Australian Government

Department of Immigration and Border Protection

COPY

SECRETARY

10 November 2014

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

BY E-MAIL: president.ahrc@humanrights.gov.au

Dear Professor Gillian Triggs

The Forgotten Children: National Inquiry into Children in Immigration Detention 2014

Thank you for your correspondence of 31 October 2014, in which you provided the Department of Immigration and Border Protection (the Department) with the final findings and recommendations of *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* (the Inquiry).

I understand that, under section 29 of the *Australian Human Rights Commission Act 1986,* in referring your final report to the Attorney-General, you are to advise of any action, to your knowledge, that the relevant party has taken or is taking as a result of the findings and recommendations of the Inquiry. Accordingly, you have asked for my advice regarding any intended action by the Department in response to the Inquiry and its report.

On 3 October 2014, you provided the Department with the opportunity to respond to the preliminary findings of the Inquiry. On 13 October 2014, you also provided the Department with changes to your preliminary findings and some of the body of the draft report.

The Department provided its response to the preliminary findings and the draft report on 27 October 2014 in order to comply with the three week timeframe provided by the Commission. I note that the final report, now provided to the Department, newly incorporates a series of recommendations. I also note that some substantial changes have been made to the findings and that some changes have also been made to the body of the final report.

In its response to the draft report and preliminary findings, the Department has already identified a wide range of concerns regarding the manner in which evidence and information provided to the Inquiry has been evaluated and utilised and has provided the Commission with a range of thematic concerns, supported by specific examples. A copy of that response is enclosed at **Attachment A**.

Whilst the Department acknowledges that the Commission has made some substantial changes to the findings and has also made some changes to the final report, I note that these changes appear to only partially address the specific examples raised and do not appear to address the underpinning thematic issues which the examples were intended to illustrate.

With respect to the findings and recommendations of the final report, the Department notes that these primarily relate to the legal and policy settings for immigration detention in Australia and other government agencies. I expect that the Government will consider the final report, including its findings and recommendations, after it is tabled. Accordingly, where the recommendations provided in your final report are practical and consistent with government policy, the Department will continue to work with the Commission to implement these as appropriate.

You may also be interested to note that, effective today, 10 November 2014, the Department is establishing a Detention Assurance Team as part of an overall integrity and assurance framework being established across the portfolio. The role of this team will be primarily to act as a triage point and support commissioned inquiries, assess trends in allegations of inappropriate behaviour by the Department's service providers and their staff, recommend action where appropriate, and provide independent advice to the Secretary and Chief Executive Officer (CEO).

The Department would like to thank the Commission for the report which is a significant body of work and looks forward to a continued productive working relationship.

Yours sincerely

Michael Pezzullo

ATTACHMENT A

COPY

Australian Government

Department of Immigration and Border Protection

SECRETARY

27 October 2014

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

BY E-MAIL: president.ahrc@humanrights.gov.au

Dear Professor Triggs

National Inquiry into Children in Immigration Detention Preliminary Findings

I write with respect to your letter dated 3 October 2014 in which you provided the Department of Immigration and Border Protection (the Department) the opportunity to respond to the preliminary findings of the *National Inquiry into Children in Immigration Detention 2014* (the Inquiry). I also acknowledge your correspondence of 13 October 2014 in which you provided the Department with changes to your preliminary findings and some of the body of the report.

The Department has worked closely with the Australian Human Rights Commission (the Commission) Inquiry Team since the announcement of the Inquiry on 3 February 2014, including the provision of a dedicated, highly experienced Taskforce team to support the activities of the Inquiry, led by an SES officer. During the course of the Inquiry, the Department has:

- facilitated visits to five alternative places of immigration detention in which family and children may be held, including:
  - Sydney Immigration Residential Housing (IRH);
  - Christmas Island Immigration Detention Facilities (IDF) (twice);
  - Melbourne Immigration Transit Accommodation (ITA);
  - Inverbrackie Alternative Place of Detention (APOD); and
  - Darwin Immigration Detention Facilities (Bladin, Wickham Point and Darwin Airport Lodge);

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- attended each of the five public hearings, with formal appearances by the Minister for Immigration and Border Protection, the Hon Scott Morrison MP, and senior departmental officers including the then Secretary of the Department, Mr Martin Bowles PSM, at four of those hearings;

- provided the Inquiry team with detailed information on, and responses to, over 250 individual cases of concern raised with the department's Taskforce team, including information on health treatment, case management, care and welfare service provision, transfers, and accommodation;

- responded to three formal notices to produce under section 21 of the *Australian Human Rights Commission Act 1986*, through which the Commission has been provided with an extensive amount of information and documentation regarding immigration detention in Australia, including:

  - historical and current data on persons in immigration detention and on places of immigration detention in Australia;
  - the policy and procedure libraries of the Department and its contracted health and welfare service providers;
  - incident detail reports and individual case and health files;
  - reports provided to the Department by external scrutiny bodies; and
  - copies of the service provider contracts relating to the management of children.

In addition, the Department has provided a detailed written submission to the Inquiry, as have some departmental service providers. The Department has also facilitated a series of specialist meetings with the health services provider in order to provide the Inquiry with further information and assurances regarding the provision of primary and specialist health services, consistent with Australian community standards, both generally and in relation to specific individual cases.

The Visits and Inspection Programme

The Department acknowledges that the visits programme and the discussion of individual cases of concern with the Commission has, in particular, proved to be a practical and useful exercise. These are longstanding and welcomed functions of public scrutiny bodies, including the Commission, the Commonwealth Ombudsman and civil society organisations such as the Australian Red Cross. The Department values them greatly as an opportunity to receive a fresh perspective, to share information and expertise, to ensure transparency and accountability in an environment that is otherwise subject to operational security and privacy considerations and as an opportunity to share knowledge and expertise in the pursuit of practical and tangible suggestions for change and improvement.

Indeed, where the Commission has made practical suggestions and observations for improvement over the course of the Inquiry, the Department and its contracted service providers have been swift to respond, both with respect to concerns regarding the care and management of individuals and groups and with respect to systemic issues where these have been identified by the Commission (including improving services to new mothers on Christmas Island).

Throughout the course of the Inquiry, the Department has been open in acknowledging the impact to service delivery, on Christmas Island in particular, resulting from the unprecedented surge in illegal maritime arrivals (IMAs) from 2011 and up to the middle of 2013. As the Commission has itself noted in the draft report, this includes an unprecedented surge in the number of unaccompanied minors and families with young children during this period.

The Department has not sought to use this as a justification where inadequacies have been identified as a result – this is the reality of the situation following the surge. The Department and its services providers have, however, worked tirelessly to respond to these changed circumstances and were swift in most cases to commence work early on major infrastructure and systemic changes required as a result of the surge and changes in Government policy in response to this.

In the case of education services on Christmas Island, and as stated during the Inquiry's first public hearing, the Government acknowledged early on that action was required to address the increased numbers of children arriving. In its submission to the Inquiry, the Department noted that the Government had allocated $2.6 million in the 2014-15 Commonwealth budget to ensure that full time schooling is available to IMA children on Christmas Island. All school-aged children on Christmas Island are now provided with full-time schooling through a newly constructed learning centre, opened in July 2014 and run by the Western Australia Catholic Education Office. This is a welcome development for all concerned.

As mentioned above, the Department welcomes the involvement of public scrutiny bodies through site inspection and visits programmes and individual case analysis and the Commission's recent activities in this respect have been practically focussed and productive in terms of changes and improvements already made.

The Draft Report and Preliminary Findings

The Department has undergone a considerable cultural change over the past decade. It has continued to work closely with public and private sector stakeholders and scrutiny bodies and has introduced a range of innovative improvements, including the breadth of services delivered under the community detention programme, since the time the Commission's *A Last Resort? National Inquiry into Children in Immigration Detention* was published in 2004. That report represented a significant investigation into, and analysis of, Australia's laws and practices in relation to children who arrived in Australia without a valid visa and their treatment in Australia's immigration detention centres for the period covering 1999-2002.

The current draft report lacks objective reference to the considerable information and documentation that has been provided to the Commission by the Department and its contracted service providers. Where information provided by the Department has been used, this appears to have been selected in order to support the position taken by the Commission, rather than having been used to contribute to an accurate, balanced and contextualised description of the matters to be investigated.

The report appears to rely on subjective statements which are largely unverifiable by the Department. It appears to be selective in its use of information in support of its findings. The preliminary findings make broad statements regarding immigration detention and provide little clarity regarding the methodology that the Commission has used to collect and test its information in coming to those conclusions. Nor does the report make any specific and practical recommendations for improvement or change, beyond the immediate release of all children from held immigration detention.

I would encourage the Commission to revisit the draft report, in order to ensure that findings are based in objective, testable facts and that where allegations are published by the Commission, sufficient time and information has been provided in order to allow those allegations to be responded to by the affected parties. For its part, the Department is willing to continue to work closely with the Commission in furtherance of this goal.

With respect to the report and findings as drafted, I offer the following specific concerns which I believe prevent the Department from providing a thorough response on the information as presented:

- the report relies extensively on anonymous quotes, both from detainees and individual service provider staff, which cannot be objectively verified or corrected and which, by any fair measure, should not be extended to create general findings;

- the report does not take account of the context of the recent circumstances facing the Department and its contracted service providers, particularly with respect to the surge of IMAs from 2011 to mid-2013, which placed considerable strain on the resources of the Department and its service providers in the immediate term. The Department has discussed at length, with members of the Inquiry team, the various measures that were taken – as early as the mid-year financial outlook process in late 2013 – in order to respond to this pressure;

- the report does not take account of the fact that much of the 'evidence' provided by particular individuals was only relevant to a particular place and time, most notably, Christmas Island during the surge in 2013. The Department and the health services provider have gone to considerable lengths to demonstrate why this period of time is not, and has not been for some considerable time, indicative of current practice;

- the report does not take account of the extensive legal, policy, procedural and training requirements – all provided to the Commission during the course of the Inquiry – which guide departmental and service provider staff; and

- in the case of the chapter on Nauru, the Department understands that the Commission has no jurisdiction in Nauru and has not been invited by the Government of Nauru to visit its regional processing operations, which would be necessary if the Commission was to inspect these facilities. This has been the position of the Department for the duration of the Inquiry, a point made on multiple occasions in communication with the Commission.

  To the extent that the Commission has provided 'facts' and 'findings' with respect to regional processing, the Department notes that it has relied on second hand and third party information. Further, to the extent that the Department is familiar with the information the Commission has relied on as 'fact', it considers the Commission has done so in error. For example, the Department has tabled responses to the Joint Advisory Committee on Nauru Regional Processing Arrangements regarding a number of inaccuracies contained in the Health sub-committee's February 2014 Visit Report that has been circulated publicly.

I note that the Commission has made some efforts to conduct its own primary research, in the form of quantitative and qualitative surveys and through its own analysis of information provided by the Department as part of the Inquiry. This is problematic. The Department remains cautious about the weight that should be placed on self-identified, self-reported survey data, at the expense of other more robust academic literature. The Department is also circumspect about the Commission's use of its data and information to support its findings, without demonstrating how this source data has been modified through analysis by the Commission and without greater consideration of, and reference to, the fuller context from which the information has been drawn.

In light of the Department's extensive concerns regarding the rigour of this draft report and preliminary findings, it will not be possible for the Department to correct all of the factual errors and statements. Instead, I have provided some demonstrative examples of the Department's concerns against particular themes, along with some specific and technical points of correction, in the attachment to this response (**Attachment A**).

With respect to the specific findings made by the Commission in relation to Australia's domestic and international legal obligations, I will only observe that the Commonwealth and the Commission have a long history of difference on this particular point. It is the view of the Government that detainees are provided with appropriate care, support and services, are

treated with dignity and respect and have their claims addressed as soon as is reasonably practicable and consistent with current policy settings.

I would encourage the Commission to consider any specific, practical recommendations that the Commission might seek to make in the publication of the final report, in order to continue the improvement of the Department's management of immigration detention arrangements.

I would also encourage the Commission to include an updated section in the report to better reflect the fact that the Government continues to work toward the release of families and children from held detention arrangements through the arrangements announced by the Minister in August this year for the release of families with children under ten years old on Bridging Visas and, if passed, through the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* which will mean that the processing of asylum claims can commence for those IMAs, currently on Christmas Island and the mainland, who arrived before 1 January 2014.

I thank you for this opportunity to make comment on the draft report and the Department looks forward to an ongoing productive relationship with the Commission.

I would also like to thank the officers of the Department and its contracted service providers for their tireless efforts and dedicated professionalism. They work together in challenging circumstances to provide a high standard of care and support for all people in immigration detention. I would also like to thank the many officers who have been involved in responding to the requests of the Inquiry over the last eight months.

Finally, I would like to extend a special thanks to the Department's Taskforce to the Inquiry led by Ms Katie Constantinou and supported by Mr Daniel Caldwell, Ms Caroline Hatswell and Mr Mark Buick. I am confident you will agree that the Department has offered the Inquiry a highly responsive and capable support team.

Yours sincerely

Michael Pezzullo

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 diagnosed for the first time during the perinatal period of the infant selected for the 2010 survey.*[1]

- *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,*

[1] http://www.blackdoginstitute.org.au/docs/Factsandfiguresaboutmentalhealthandmooddisorders.pdf

severity and duration. It can also vary in the need for professional assessment and the type of treatment.[2]

- *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 <u>all</u> 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.