



6 June 2014
CCYPD/14/285

Professor Gillian Triggs
President
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Dear Professor Triggs

National Inquiry into Children in Immigration Detention 2014

I am writing on behalf of some of the Australian Children's Commissioners and Guardians (ACCG). At the National Meeting of the ACCG held recently in Melbourne, the human rights and experiences of children in "held immigration detention" were discussed with a range of concerns raised. It was agreed that a joint submission on behalf of the ACCG would be facilitated by the Victorian Commission for Children and Young People (CCYP). Whilst the statutory responsibilities for the Children's Commissioners and Guardians vary in relation to some details according to state legislation, all have a broad role in promoting and monitoring the wellbeing of all children and young people under the age of 18 years, especially those who are perceived to be vulnerable due to a range of factors. The purpose of the ACCG is to strengthen the quality and effectiveness of strategic advocacy to promote and protect the safety, wellbeing and rights of children in Australia, particularly the most vulnerable or disadvantaged.

The United Nations Convention on the Rights of the Child (CROC) provides the international framework for children's rights which guides the work of the Commissioners and Guardians. In Article 22, the CROC makes specific provision for children who are refugees to receive special protection and help, in addition to the other rights set out under the Convention. The ACCG therefore holds a position that mandatory detention of child asylum seekers is also inconsistent with Article 37 which specifies that children should not be deprived of their liberty, except in conformity with law, and only then as a measure of last resort and for the shortest possible time. Whilst an argument is made that such detention occurs until processing of applications for humanitarian asylum is completed, the ACCG has long held the position that children should be accommodated outside of detention facilities whilst awaiting decisions on immigration status. Accommodation of refugee children in the community also provides much greater assurance that their human rights to access appropriate health services, education programs, recreation activities, social connections and other supports will be facilitated.

The appropriateness of facilities in which children are detained

ACCG members have previously expressed concerns about the facilities in which children have been detained, which include¹:

¹ Comments and observations may not apply to all immigration detention facilities.

- The institutional nature of the accommodation, where family groups must attend a canteen for meals during scheduled meal times and so are not able to cook for themselves and live as a functional family unit, including the important role of teaching children to prepare and cook food consistent with their cultural traditions.
- The requirement for children and adults to queue up, in some cases twice daily, to receive medication and other personal items, is perceived as humiliating and exhausting, especially for single parents who must manage restless toddlers in a queue for lengthy periods (a task which any parent in Australia would find onerous).
- The lack of appropriate play areas or facilities, which in some locations is made worse by the extreme temperatures and dusty conditions. Children may not have the quality of play experience that is afforded to other children in Australia at their local park, despite children in detention usually not having access to other play opportunities.
- At the MITA (Melbourne Immigration Transit Accommodation) Centre there is also a lack of a boundary fence between the family areas where children play between accommodation units, and the area where single men are accommodated, raising obvious concerns for the safety of the children (which would not be the situation in other institutions in Australia such as psychiatric hospitals, prisons, etc).
- A lack of activities appropriate for different age groups has also been observed (which is also a situation that would not be found within Australian prisons, hospitals, etc).
- The limited facilities for access to computers which stymies young people's efforts to do their homework given the many people wanting access to the few facilities available.

It is likely that the issues above would be of a more serious nature in off-shore processing centres.

The impact of the length of detention on children

Children have a different concept of the measurement of time compared with adults. Whilst a month in an adult's life might seem like a short period, for a child, this is an extremely long time. Furthermore, the adverse impact on the learning and development of children is clearly demonstrated when we look at the enormous challenges faced by children who have experienced interrupted or lack of schooling due to conflict and displacement. The ACCG has previously expressed support for the Council of Australian Governments' (COAG) endorsed *National Early Childhood Development Strategy*, stating that every opportunity should be taken to enhance the life chances of children, including those residing within immigration detention.

The ACCG is therefore concerned that after a period in 2011, when the Australian Government goal of promptly moving children and family groups into community based accommodation and the length of time in detention for most families was

shortening, this trend has now been reversed. It is noted that the average period of time that people are held in detention is now reported to be 275 days, with the vast majority of newly arrived asylum seekers held in detention for over 6 months. It is understood that this lengthening in the period of detention has been a result of delays in visa processing and because the average length of time had previously been artificially held down by surges in new arrivals, which is no longer the case (Inga Ting and Conrad Walters, *The Age*, 05.05.14).

It has been continually reported that the issue of greatest concern to asylum seekers is the length of time that they are held in detention and the indefinite nature of this process with uncertain outcomes. Asylum seekers reflecting on their time in detention have felt it was worse than prison which has a definite end date. One asylum seeker described the impact as “their body and then their mind is in detention, and when out in the community their mind is still in detention” (Baqir Rezaie, Amnesty International Australia event, 22.05.14). The Royal Australian and New Zealand College of Psychiatrists (RANZCP) has highlighted that the combination of experiences that has led a family to seek refuge in another country, combined with the experience of detention, has a consequence of raising parent stress and their capacity to provide support and nurture to the children in their care (RANZCP, 2011, *Children in Immigration Detention*, Position Statement 52). Parental incapacity results in considerable developmental risk to children and young people of families who are seeking asylum, with an added burden falling upon children and young people who recognize the distress evident in their parents and siblings. The high rates of suicide, self-harm, depression, post traumatic stress disorder (PTSD), post natal depression and anxiety amongst asylum seekers held in detention have been well documented. In addition to this impacting upon children directly when it is a feature of their own families, they are also exposed to the mental health difficulties experienced by others within detention.

The combination of the trauma that children and young people experience in relation to their asylum seeking journey is compounded by living in a detention environment, with both having a negative impact upon their own and their parents’ mental health and wellbeing. When parental capacity is similarly impaired for families living in the Australian community, it is perceived as so serious that society has sanctioned legislation that gives the state the mandate to intervene through the operation of child protection services to protect the health and wellbeing of the child and to assist families to safely care for their children.

Measures to ensure the safety of children

The ACCG has previously put on the public record, in a letter to the Chair of the CDSMC (Community and Disability Ministers’ Conference) in June 2011, their position that if children are to be held in immigration detention facilities, then it is incumbent upon all Australians that they receive protection from abuse and neglect. The absence of Commonwealth child protection legislation or a responsible agency means that state and territory child protection authorities should have a mandate to respond to allegations of child abuse or neglect. South Australia remains the only state or territory that has a protocol in place with the Commonwealth Government for statutory child protection.

In November 2011, through an appearance before the *Joint Select Committee on Australia's Immigration Detention Network*, the ACCG urged that a uniform protocol consistent with the Commonwealth Government's commitment to the *National Framework for Protecting Australia's Children 2009*, and recognizing the specific statutory requirements be agreed with each state and territory department as a matter of urgency. The arrangements for the notification, investigation and response to suspected abuse or neglect of children varied significantly from one detention centre to the next. The Western Australian Commissioner was advised in June 2011, after raising the matters with the then Minister for Immigration and Citizenship and the WA Department for Child Protection and Family Support, that the relevant departments had agreed to develop a detailed schedule on the provision of child protection services to children and young people in immigration detention facilities within WA, but this did not occur.

However, in response to a specific query from the Victorian Commission in October 2013, the DIBP provided information about what was claimed to be an "agreed process" in place at the MITA regarding notification of child protection concerns, which is not a formalized process (see Attachment 1). DIBP again also suggested that their department was at that time in the process of developing a formalized departmental procedure around this issue, to ensure consistency across the immigration detention network.

At the meeting of the ACCG on 15 May 2014, it was confirmed that a uniform arrangement to protect very vulnerable children has not been developed. The ACCG members are of the view that a consistent, national approach needs to be applied to the development of an MoU with each state or territory. In formulating the MoU, attention needs to be paid to the provision of a child safe environment, including child safe environment training, child safety procedures and parenting support. The Memorandum of Understanding (MoU) between what was then DIAC (Department of Immigration and Citizenship) and South Australia's Department for Families and Communities (DFC) provides a model for the inclusion of parenting support, as it states that advice and training in areas such as parenting skills can be provided to asylum seekers in immigration detention. This proactive skills training and support could be provided by agencies or organizations other than the statutory child protection agency.

Child Safe Environment Training

The need to provide a child safe environment results in a requirement that all staff who have contact with children in immigration detention must have child safe environment training.

It is proposed that the child safe environment training should include:

- How to provide appropriate care and protection for children in detention
- How to recognize physical and behavioural indicators of abuse or neglect
- Reporting and notification procedures that apply in that state or territory
- The circumstances under which a staff member is required to intervene in family life when there are reasonable grounds to believe that a child is at risk of abuse or neglect, or that such abuse or neglect has occurred
- Required and appropriate information sharing among agencies that is in the interests of the child's safety

- How to assist families to perform their responsibilities in caring for and protecting their children
- The appropriate support of unaccompanied minors.

Child Safety Procedures

Consistent with the provisions in the South Australian MoU, the ACCG suggests that the following should be included in child safety procedures included within the MoUs developed with the States and Territories:

- The Department of Immigration and Border Protection (DIBP) must notify and refer all cases of suspected child abuse or neglect in immigration detention, to the relevant child protection authority in that state or territory.
- All staff employed, or working within immigration detention centres (DCBP and detention services private contractors, and external agency staff – including volunteers) must be required to notify Child Protection.
- If, after a person/child has been granted a visa and released from detention, a DCBP officer, detention services private contractor or external agency employee or volunteer suspects that abuse of a child has occurred whilst in detention, they must notify the child protection authority in that state or territory.
- The child protection authority will provide advice to the Minister for Immigration and to authorized independent monitors on the broad nature of abuse allegations for children in immigration detention.
- The child protection authority will provide advice and assessment on appropriate care arrangements for unaccompanied minors.
- In considering whether an unaccompanied minor meets the criteria for a visa, the DCBP will take into account any assessment made by the child protection authority regarding the best interests of the child.
- If an unaccompanied minor is granted a visa and released from detention, the child protection authority in that state or territory must ensure that appropriate arrangements are in place regarding the child's care and accommodation.

In summary, the mental health status of people held in often over-crowded immigration detention facilities increases the vulnerability of children and young people to abuse and neglect. Therefore it is imperative that there are clear policies and procedures, and appropriately qualified, trained and supported staff to manage the safety and wellbeing of children and young people in all immigration detention facilities, as a matter of the highest priority.

Provision of education, recreation, and maternal and infant health services

Consistent with the international human rights of children and young people (CROC), and relevant state or territory legislation, children and young people detained in immigration facilities must have access to appropriate education, recreation and health services. The intention of the international convention is that children's rights are universal and will apply wherever they live. Children should attend local play groups, kindergartens and schools for learning, to reduce social isolation and build community connections. This benefits the asylum seeker child and local communities, and eases transition into the broader Australian society. It is very important, however, that kindergartens and schools are appropriately resourced to effectively support the

needs of asylum seeker children who are likely to have limited proficiency in English, disrupted or little formal education, experience of trauma and limited understanding of Australian social mores. Students need computer and internet access to effectively undertake their studies, as well as access to a suitably resourced library, capacity to participate in collaborative student working groups, tutoring, excursions and support with home reading for younger students.

Recreational activity is crucial for the healthy development of children and even more so in environments that have a high burden of mental health issues. In addition to mitigating against mental health issues, recreation provides an opportunity to improve physical health, teamwork and integration into the Australian community. The Australian Government recognizes how important it is for children to participate in such activities through its provision of the Active After-School Communities (AASC) program. The AASC ensures primary school aged children are provided with access to free sport and other structured physical activity programs to promote a love of sport and physical activity in general. The key to the program is the involvement of the local community in the delivery of the program, with the aim of supporting and strengthening community cohesion and development. Given these benefits, it should be expected that DCBP would be keen to facilitate any recreational and community activities that could be offered to children and young people in detention, with appropriate resourcing including provision of uniforms and equipment.

The importance of maternal and child health services cannot be over-estimated. State and territory governments regard these services as an important platform for delivery of a range of health, development and parenting supports including referrals to other professionals and linking of families to the local community to reduce social isolation. It is often preferable if such visits can be made to the health centre for improved access to specialist equipment and professionals. Arrangements should also be made for children to access appropriate medical and disability aids and equipment as required. Parents in detention could also benefit greatly from access to the maternal and child phone service. When families are released into the community, the child health service nurse must be informed to ensure that an effective handover is made. This system operates in Victoria for those children who have been domiciled in prison with their mothers.

Parenting support and services are especially important for families who are dealing with trauma experiences and dislocation. The added impact of detention makes the need for cultural competence training essential for staff. It can be intimidating and distressing for parents negotiating the challenges of parenting in a new country that may have quite different traditions in relation to parenting norms and beliefs. Intergenerational tensions may also develop in situations when children and young people take on new roles and responsibilities, creating a power imbalance as parental authority is undermined. Anecdotal evidence suggests families from refugee and culturally and linguistically diverse backgrounds in the community may be over-represented in child protection statutory systems and in out of home care as a consequence of these factors.

Monitoring

The ACCG believe that there must be a system in place to monitor the provision of the services required by children and young people and their families in immigration

detention. The agency undertaking this monitoring role must have sufficient resources, be independent, and have access to the information required to undertake the role effectively. This monitoring function would need to include a process for service consumers to provide any complaints or feedback which is acted upon in a timely manner. National standards which must at least meet the minimum required for the state in which the facility is located, need to be developed to ensure consistency.

The separation of families across detention facilities in Australia

According to Article 9 of the CROC, a child is not to be separated from his or her parents against their will, unless it is in his/her best interests. Such situations may arise, for example, if a parent is mistreating or neglecting a child. Children whose parents have separated from each other have the right to stay in contact with both parents, unless this might harm the child. For families who have already experienced significant trauma in their journey to Australia, including great disruption of family relationships causing loss and grief, and potentially leading to mental health issues, even temporary separation may prove extremely distressing. It is known that promotion of healthy relationships between children and their parents or carers and other family members is critical to recovery from trauma and the ongoing healthy development of the child. Any further separation must be an option of absolute last resort. The importance placed upon maintaining family bonds wherever possible is reinforced by the state and territory child protection legislation that states there is a need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society, and to place siblings together if they are to be put in an alternative placement.

The guardianship of unaccompanied children in detention in Australia

The ACCG notes that the matter of the guardianship of unaccompanied children in detention has previously been raised in the *Joint Select Committee on Australia's Immigration Network* report of March 2012, which recommended that the Minister for Immigration be **replaced** under the *Immigration (Guardianship of Children) Act 1946*, as the guardian of unaccompanied minors arriving in Australia seeking permanent residence. However, the Australian Government did not accept this recommendation.

Concerns have regularly been raised in relation to the role of the Immigration Minister as the guardian for unaccompanied minors and the conflict of interest with detention and visa determination decisions. It is acknowledged that the guardianship duties of the Immigration Minister are delegated to departmental staff, but the independence of the guardian to act solely in the best interests of the child or young person is fundamental. The ACCG therefore strongly supports the establishment of an independent guardian for unaccompanied children and young people seeking asylum in Australia. Consideration needs to be given to determining an appropriate model for the role and functions of an independent guardian and the ACCG members would welcome the opportunity to work with the Australian Human Rights Commission to develop options that consider state and territory based legislative requirements.

The role of independent guardian needs to take into account that unaccompanied children and young people are especially vulnerable in environments where they lack the nurturing, support and guidance of family members. In recognition of this vulnerability, the development of an independent guardian's role could be guided by:

1. State and territory child protection legislation that is based on the best interests of the child and broadly requires that contact arrangements with parents, siblings and other family members is maintained, along with a connection to their culture, and support to gain access to appropriate educational services, health services and accommodation, and participation in appropriate social opportunities.
2. The principle that the education, training or employment of the child is also to continue without interruption or disturbance.
3. The section 16 1.(g) of the Victorian *Children, Youth and Families Act 2005* that specifies the Secretary of the Department of Human Services must provide, or arrange the provision of services to assist in supporting a person under the age of 21 years to gain the capacity make the transition to independent living when that young person has been in the custody or under the guardianship of the Secretary.

Assessments conducted prior to transferring children to be detained in ‘regional processing countries’

The ACCG is fundamentally opposed to the transfer of children to ‘regional processing countries’ where access to family members, connection to culture, access to appropriate educational services, health services, accommodation and appropriate social opportunities cannot be assured, thus failing the test of what is in the best interests of the child. In particular, the ACCG is very concerned that it may be proposed to transfer children to a country where their health needs cannot be met, potentially leading to serious illness, impairment or even death. Any health assessments conducted prior to decisions about transfers should therefore carefully consider what health and medical facilities are available to meet the child’s needs. Similarly, careful consideration must be given to any health or medical needs of the parent or carer of children, which if not addressed adequately, would impact upon the individual’s capacity to parent.

Progress that has been made during the 10 years

The ACCG was very pleased to see an increased use of community detention, particularly for families with children, for despite concerns about the level of support provided, this was seen as a much preferred alternative to holding families within detention facilities.

Conclusion

The re-introduction of ‘third country’ processing in 2012, including the transfer of asylum seekers to Nauru and Manus Island, and including the transfer of children from Australia to Nauru, is very concerning. In addition to a perpetuation of the issues associated with mandatory and indefinite detention, the inability to ascertain the conditions to which children are subjected in these facilities means that Commissioners and Guardians cannot be assured that children are receiving the care and support they require.

It would also seem that if unaccompanied children and young people are transferred to third countries they are no longer under the guardianship of the Minister for Immigration and Border Protection. It is unclear what the replacement guardianship arrangements are in these circumstances and is of great concern given the particular vulnerability of these children. Under most other circumstances, if a child is without a

guardian it is sufficient grounds for a protection application to be granted to ensure the child's safety.

The ACCG shares a strong belief that like Australian children, under Article 12 of the CROC, asylum seeker children and young people have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account.

ACCG members are cognisant that this Inquiry is being conducted at a time when the Royal Commission into Institutional Responses to Child Sexual Abuse and the Victorian Betrayal of Trust report have highlighted that a lack of independent oversight and monitoring of institutions which have the care of children have resulted in neglect, physical, sexual and emotional abuse of children going undetected, and that the harm the children have experienced can last a lifetime.

The ACCG is clear that as a signatory to the CROC, Australia has committed to:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

The mandatory and indefinite detention of children, young people and their families is not compatible with their best interests, and thus the continued use of mandatory detention remains contrary to Australia's obligations under the Convention.

Yours sincerely



Bernie Geary OAM

Principal Commissioner

Commission for Children and Young People (Victoria)

Convener Australian Children's Commissioners and Guardians

Att.

Signed on behalf of ACCG members:

- Mr Andrew Jackomos, Commissioner for Aboriginal Children and Young People, Victoria
- Ms Pam Simmons, Guardian for Children and Young People, South Australia
- Dr Howard Bath, Commissioner for Children and Young People, Northern Territory
- Mr Alasdair Roy, Children and Young People Commissioner, Australian Capital Territory
- Mr Steve Armitage, Principal Commissioner, Queensland Family and Child Commission

Attachment 1 Correspondence dated 11.10.13 from DIBP to the Victorian Commission for Children and Young People

7) Details of the procedures in place to notify child protection when staff or visitors observe behaviours or other indicators that may indicate sexual, physical and/or emotional abuse or neglect of children.

I can confirm there are agreed processes in place at the MITA to notify Child Protection of instances of suspected sexual, physical and/or emotional abuse or neglect of children. This includes all stakeholders, including the department, IHMS and the department's Detention Services Providers (Serco and Maximus). The process is outlined below.

- If staff or stakeholders become aware of any behaviours or other indicators that a child has suffered, or is at risk of suffering significant harm, a stakeholder meeting is held to discuss a course of action. The department aims to have this meeting on the same day the issue arose.
- Usually this process will involve a discussion of what information is already available and documented, and discussion of which stakeholders will be responsible for undertaking follow-up enquiries with clients, parents, witnesses or other staff or stakeholders, with a view to gaining relevant information to inform whether a notification to child protection or child FIRST is appropriate in the circumstances.
- Indicators might include a disclosure by a child about abuse or neglect or observations by staff or stakeholder of concerning behaviours suggesting the possibility of abuse or neglect.
- Once relevant follow-up enquiries have been conducted, another case conference is held to enable all stakeholders to be consulted and information shared. The second case conference is generally held on the same day the department become aware of the issue, depending on whether the necessary enquiries have been completed.
- If a belief is formed that a child has suffered or is at risk of harm, or there are doubts about the child's parent or guardian's ability to protect their child, that would prompt the department to make the notification to Child Protection or Child FIRST.
- The MITA Centre Manager is responsible for making the call to the appropriate agency, to make the necessary notification. The Centre Manager consults with their Director (Detention Operations Victoria), prior to making the notification.

