang). 13 departures.

31 11 December 1994, Darwin (Eagle) 89 - 51 adults, 38 children (Sino-Vietnamese). 89 departures.

32 12 December 1994, Broome (Falcon) 27 - 24 adults, 3 children (Vietnamese, ex-Galang). 27 departures.

33 22 December 1994, Darwin (Galah) 71 - 54 adults, 17 children - plus 3 babies* (Sino-Vietnamese). 74 departures.

34 23 December 1994, Darwin (Heron) 90 - 51 adults, 39 children (Sino-Vietnamese). 90 departures.

35 25 December 1994, Darwin (Jabiru) 82 - 46 adults, 36 children - plus 3 babies* (Sino-Vietnamese). 85 departures.

36 28 December 1994, Darwin (Kookaburra) 72 - 46 adults, 26 children (Sino-Vietnamese). 72 departures.

1995

37 18 January 1995, Christmas Island (Lorikeet) 65 - 46 adults, 19 children - plus 4 babies* (Sino-Vietnamese). 1 refugee, 68 departures.

38 9 March 1995, Darwin (Mudlark) 52 - 34 adults, 18 children - plus 1 baby* (Sino-Vietnamese). 53 departures.

39 13 March 1995, Darwin (Nightingale) 54 - 31 adults, 23 children (49 Sino-Vietnamese, 5 Vietnamese). 49 departures, 5 detained.

40 17 March 1995, Ashmore Reef (Oriole) 5 adults (Afghani). 5 refugees.

41 11 May 1995, Darwin (Pheasant) 37 - 32 adults, 5 children (2 Chinese, 35 Sino-Vietnamese). 35 departures, 2 detained.

42 29 May 1995, Darwin (Quail) 18 - 16 adults, 2 children (East Timorese). 18 bridging visas.

43 25 August 1995, Ashmore Reef (Rosella) 6 adults (Kurdish). 6 refugees.

1996

44 17 January 1996, Ashmore Reef (Sandpiper) 4 adults (Iraqi). 4 refugees.

45 6 February 1996, Christmas Island (Teal) 46 - 34 adults, 12 children (Chinese). 46 departures.

46 14 March 1996, Christmas Island (Wattle Bird) 37 - 25 adults, 12 children (Chinese). 37 departures.

47 6 May 1996, Christmas Island (Yellow Bird) 61 - 48 adults, 13 children (Chinese). 61 departures.

48 7 May 1996, Christmas Island (Zebra Finch) 62 - 36 adults, 26 children (Chinese). 62 departures.

49 9 May 1996, Christmas Island (Acacia) 55 - 31 adults, 24 children (Chinese). 55 departures.

50 10 May 1996, Christmas Island (Banksia) 66 - 46 adults, 20 children (Chinese). 66 departures.

51 19 May 1996, Ashmore Reef (Correa) 6 adults (Sri Lankan). 6 departures.

52 26 May 1996, Christmas Island (Dahlia) 40 - 31 adults, 9 children (Chinese). 40 departures.

53 31 May 1996, Darwin (Erica) 23 - 16 adults, 7 children (Chinese). 23 departures.

54 5 June 1996, Christmas Island (Freesia) 86 - 58 adults, 28 children (85 Chinese, 1 Sino-Vietnamese). 86 departures.

55 15 June 1996, Darwin (Grevillea) 67 - 45 adults, 22 children - plus 1 baby* (29 Chinese, 39 Sino-Vietnamese). 11 detained, 57 departures.

56 30 June 1996, Darwin (Hakea) 30 - 24 adults, 6 children (Chinese). 30 departures.

57 7 September 1996, Ashmore Reef (Iris) 7 adults (Iraqi). 7 refugees.

58 9 September 1996, Ashmore Reef (Juniper) 5 adults (Iraqi). 5

59 25 September 1996, Tudu Island (Kerria) 21 - 11 adults, 10

60 3 October 1996, Ashmore Reef (Lambertia) 8 adults (Iraqi). 8

61 8 October 1996, Ashmore Reef (Melaleuca) 24 - 23 adults, 1

62 11 December 1996, Ashmore Reef (Nandina) 12 adults (10 Iraqi,

1997

63 15 January 1997, Saibai Island (Oleria) 4 adults (Iraqi). 4 refugees.

64 10 February 1997, Ashmore Reef (Pilliga) 7 adults (2 Iraqi, 1 Iranian, 4 Algerian). 4 refugees, 3 detained.

65 6 March 1997, Darwin (Quercus) 70 - 54 adults, 16 children (70 Chinese). 70 departures.

66 23 March 1997, Christmas Island (Red Gum) 9 adults (Iraqi). 9 detained.

67 30 April 1997, Darwin (She Oak) 44 - 36 adults, 8 children (Chinese). 44 departures.

68 13 June 1997, Thursday Island (Telopea) 139 - 132 adults, 7 children (Chinese). 135 departures, 4 detained.

69 3 July 1997, Coral Bay, WA (Urtica) 15 adults (Sri Lankan). 15 departures.

70 25 July 1997, Christmas Island (Viola) 15 adults (8 Iraqi, 7 nationality yet to be determined). 15 detained.

71 4 September 1997, Christmas Island (Waratah) 25 - 18 adults, 7 children (nationality to be determined). 25 detained.

Summary - status at 9 September 1997	
Arrivals (2,124 adults, 789 children)	2,913
Australian births	75
Total boat people	2,988
Granted refugee status	455
Entry on humanitarian grounds	61
Entry on other grounds	49
Total granted entry	565
Released on bridging visas	36
Escaped from custody	7
In custody	91
Total awaiting a decision	134
Total removed from Australia	2,289

Appendix 3 - Participants in the Inquiry

Commissioner	Chris Sidoti, Human Rights Commissioner
Site visits	Sir Ronald Wilson (then President of the Commission), Commissioner Sidoti, Jodie Ball, Rocky Clifford, Nadja Diessel, Kieren Fitzpatrick, Julie Kinross, Karen McCabe, David Norrie, Bill Chapman (then Acting Secretary of the Commission, in 1991)
Research	Jodie Ball, Nadja Diessel
Legal advice and research	Kate Eastman, Mary Crock, Linda Haupt, Meredith Wilkie
Writing	Jodie Ball, Nadja Diessel, Meredith Wilkie
Investigation of individualcomplaints	Jodie Ball, David Norrie
Project management	Rocky Clifford, Julie Kinross, Meredith Wilkie

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