

ADDITIONAL OBSERVATIONS - AHRC DRAFT REPORT**1. GENERAL CONCERNS WITH METHODOLOGY**

The Australian Human Rights Commission (the Commission) has provided the Department of Immigration and Border Protection (Department) with a three week period (comprising 14 business days) to respond to the preliminary view of the facts raised in the draft Inquiry report. Despite this offer to provide the Department with sufficient time to comment on the draft report from a factual perspective, a commitment made repeatedly by the Commission during the course of the Inquiry, the brief period of time offered for the review has proved completely inadequate given the nature of the report that has been submitted.

The Department is concerned with the reliance on anonymous and de-identified quotations as credible supporting evidence throughout the report. While it is the prerogative of the individuals concerned to remain anonymous, the Department is concerned by the Commission's choice to publish these de-identified quotations so extensively, and its apparent choice to rely on these as evidence to support its findings.

In light of the limitations identified above, the Department offers the following thematic examples of the types of issues it has with the report, in lieu of countering each and every unsubstantiated claim that has been made, which would require some considerable time and which does not appear to be justifiable based on the scant legitimate evidence presented in the draft.

Example 1- Claims not affording procedural fairness right of reply: One such example appears on page 78 of the report, where an anonymous allegation is made, as follows, "*...if you don't calm down, we will get the police dogs onto you.*" No evidence is provided to support this claim. In point of fact, there are no police dogs on Christmas Island and they have never been contemplated. Such allegations should be raised as formal, individual complaints, affording a right of reply and the opportunity to appropriately investigate, rather than tarnishing the reputation of individuals and service providers without evidence to back up such claims. There are many similar claims made regarding misconduct of individuals, which also provide insufficient detail or context in order to allow proper investigation. The Department notes that as early as March 2014, the Commission had been formally requested to put any substantive evidence of misconduct directly to the Secretary. The Department notes that no such evidence has been advanced for the duration of the Inquiry and suggests that, given the role and standing of the Commission, it is irresponsible to advance such claims without having first sought to have their veracity investigated.

Example 2 – Untested claims and subjective observations: At the fourth public hearing of the Inquiry held in Canberra on 22 August 2014, the AHRC President stated that there are 'armed guards' at Immigration Detention Facilities in Australia. While the Department has refuted this claim on multiple occasions and has separately written to the President requesting that this statement be withdrawn or evidence offered in support, no such evidence has been advanced. The Department has profound concerns that many similar claims have been made and accepted, without supporting evidence, throughout the report.

Example 3 – Over reliance on the Commission's own experts: The draft report makes extensive reference to, and gives disproportionate weight to, the opinions and submissions of the medical consultants that were engaged by the Commission to attend the site visits. Without seeking to question the intentions and good standing of these highly qualified medical professionals and academics, the Department notes that their observations have often been made on the basis of cursory observations made during only brief visits to alternative places of detention. As the Commission notes, they did not conduct individual clinical assessments and nor did they engage in a health clinician/patient relationship with the children in detention. The Department notes that more rigorous testing of these observations would be required in order to effectively link these observational statements to findings of breaches of international law.

The Department further notes that the Commission has not afforded similar weight to the evidence provided by the health services provider (with some notable exceptions where the evidence supports the position taken by the Commission). The health services provider works directly with the individuals in question and its evidence should be afforded due consideration. The Commission has been afforded multiple opportunities to meet with the health services provider at its corporate headquarters and to speak with senior specialists involved in the delivery of services on site. It has been provided with extensive data on presentations of illness and treatment and has been provided with an open invitation to seek further information and advice.

For example, on page 75 of the draft report, Professor Elliott states that during a brief visit to Christmas Island, *"We witnessed many children with respiratory infection (including bronchiolitis in infants, probably due to respiratory syncytial virus) and there had been outbreaks of gastroenteritis. We repeatedly heard the refrain 'my kids are always sick'. ...Asthma is common in childhood and was a frequent diagnosis in the camps. This is not surprising as respiratory infection is the most common reason for exacerbation of asthma. Parents expressed concern that ... the onset of asthma may relate to the environment."* [This is the full quote as provided in the draft report. The editing is done by the Commission.] The Department notes that its health services provider has prepared an analysis of presentations to GPs by minors on Christmas Island based on the contemporaneous health records. It found that the reasons for consultation did not differ significantly from those in the Australian community, excepting a lower rate of presentations for respiratory illnesses. These figures have already been provided to the Commission. The health services provider notes that while viral illnesses do appear at times, there are very few respiratory conditions or respiratory infections requiring antibiotics at any time. As at 15 October 2014, three children under the age of 16 have asthma, out of a group of 107.

Example 4 – Little or no weight afforded to policy and procedure of the Department and its contracted services providers: While the Department has requested that appropriate steps be taken to protect operationally and commercially sensitive documents provided to the Commission for the purposes of the Inquiry, the Department is concerned to note that little weight or consideration appears to have been afforded to the extensive policy and procedural documentation provided in support of its management of health, care and welfare for families and children in immigration detention. In the course of making its preliminary findings, the Commission appears to have placed very little emphasis on the role of domestic law, policy and practice in addressing the needs of adults, families and children in immigration detention. Nor does it appear that the

Commission has made any real attempt to describe how the various policies and practices of the Department and its service providers contribute to the care and wellbeing of families and children.

One such example appears on page 81 of the draft report which states that food, recreation and the culture of detention facilities is determined by the detention services provider staff and that parents' autonomy is limited by this. In fact, the service provider's policy specifies that food and recreation plans are developed and informed by information gathered through the development of individual management plans both at induction and on a regular basis (within 14 days) as per Serco policy and Contract. This is further augmented through Detainee Consultative Committees and requests and feedback processes. The detention services provider also engages a qualified dietician to assist with food planning.

Further, the detention services provider has a range of policy frameworks and procedures designed to promote health and wellbeing including the Healthy Centre Framework and the Serco Care Model, which underpin Serco's compassionate approach to managing the immigration detention network on behalf of the Department. These are based on international best-practice principles in relation to child welfare and safety.

Example 5 – Dismissal of evidence provided to the Commission: One such example occurs on page 120 of the draft report, where the Commission reports that *"it is difficult to confirm the actual availability of child mental health specialists and services on Christmas Island, though all indications suggest that any provision from July 2013 to March 2014 was intermittent."* The Department is concerned to note that written advice provided to the Commission from International Health and Medical Services (IHMS) on 19 September 2014 does not appear to have been appropriately acknowledged in the report, which states:

Staff on Christmas Island with expertise in child and adolescent health

As you have seen, the health care at each site is provided by a multidisciplinary team of doctors, registered nurses, mental health nurses, psychologists, counsellors and visiting specialists. As at 17 August 2014, there were 66 IHMS health professionals on Christmas Island, including seven general practitioners. On Christmas Island, there has been a particular emphasis on including staff who have formal qualifications and experience in providing care for children and adolescents.

We have reviewed our records of staff deployments to Christmas Island for the period 1 July 2013 to 31 July 2014. On each day there have been both registered nurses and mental health nurses working with IHMS on Christmas Island who have formal qualifications in child and adolescent health. There have also been psychologists with formal qualifications in child and adolescent health working on Christmas Island for 366 of the 396 days of this period. Child and adolescent psychiatrists have visited in February and July 2014 and will continue to visit on a scheduled basis in addition to the monthly visits by the psychiatrist. Our staff are also able to speak with child and adolescent psychiatrists working in public or private practice for advice on particular cases on an as-needs basis and we use telehealth as necessary for consultations, as is the normal practice in remote Australia.

To the extent that the Commission is not prepared to accept the express advice of the Department and its service providers, this should be raised directly with the Department.

Example 6 – Generalisations and lack of a full context: The report appears to be rich with unsubstantiated generalisations. One such example appears on page 36 of the draft report, where it states "it has become common practice in Australia to hold people for indefinite periods." In addition to being inaccurate, this disregards the Department's Community Status Resolution approach, which works to resolve immigration status prior to the use of detention, and the work by the Department within the onshore compliance cohorts.

Example 7 – Misleading use of quotations: For one example of this, see page 65, where an anonymous detainee is quoted as saying, "*They gave her antidepressants even though she is pregnant. Then they said, 'just go back then if you don't like it'*" [no footnote]. Despite the Commission having a range of consultant medical specialists engaged for the purposes of the Inquiry, no comment is added to clarify that women who are pregnant can, depending on the circumstances, be prescribed antidepressants.

Example 8 – Expectations that the Department must refute claims made: The Department is particularly concerned by the selective presentation of information in the report. It appears that the Commission has advanced a prosecutorial case with the expectation that it is up to the Department to then find evidence to refute the claims made by the Commission. This is unacceptable. The Department is of the view that the Commission is obliged to investigate and test the facts of its claims, prior to advancing them in publication. Where information is contestable, or open to interpretation, it is the responsibility of the Commission, as the inquiring agency, to consider, evaluate and present a balanced view of the issue.

One such example appears at page 69 of the draft report, where the Commission reproduces information it had requested from the department regarding the number of new mothers who were diagnosed with a mental illnesses. The Commission then states this constitutes a mental illness rate of approximately 14 per cent amongst new mothers in detention. The Commission offers no information regarding the prevalence of mental illness in the Australian community by way of context. The following examples regarding the wider Australian community put this observation into some further context (and the Department would expect the Commission to present this type of additional and relevant context):

- *Data from the 2010 Australian National Infant Feeding Survey showed that one in five mothers of children aged 24 months or less had been diagnosed with depression. More than half of these mothers reported that their diagnosed depression was perinatal (that is, the depression was diagnosed from pregnancy until the child's first birthday). Further, of all the cases of diagnosed depression, just over one in five were diagnosed¹ for the first time during the perinatal period of the infant selected for the 2010 survey.*
- *Perinatal depression refers to depression that occurs during pregnancy or the postnatal period and affects 15-20 per cent of women in Australia. The childbearing years, especially the first few weeks after childbirth, are the peak period for the onset of depression in women. Perinatal depression varies with respect to symptoms, timing of onset, causes, risk factors, severity and duration. It can also vary² in the need for professional assessment and the type of treatment.*

¹ <http://www.blackdoginstitute.org.au/docs/Factsandfiguresaboutmentalhealthandmooddisorders.pdf>

- A new study by Murdoch Children's Research Institute has found almost one in six mothers with young infants who attended an emergency department suffered from post-natal depression, and many mothers hadn't been previously screened for the condition. Researchers at the Institute screened 200 mothers in the children's emergency department at The Royal Children's Hospital and found the incidence of post natal depression was 16%; more than double the reported 7.6% prevalence rate. Researchers also found that more than half (58%) of mothers hadn't been screened at their maternal health nurse or GP for post natal depression.³

2. SPECIFIC FEEDBACK AND TECHNICAL COMMENTS

The Department offers the following specific feedback and technical comments. Again, these do not represent a comprehensive analysis of the technical and factual accuracy of the report. While the Department has previously indicated its interest in reviewing the report for factual accuracy, the amount of information requiring verification and the limited references to sources make this unfeasible because of the way that the report is currently drafted and owing to the limited time afforded for review of such a lengthy document. Nevertheless, the Department offers the following observations:

1. The Department notes that some of the photos, proposed to be included by the Commission in the final report, clearly identify the faces of children. The Department requests that the President take the necessary steps to protect the privacy of these individuals.
2. The Department notes that the table provided on page 45, relating to persons with certain mental health conditions or impairments, provides a level of detail that may not afford reasonable privacy to those to which it makes reference. The Department asks that the President consider exercising her powers under the *Australian Human Rights Commission Act 1986* regarding the publication of such materials.
3. The Department notes that some of the information and data provided by the Department has been utilised by the Commission to create tables and to form the basis for the Commission's own statistical analysis. Owing to the complex nature of data and statistical reporting in the immigration detention context, it is the Department's preference that statistical responses and data sets should only be used to answer the original question. To the extent that the Commission elects to modify these answers, in presentation or through further analysis, the Department respectfully requests that the Commission:
 - a. checks that in all cases where data is used in the report that the appropriate caveats applied to the original data are included with the data when reproduced;
 - b. makes clear that it has used original responses for a separate (even if related) purpose;

² <http://www.blackdoginstitute.org.au/docs/DepressionduringPregnancyandthePostnatalPeriod.pdf>

³ <http://www.mcri.edu.au/news/2012/november/post-natal-depression/>

c. where data is re-presented in a new graphical form or where further analysis is undertaken, this is identified as such (eg – "Graph prepared by AHRC based on DIBP data" or "AHRC analysis of data provided by DIBP").

4. There are some specific examples where the Commission has attempted to devise a particular statistic (such as date of arrival) based on other information provided (including days in detention) and these methodologies are not always as straightforward as they appear. For example, the Department believes that the correct figures in relation to "Chart X: Children detained as at 31 March 2014 by month of arrival (May 2012 to March 2014)" on page 35-36 should be:

Of the 883 IMA children in detention at 31 March 2014, 442 arrived on or after 19 July 2013 who are subject to transfer to Nauru. Of these, 47 were unaccompanied minors at 31 March 2014.

AND

| Family Status | May-12 | Jun-12 | Jul-12 | Aug-12 | Sep-12 | Oct-12 | Nov-12 | Dec-12 |
|-------------------|--------|--------|--------|--------|--------|--------|--------|--------|
| Accompanied Minor | 9 | | - | - | 6 | 2 | 11 | 2 |
| UAM | - | | - | - | - | 1 | 1 | - |
| Total | 9 | - | - | - | 6 | 3 | 12 | 2 |

| Family Status | Jan-13 | Feb-13 | Mar-13 | Apr-13 | May-13 | Jun-13 | Jul-13 | Aug-13 | Sep-13 | Oct-13 | Nov-13 | Dec-13 | Total |
|-------------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|-------|
| Accompanied Minor | | 3 | 13 | 69 | 61 | 101 | 256 | 162 | 57 | 20 | 12 | 44 | 828 |
| UAM | | | 2 | 1 | | 2 | 10 | 14 | 8 | 3 | 6 | 7 | 55 |
| Total | - | 3 | 15 | 70 | 61 | 103 | 266 | 176 | 65 | 23 | 18 | 51 | 883 |

*Does not include 6 children who are not IMAs (eg visa overstayers, illegal foreign fishers and compliance caseloads).

**Based on Port Arrival Date, as recorded in DIBP systems, babies born in detention have an arrival date based on their mother.

5. The Department notes that there appears to be counting errors in the report, (for example, there has possibly been double counting of six individuals in the 'children in mainland detention' total at page 9), and encourages the Commission to review its numbers more generally.
6. As mentioned elsewhere in this response, the Department notes that it has made repeated invitations through the course of the Inquiry, both in conversation and in writing, to receive evidence of any allegations regarding a breach of the human rights of individuals in immigration detention or evidence of misconduct. The Department remains open to, and will investigate or refer to the appropriate authorities for investigation, any such evidence if presented, in accordance with established procedures.
7. Page 35 – The Department notes that the Minister is not the guardian of all unaccompanied minors.

8. Page 67 – The Department offers the following correction to information it had provided the Commission. The baby in question passed away on 15 October 2013. The Department notes that date of 1 April 2013 provided in a footnote to a request for information (at Schedule 2 Item 11) was incorrect.

3. GENERAL CONCERNS WITH FINDINGS IN DOMESTIC AND INTERNATIONAL LAW

It is the Department's view that the draft report does not provide the level of detail and legal analysis necessary to make the case for how the Commonwealth has breached any or all of the articles listed against those findings. While the body of the report details issues that the Commission has found during its Inquiry, it appears to lack further analysis regarding how these findings demonstrate a breach of international or domestic law. It is the Department's observation that this applies to the analysis of most of the alleged breaches of international law in the draft report, for all the cohorts of children discussed, including mothers and babies; pre-schoolers; primary school aged children; teenagers; unaccompanied minors and 'children indefinitely detained'. The Department remains open to receiving a clearer link between the evidence made available to the Commission, the Commission's impartial analysis of that evidence with a broader context, and the application of this, against what international law requires.

With respect to findings that the Department has breached Article 28(1) of the *Convention of the Rights of the Child*, the Department observes that there appears to be no acknowledgement by the Commission that this right is progressively realisable, a point particularly relevant when viewed in the context of the surge in irregular maritime arrivals in mid-2013 in particular. Again, the lack of context applied by the Commission in making its findings is of considerable concern to the Department, particularly if the final report is to be published and presented by the Commission to be a rigorous and independent investigation of immigration detention and evaluation of Australia's compliance with its legal obligations at domestic and international law.

At pages 55 and 56, the Commission indicates that the decision in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (Plaintiff S4) represents a change in the interpretation of domestic law that is "more in line with a prohibition on arbitrary detention". However, the department is of the view that Plaintiff S4 is consistent with previous High Court authority (including *Al-Kateb v Godwin & Ors* [2004] HCA 37). Plaintiff S4 is authority for the proposition that immigration detention is authorised whilst it is for a legitimate migration purpose, being to: remove or transfer the detainee; consider a visa application made by the detainee; or consider whether to allow the detainee to make a valid visa application (as in the case of Plaintiff S4). These processes must be undertaken 'as soon as reasonably practicable'. What period of time is 'as soon as reasonably practicable', will depend on the circumstances of each case.

At page 61, the Commission states that the Department "recognises that it has a duty of care to all people in immigration detention". The Department accepts that it owes a duty of care to individuals in held detention (see Department of Immigration and Border Protection, Submission 45, p13). In all other circumstances, whether a duty of care is owed will depend upon an assessment of a number of factors.