

**Report of Justice P. N. Bhagwati, Regional Advisor for Asia and the Pacific of the
United Nations High Commissioner for Human Rights**

Mission to Australia 24 May to 2 June 2002

Human Rights and Immigration Detention in Australia

I. Introduction

1. From 24 May to 2 June 2002, Justice P.N. Bhagwati, Former Chief Justice of India, undertook a mission to Australia on behalf of the United Nations High Commissioner for Human Rights, Mrs. Mary Robinson. The purpose of the mission was to look at and report on human rights issues with regard to the treatment of asylum seekers currently in detention in Australia, with a specific focus on Woomera Immigration Reception and Processing Centre (IRPC) in Southern Australia.

2. On 4 February 2002, during a meeting in Geneva with the Minister for Foreign Affairs of Australia, Mr. Alexander Downer, the High Commissioner expressed concern about the human rights situation of persons detained in Woomera IRPC in Southern Australia. In this context, the High Commissioner requested that the Australian Government accept a visit of her Regional Advisor for Asia and the Pacific, Justice Bhagwati, to look into the conditions of detention and report back to her.

3. The Australian Government subsequently accepted the request of the High Commissioner. In a letter received on 11 February 2002, Mr. Downer informed the High Commissioner that following discussions “with my Cabinet colleagues, I am pleased to advise that we would be ready to accept a visit by a special envoy as part of the planned visit by the Working Group on Arbitrary Detention.” At this stage the Government of Australia had already accepted the visit by the Working Group of the Commission on Human Rights on Arbitrary Detention (WGAD), which was scheduled to take place between May and August.

4. Following contacts between the Office of the High Commissioner for Human Rights and the Australian Permanent Mission to the United Nations Office at Geneva, Justice Bhagwati addressed a letter on 6 May to the Permanent Representative, Ambassador Michael Smith, which briefly outlined the purpose of the mission. In the letter, Justice Bhagwati pointed out that following “discussions between the High Commissioner and the Australian Foreign Minister, HE Mr. Alexander Downer during his visit to Geneva in February, the High Commissioner has asked me to look at, and report back to her on, human rights issues relating to the treatment of persons seeking asylum in Australia who are currently in detention, with particular reference to the situation of those detained in Woomera”.

5. The letter further clarifies the mandate of Justice Bhagwati: “As the High Commissioner’s Regional Advisor for Asia and the Pacific and, for the purposes of the visit, her personal envoy, I will be acting within the terms of her mandate as United Nations High Commissioner for Human Rights.”

6. The mandate of the High Commissioner was adopted by General Assembly resolution 48/141 of 20 December 1993, and, inter alia, states that the High Commissioner shall: “Function within the framework of the Charter of the United Nations, the Universal Declaration of Human Rights, other international instruments of human rights and international law, including the obligations, within this framework, to respect the sovereignty, territorial integrity and domestic jurisdiction of States and to promote the universal respect for and observance of all human rights, in the recognition that, in the framework of the purposes and principles of the Charter, the promotion and protection of all human rights is a legitimate concern of the international community;” (Article 3 a) and “[be] guided by the recognition that all human rights - civil, cultural, economic, political and social - are universal, indivisible, interdependent and interrelated and that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms” (Article 3 b). The resolution further states that the High

Commissioner's responsibilities shall be: “(a) To promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights;” (Article 4 a).

7. The mandate of WGAD is mainly limited to investigations “of cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards”. In other words, with regard to the visit to Australia, the task of WGAD would be to assess whether any particular form or instance of immigration detention is imposed in an arbitrary manner. In this sense, and for the purpose of the mission to Australia, an informal division of labour was established between Justice Bhagwati and WGAD: While the main focus of WGAD would be to look into the specific legal aspects regarding the possible arbitrariness of the detention of asylum seekers, the main focus of Justice Bhagwati would be the human rights issues related to the conditions in detention.

8. In view of the specific nature of the mandate, the present report is mainly focusing on the human rights issues related to the *conditions of detention* and the *treatment of persons* in the immigration detention facilities, and will not focus in detail on the issue of the legality of the detention itself, i.e. it will not address the question whether Australian policy of detaining unlawful non-citizens could be considered as arbitrary detention. Nor will it enter into specific refugee law related issues, such as the appropriateness of the Australian refugee determination procedure, or any other matters directly related to the 1951 Convention relating to the Status of Refugees and the mandate of the United Nations High Commissioner for Refugees. However, some areas of overlap do exist, and might therefore have to be addressed in the report.

9. It should be stressed that this report is based on a brief mission to Australia, which included a one day visit to Woomera, and as such it does not claim to present a complete picture of the human rights situation of persons in immigration detention, but rather, its purpose is to describe some of the human rights concerns identified by Justice Bhagwati during his mission.

10. It should also be noted that on 18 July 2002 the High Commissioner provided the Government of Australia with an advance copy of this report, and she indicated that she

“would welcome observations by the Government of Australia regarding any possible factual errors by Friday 26 July”. By letter dated 26 July 2002 the Minister for Foreign Affairs of Australia provided the High Commissioner with his comments on the report and forwarded a 12 page note prepared by the Government containing comments to specific sections of the advance copy of the report. The comments were forwarded to Justice Bhagwati, who has sought to incorporate these comments in as far as they relate to corrections of any factual errors contained in the advance copy.

Itinerary

11. Following consultations with the Government of Australia, it was agreed that the mission of Justice Bhagwati would take place from 24 May to 2 June 2002, which would coincide with the timing of the mission of the WGAD. According to the request of the High Commissioner, it was agreed that Justice Bhagwati would visit the detention facilities in Woomera, as this had been the main subject of the discussions between the High Commissioner and Mr. Downer. Upon the request of the Government, it was also agreed that the mission would include a visit to the new facility in Baxter, South Australia, which would be operational shortly, but at the time of the visit would not house any detainees. As indicated by the Government of Australia, the visits to Woomera and Baxter would be undertaken together with WGAD. Given that the mandate of the two missions were somewhat distinct, it was also agreed that meetings with Government Ministers and Officials would be scheduled separately.

12. During the mission, Justice Bhagwati met with the Regional Representative of the United Nations High Commissioner for Refugees, as well as the President of the National UNICEF Committee of Australia. As a matter of principle, at all stages of the mission, as well as prior to departure and upon return, Justice Bhagwati sought to maintain close contact with various United Nations partners with regard to the issue of immigration detention.

13. Justice Bhagwati had a meeting with the Human Rights and Equal Opportunity Commission of Australia (HREOC), including its President, Ms. Alice Tay and Dr. Sev

Ozdowski, Human Rights Commissioner. Dr. Ozdowski had the opportunity to brief Justice Bhagwati in detail about the Inquiry into Children in Immigration Detention, which is currently being undertaken by the Commission. In this regard it should be noted, that Justice Bhagwati had access to many of the submissions to HREOC by a broad range of actors and organisations, including governmental sources, which provided rich and detailed background information material¹.

14. Justice Bhagwati also had meetings with a large number of civil society actors and organisations who were consulted in order to obtain additional background information. In this context he met with representatives of the Australian Refugee Council, the United Nations Association of Australia, the National Council of Churches, the Council on Human Rights of Australia, the Catholic Commission for Justice, Peace and Development, the Refugee and Immigration Legal Centre, Amnesty International Australia, the Victorian Foundation for Survivors of Torture, Suicide Prevention Australia, and others. Justice Bhagwati also had meetings and consultations with various lawyers, including the Woomera Lawyers Group, Mr. Julian Burnside, and Mr. John Pace of the University of New South Wales.

15. Justice Bhagwati also had the opportunity to consult with individuals who had previously been in immigration detention in Australia.

16. On 28 May Justice Bhagwati and WGAD jointly visited the detention facilities in Woomera as well as the new centre being prepared in Baxter close to Port Augusta. In Woomera the centre management, Australian Correctional Management (ACM), and the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) provided Justice Bhagwati with background information about the facilities. Justice Bhagwati also had the opportunity to inspect the various facilities and have private discussions with persons in detention, including children. During all conversations and interviews with persons in detention, Justice Bhagwati again and again made it absolutely clear that he had no authority whatsoever to decide on applications for visas and that he had no authority to release individuals from detention. He always stressed that his mandate was limited to

¹ Many of the submission can be found on the internet at http://www.humanrights.gov.au/human_rights/children_detention/submissions/index.html#legal

examining the human rights situation of persons in detention and to report back to the United Nations High Commissioner for Human Rights.

17. On 30 and 31 May Justice Bhagwati had a series of meetings in Canberra. He met with the Minister for Foreign Affairs, Hon. Alexander Downer, the Minister for Immigration and Multicultural and Indigenous Affairs, Hon. Philip Ruddock, and the Attorney-General, Hon. Daryl Williams. He also had a series of meetings with senior Government officials, during which he presented some of his preliminary concerns and had the opportunity to discuss the issues in further detail. A separate meeting was also organised with three members of the Immigration Detention Advisory Group (IDAG), which is an independent body providing advice to the Minister for Immigration and Multicultural and Indigenous Affairs.

Acknowledgments

18. Justice Bhagwati is deeply appreciative of the cooperation extended by Mr. Downer, Mr. Ruddock, Mr. Williams and the Government Officials in furnishing whatever information was requested and in engaging in discussion and offering their views on behalf of the Government. During the visit to Woomera IRPC, both DIMIA officials and ACM officials were very helpful in accommodating the various requests put forward, and at no time was access to any given site of the centre denied.

19. Justice Bhagwati also wishes to thank HREOC for the thorough briefing provided during the meeting in Sydney. Justice Bhagwati is very grateful for the good cooperation with the Regional Representative of UNHCR, and also wishes to thank the staff of the United Nations Information Centre in Sydney, who provided invaluable support in preparing and conducting the mission. Justice Bhagwati also wishes to thank the broad range of NGO representatives and individuals who provided him with very useful background information. Most of all, however, Justice Bhagwati wishes to thank all the persons in immigration detention with whom he had the opportunity to discuss their human rights situation.

II. General Impression

20. Justice Bhagwati was considerably distressed by what he saw and heard in Woomera IRPC. He met men, women and children who had been in detention for several months, some of them even for one or two years. They were prisoners without having committed any offence. Their only fault was that they had left their native home and sought to find refuge or a better life on the Australian soil. In virtual prison-like conditions in the detention centre, they lived initially in the hope that soon their incarceration will come to an end but with the passage of time, the hope gave way to despair. When Justice Bhagwati met the detainees, some of them broke down. He could see despair on their faces. He felt that he was in front of a great human tragedy. He saw young boys and girls, who instead of breathing the fresh air of freedom, were confined behind spiked iron bars with gates barred and locked preventing them from going out and playing and running in the open fields. He saw gloom on their faces instead of the joy of youth. These children were growing up in an environment, which affected their physical and mental growth and many of them were traumatized and led to harm themselves in utter despair.

III. Legal Framework, Immigration Detention Standards & Statistical Data

International Legal Framework²

21. As noted above, the purpose of the mission was to look into the “human rights issues relating to the treatment of persons seeking asylum in Australia who are currently in detention”, and, in particular, the detention conditions. From the perspective of international human rights law, the essential international human rights instruments are the following: The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, The Convention on the Elimination of All Forms of Discrimination against Women, and The Convention on the Elimination of All Forms of Racial Discrimination.

² The texts of the international human rights instruments can be found on the internet at <http://www.unhchr.ch>

Australia is a state party to all six instruments and as such the provisions of the instruments are legally binding upon Australia.

22. In addition to these legally binding instruments, some additional points of reference also need to be mentioned, namely: The Universal Declaration on Human Rights, adopted by the General Assembly on 10 December 1948, which together with two International Covenants, is considered as the International Bill of Human Rights. With regard to detention, there is at least one body of principles which is relevant, namely the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which was adopted by General Assembly resolution 43/173 of 9 December 1988. While these instruments are not legally binding upon Australia, they nevertheless, as principles adopted by the General Assembly, represent standards which broadly reflect the consensus of the international community.

23. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provide that all persons under any form of detention or imprisonment must be treated with respect for their human dignity. They deal with issues such as treatment and discipline; contact with the outside world; health; classification and separation; complaints; records; work and recreation; and religion and culture.

24. Furthermore, Australia is a state party to the 1951 Convention relating to the Status of Refugees as well as its 1967 Protocol, which are specifically relevant in this context. However, for the purposes of this report, the provisions of this Convention have not been considered, as they relate directly to the mandate of the United Nations High Commissioner for Refugees.³

Australian Legal Framework⁴

³ UNHCR's position with regard to detention of asylum seekers is set out in *UNCHR Revised Guidelines on Detention of Asylum Seekers*, of February 1999, which can be found on the internet at <http://www.unhcr.ch>

⁴ This sub-section is based extensively on briefing notes provided by the Government of Australia to Justice Bhagwati, which can to some extent also be found in the submission of DIMIA to the HREOC Inquiry into Children in Detention at <http://www.dima.gov.au/illegals/hreoc/index.htm>. It is also based on fact sheets produced by DIMIA, available on the internet on <http://www.immi.gov.au>.

25. The Government of Australia has repeatedly affirmed that its approach to immigration detention is “informed by its international obligations and it complies with these treaties insofar as they have been incorporated into Australian domestic law”⁵. Under Australian law, international treaties ratified by Australia are not automatically self-executing in domestic law. However, the Government pointed out to Justice Bhagwati, that it was of the view that Australia legislation regarding immigration detention is in conformity with Australia’s obligations under the international human rights treaties ratified by Australia.

26. The main domestic piece of legislation with regard to immigration detention is the Australian Migration Act of 1958 and subsequent amendments (the Act)⁶. Since September 1994 the Act has required that all non-citizens who are unlawfully in Australia must be detained. The detention requirement continues until the person is determined to have a lawful reason to remain in Australia or is removed from Australia⁷. Once detained, unlawful non-citizens are to be kept in detention until they are granted a visa or they are deported or removed from Australia. The Act applies to all unlawful non-citizens, regardless of their age, sex, nationality or any other status.

27. Immigration detention is defined in the Act as being in the company of, and restrained by, an officer or any other person as directed by the Secretary of DIMIA, or being held by or on behalf of an officer in: a detention centre established under the Act; a State or Territory prison or remand centre; a police station or watch house; a vessel; or any other place approved by the Minister in writing.

28. According to the information provided by the Government, those detained include people who have:

⁵ Extract from Exposure Draft of a Request for Tender to provide Immigration Detention Services, p 5 (Provided to Justice Bhagwati by DIMIA).

⁶ The Migration Act of 1958 can be found on the internet at <http://scaletext.law.gov.au/cgi-bin/download.pl?/scale/data/pasteact/0/436>

⁷ As a result of amendments to the Migration Act in September 2001, certain areas of the Australian territory were declared to be excised offshore places. At present, these places include the territories of Christmas Island, Cocos Islands, and Ashmore and Cartier Islands. A person landing in an unauthorized manner in an excised offshore place is not permitted to apply for a visa under the Migration Act. There are, however, mechanisms for assessing asylum claims these persons may have. This issue is not dealt with in the present report, as it falls outside its scope and purpose.

- arrived in Australia without a visa. This includes people who arrived with the intention of making claims which, prima facie, may engage Australia's protection obligations, as also those who do not apply for a visa and do not make claims
- arrived without an acceptable visa or travel document, including with visas obtained on the basis of false claims or false identity;
- overstayed their visa, or had their visa cancelled as a result of breaching the conditions of the visa, and are awaiting travel arrangements to be made for their departure from Australia.

29. The Act provides that persons in immigration detention shall, upon request, be afforded all reasonable facilities for making a statutory declaration for the purposes of the Act or for obtaining legal advice or taking legal proceedings in relation to their detention. DIMIA states that it complies with its obligation under the Act by affording all reasonable facilities for obtaining legal advice at the request of a person in immigration detention.

30. In some cases, the Minister can issue a so-called Bridging Visa to “eligible non-citizens” which provides for the release from detention pending the processing of a visa application.

31. In addition, other State and Territory legislation and regulations, Ministerial Directions, departmental policies and procedures, memorandums of understanding, and other similar documents also form part of the legal framework governing immigration detention.

32. According to the Government, in Australia there are currently 7 operational facilities of detention which are covered by the regular provisions of the Act. These are the following:

Curtin, Western Australia (To be closed)

Maribyrnong, Victoria

Perth, Western Australia

Port Hedland, Western Australia

Villawood, New South Wales

Woomera, South Australia

Woomera Residential Housing Project, South Australia

33. There is also a new facility in Baxter, Southern Australia , which is in the process of becoming operational. In addition, two facilities currently exist in excised offshore places. These are the facilities at Christmas Island and Cocos Island (the latter is not operational). A person landing in an unauthorized manner in an excised offshore place is not permitted to apply for a visa under the Migration Act. There are, however, mechanisms for assessing asylum claims these persons may have.

34. The operation of the detention facilities has been outsourced to private companies under a public tender scheme. The current service provider is a private company called Australian Correctional Management (ACM).

35. DIMIA has promulgated a set of standards, the Immigration Detention Standards (IDS) that regulate the conditions required to be observed by the Service Provider in the provision of services in detention centres. Justice Bhagwati was provided with the IDS effective 27 February 1998. However, Justice Bhagwati was also provided with a text entitled *Extract from Exposure Draft of a Request for Tender to provide Immigration Detention Services*, which included excerpts from a revised set of IDS. It was only subsequently, in June 2002, that DIMIA released the new IDS in connection with a request for tender for a new service provider contract. Justice Bhagwati finds it unfortunate that he was not briefed more comprehensively about the new IDS.

36. The new IDS (June 2002) stipulate, inter alia, that “Australia’s international obligations, such as those relating to human rights, inform the approach to delivery of the detention function”. The new IDS represent considerably developed standards in comparison to the 1998 standards, and contain a long and very detailed list of standards and corresponding “Performance Measure” indicators. The IDS contain, inter alia, standards relating to education, health, security, access to information, visits, complaint mechanisms, as well as very detailed standards relating to the competence and authority of

and restrictions on the staff of the detention centres. It would appear that serious efforts have been invested in the drafting of the revised IDS, which, it would seem, seek to address many of the points of criticism previously put forward by outside observers⁸. At this stage however, it is not possible to make any comments as to how these principles will actually be implemented, as they are not yet binding on the current service provider ACM, but will come into effect later this year, when a new contract is expected to be signed.

37. With regard to the numbers of persons in immigration detention, according to the information provided by the Government, as at 3 May 2002 there were 1,495 persons in immigration detention. This figure includes 181 women, 1144 men, 65 female minors and 105 male minors. Of these, 765 were unauthorized boat arrivals, 110 unauthorized air arrivals, 88 unauthorized boat arrivals in offshore detention facilities, 323 Visa Overstayers and 209 others (e.g. visa breaches.) Out of the total number, five persons were unaccompanied minors. According to the relevant legislation, the Minister for Immigration is the legal guardian of some of the unaccompanied minors (e.g. the Minister is not the guardian of an unaccompanied minor with an adult relative, such as an uncle or aunt, in immigration detention).⁹

38. Woomera IRPC and Woomera Alternate had a total of 228 detainees, 12 of whom were in Woomera Alternate, which is a pilot project for alternative detention for women and children which is located in a number of houses in Woomera town proper.

39. With regard to the facilities and conditions in the centres, the Government provided Justice Bhagwati with a 29 page note regarding improvements in the conditions at the various detention facilities which have been progressively implemented.

IV. Issues of Concern Identified and Discussed During the Mission

40. This section highlights key human rights issues of concern identified by Justice Bhagwati during his mission. As mentioned earlier, these concerns do not relate to the

⁸ The new IDS can be found on the internet at http://www.immi.gov.au/tenders/detention_strategy/part4.pdf

⁹ On 26 July the Government provided the following information: As at 19 July 2002, there were 1334 people in detention, comprising 1,016 adult males, 171 adult females, 85 male minors and 62 female minors.

refugee status determination procedure. Moreover, this listing of human rights concerns does not purport to be exhaustive, as it is based exclusively on the information gathered during this particular mission.

41. Many of these concerns were discussed with various representatives of the Government of Australia, to which reference has been made earlier in this report. The views expressed by the Government have been taken into consideration by Justice Bhagwati in preparing this report.

42. In the context of this mission certain provisions of international human rights instruments are particularly relevant (all of these instruments have been ratified by Australia): Article 9 of the International Covenant on Civil and Political Rights and Article 37 of the Convention on the Rights of the Child prohibit arbitrary detention. Article 2 of the International Covenant on Civil and Political Rights and article 2 of the International Covenant on Economic, Social and Cultural Rights, contain a general non-discrimination clause with regard to the rights contained in the Covenants. Article 7 of the International Covenant on Civil and Political Rights, article 37 of the Convention on the Rights of the Child and, more comprehensively, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, prohibit torture and all cruel, inhuman and degrading treatment and punishment. With regard to the general conditions of detention, Article 10 of the International Covenant on Civil and Political Rights and article 37 of the Convention on the Rights of the Child, which require that detained persons be treated with humanity and respect for human dignity are also relevant. These are some of the internationally recognised human rights standards which must inform the analysis of the situation of persons in immigration detention.

43. Among the human rights issues of concern Justice Bhagwati would like to highlight the following:

44. **A. Long periods spent in detention** is identified as one major issue of concern. In Woomera, Justice Bhagwati met with a number of individuals who had been in detention for several months, often exceeding 12 months, and sometimes considerably more. The

Government did not provide any statistical information relating to time spent in immigration detention. It did, however, point out that for most persons immigration detention does not exceed 3 months.

45. It would appear that detention for unduly long periods of time is sometimes due to complications in the refugee status determination procedure itself, and sometimes due to lengthy and cumbersome appeal procedures and unnecessary delays in disposal of the proceedings. Furthermore such extended and often seemingly open-ended detention appears to cause great distress and psychological trauma to several persons in detention in Woomera. Justice Bhagwati witnessed several persons who had committed acts of self-harm, such as slicing of wrists as well as stitching of lips.

46. **B.** Some persons, who have been assessed by the Refugee Review Tribunal to meet the criteria set out in Article 1A of the 1951 Convention relating to the Status of Refugees, remain in detention for several months as DIMIA completes consideration of the refugee status of the individual, taking into account security and other character matters. This is, according to Government information, most often due to problems with regard to security checks on persons who have transited through countries other than their own prior to arrival in Australia. The explanation given by the Government does not appear to be satisfactory, because whatever inquiries were to be made regarding security and other character matters could have been made before the assessment by the Refugee Review Tribunal. This continued detention appears to contribute to additional distress and trauma.

47. **C.** Another category of persons whose detention is causing concern is the group of people who have exhausted all remedies, and whose application for a visa has been finally rejected, but who, for various – sometimes technical - reasons, cannot be returned to their country of origin, and thus remain in detention. While this category of persons have clearly been identified not to be in need of protection (whether under the 1951 Convention or other relevant human rights instruments, such as the Convention Against Torture), and they might even be willing to return home, if this in fact were possible, they are not in a position to do so, as currently no feasible method of returning these people has been identified. While the Government stresses that it endeavours to identify suitable solutions

for removal of these persons, the continued detention prior to removal would from a human rights perspective appear unwarranted.

48. **D.** The lack of proper judicial review of the detention itself. Article 9 of the International Covenant on Civil and Political Rights and article 37 of the Convention on the Rights of the Child recognise the right to take legal proceedings to challenge the lawfulness of the detention. While the challenge before the court is in theory possible – persons in immigration detention do have the ability to challenge the lawfulness of their detention under domestic law - , the simple fact that the Act stipulates that all unlawful non-citizens must be detained, restricts the courts from reviewing the decision to detain. Moreover the power of judicial review has subsequently been considerably limited by amendments made to the Act.

49. **E.** The issue of family unity and family life as protected by Article 23 of the International Covenant on Civil and Political Rights, article 10 of the International Covenant on Economic, Social and Cultural Rights and article 18 of the Convention on the Rights of the Child is of particular concern. Families in detention are sometimes separated (e.g. in the Woomera family housing project, where wife and children are living in Woomera town, while the husband is detained in the centre), which, instead of providing adequate care to families, in fact appears to introduce another element of distress. While the efforts of the Government to provide alternate and more humane places of detention, such as Woomera Alternate, have to be recognized, it appears questionable whether the separation of families is advisable, even if the participation in the family housing project is completely voluntary.

50. Recent amendments to the Act provide that persons who have arrived in the country illegally, and who have subsequently been found to be refugees, will be granted a Temporary Protection Visa. In contradistinction to refugees who have arrived legally and are granted a Permanent Protection Visa and are thus entitled to family reunification, refugees who arrive illegally and are granted a Temporary Protection Visa do not have the right to family reunification. In some cases this has led to particularly unfortunate situations where other members of the family have arrived illegally. If the arrival of the

remainder of the family occurs after a certain time following the arrival of the first family member, the remainder of the family has to undergo an individual refugee status determination procedure. This has resulted, in a few cases, in very unfortunate situations where the members of the family are present in Australia at the same time, but some are in detention and others are not.

51. **F.** Justice Bhagwati was also concerned about the situation of children in detention. The relevant international provisions are: Article 37 of the Convention on the Rights of the Child which prohibits detention of children except as a last resort and for the shortest appropriate period of time. Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights and article 28 of the Convention on the Rights of the Child, recognise children's right to education.

52. From a human rights point of view, the detention of children in the context of immigration procedures is certainly contrary to international standards. But even from a practical point of view this would be undesirable as the children would be growing up in a detention centre enclosed by spiked iron bars in surroundings hardly conducive to the healthy growth of a child. While, in most cases, the parents of these children carry the main responsibility for ensuring the well-being of the children, and as such are to some extent responsible for the plight of the children, it would nevertheless appear obvious that detention of children for immigration purposes is not in their best interest. In Woomera, Justice Bhagwati spoke to several children who had spent several months, sometimes years in detention. Most children appeared seriously traumatized, and severely affected by a culture of self-harm (e.g. slicing of wrists and suicide threats) out of a sense of desperation. With regard to education services, while children are in fact given access to education to some extent, it would appear that, at least in Woomera detention centre, the education services are at best wholly inadequate.

53. **G.** Furthermore the policy of detaining unaccompanied minors also appears seriously flawed and must be regarded as totally unacceptable from a human rights perspective. A particular issue of concern is the fact that the Minister for Immigration is both the

“detainer” and the guardian, which represents a serious conflict of interest¹⁰.

54. **H.** It was also the impression of Justice Bhagwati that more could be done to ensure that persons in detention do receive appropriate, concise and regular information about their rights. In some cases it was felt that accessing legal aid with regard to complaints about treatment and conditions in the detention centres presented a genuine difficulty.

55. NGOs, lawyers and psychologists pointed out to Justice Bhagwati that they had sometimes had difficulties in entering the detention centres to speak with clients or patients. HREOC and lawyers can visit only if they receive a specific request from a detainee. Other organizations have to request the permission of the Minister before conducting a visit. The only organ which has unfettered access and can conduct unannounced visits is the Immigration Detention Advisory Group (IDAG) which, although independent, reports directly to the Minister. It would appear that a properly structured scheme could be developed which would ensure easier access to legal aid services and appropriately provide persons in detention with information about their rights.

56. **I.** Individuals in so-called “separation detention” are subject of particular concern. These are persons, who have been “screened-out” in the initial assessment phase, and are not considered as asylum seekers, since they have not made any claims which might engage Australia’s protection obligations under international refugee and human rights laws. Section 4.3 of the 2002 IDS severely restricts individuals’ access to communication with other persons in Australia. Consequently these persons might be seriously handicapped on account of ignorance about their rights and might, at the same time, quite possibly fall within the category of people who are most in need of information about their rights.

57. **J.** The lack of a proper independent monitoring and accountability mechanism is a matter of serious concern. The situation in the detention centres seems to be bedevilled by

¹⁰ The Minister has delegated most of his guardianship powers and functions to specific DIMIA officials who do not make any decisions under the Act with regard to Protection Visa applications. However, it would appear that the fact remains that the Minister for Immigration, and as such also DIMIA, de facto assume both the role of “detainer” and guardian, which is unfortunate.

a lack of transparency and proper accountability mechanisms. Even section 9.1 of the revised IDS of June 2002, contains no institutionalized mechanism in this regard.

According to the IDS it is incumbent upon the Service Provider to provide information to DIMIA as to what extent the IDS are complied with, and DIMIA closely monitors the performance of its Service Providers. But there appears to be no independent mechanism to check the veracity of such information. It should, however, be mentioned that the IDS do provide for access to be available to HREOC and the Commonwealth Ombudsman, and, furthermore, several other ad hoc monitoring missions have previously been conducted by parliamentary committees and other organisations. Notwithstanding these arrangements, the need for a permanent, institutionalized and independent body to conduct monitoring and reporting activities on a continuing basis, including unannounced visits with the right to unfettered access, would appear to be evident.

58. In this regard Principle 29 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment is worth quoting. It reads: “1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment. 2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.”

59. **K.** In some instances, persons in immigration detention are detained in regular prisons. This would appear to be contrary to Principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which reads “Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.”

V. Concluding Observations

60. In conclusion, Justice Bhagwati finds that the human rights situation of persons in immigration detention in Australia is a matter of serious concern. Despite the many positive efforts undertaken by the Government to improve the conditions in the detention centres, from a human rights perspective it might be useful to ask whether the current approach to illegal immigration is the correct one. In any case, a more humane approach would certainly be desirable.

61. The unduly long period of detention which, to the detainees, seemed to be endless with no assurance as to when it will come to an end and they will attain freedom is a matter of serious concern. So far as the detention of children, including unaccompanied minors, is concerned, it is clearly in itself a violation of their rights under the Convention on the Rights of the Child. Furthermore, children are deprived of adequate educational services appropriate to their age and are kept in conditions not conducive to their healthy growth. It is a matter of satisfaction that HREOC is conducting an inquiry into Children in Immigration Detention.

62. As noted above, the International Covenant on Civil and Political Rights (Article 7) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, explicitly prohibit torture and all cruel, inhuman and degrading treatment and punishment. The human rights situation which Justice Bhagwati found in Woomera IRPC could, in many ways, be considered inhuman and degrading.

63. Justice Bhagwati appreciates that according to the Australian Government, immigration detention is informed by Australia's obligations under international law, including international human rights law. He also welcomes the very positive steps taken by the Government in drafting the new Immigration and Detention Standards, and notes with satisfaction the many efforts underway to improve the conditions of detention, and appreciates the willingness of the Government to address various issues of concern.

64. Justice Bhagwati recommends that the High Commissioner urge the Government of Australia to review the human rights issues of concern expressed in this report, and to seek appropriate ways to address them, with a view to meeting its obligations under international human rights law.

65. The High Commissioner might also wish to urge the Government of Australia to engage in a positive and constructive dialogue with HREOC, representatives of UNICEF, UNHCR, OHCHR and civil society for the purpose of identifying ways and means for improving the conditions of detention.

66. The High Commissioner might also wish to urge the Government to clarify and seek to expedite the determination of refugee status, and to provide people in detention with complete and adequate information about their rights at all times, ensure adequate access by lawyers and psychologists, and ensure the institutionalization of independent monitoring and accountability mechanisms.

67. The High Commissioner might also consider suggesting to the Government to restore the power of judicial review by way of appeal against the decisions of the authorities both on facts and on law by making the necessary amendments to the Act.

68. The High Commissioner might wish to suggest to the Government that a follow-up mission be undertaken in 2003 by a representative of the High Commissioner.