



Submission to the People's Inquiry into Immigration Detention
“The Removal of an Asylum Seeking Child from Australia”

A Just Australia
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It is quite obvious that if one parent in a foreign country claims custody of a child in Australia, the authorities would not simply take their word for it and secretly ship the child overseas without informing the Australian custodial parent

Or is it?

Background

- 1 The powers invested in, or even taken by, the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) is an issue that has been gaining increasing interest in Australia. The two inquiries into the deportation of an Australian citizen and the unlawful immigration detention of an Australian resident have pushed this issue from the being the concern only of refugee advocates into the broader media spotlight.
- 2 The powers of DIMIA are expressly granted and limited by the Commonwealth Migration Act 1958ⁱ and the Migration Regulations 1994ⁱⁱ, such as the power to detain or deport, which is the ultimate expression of power over an individual. It results in the removal of a person's freedom or their expulsion from a territory.
- 3 Detention can be rectified by release. In many cases deportation cannot be rectified because it relies on the actions of foreign actors who may not wish to release a person.
- 4 In other cases, the deportee may not be in a position to travel, or due to persecution may be imprisoned, have disappeared or been killed. The Edmund Rice Centre conducted research into the fate of failed asylum seekers returned to their country of originⁱⁱⁱ. They found that of the 40 deported asylum seekers only 5 could be said to be safe in either the short term or the long term.
- 5 Recent investigations such as the Palmer Inquiry^{iv} and Comrie's Ombudsman Inquiry^v into the Cornelia Rau and Vivian Alvarez incidents respectively, have found that there is a disturbing misuse and misunderstanding by DIMIA officers of the powers they do and do not have. Palmer found a corporate culture of denial and self-justification where poor performance was caused by the culture pervading the executive management in the immigration detention area of DIMIA^{vi}. Comrie agreed with the Palmer findings and also found that DIMIA culture paid "insufficient attention to detainee's welfare and care needs^{vii}."
- 6 June 2005, a DIMIA official turned whistleblower claimed that the department's compliance section, which detains and deports those staying in Australia illegally, has not been making proper checks on people before deporting them. 'Jamie' also said that officers tried to increase the numbers of people they deported in order to please the federal government^{viii}.
- 7 A Senate committee recently heard that during 2001 the department was receiving bonus payments for unlawful persons it located and deported. Shadow Immigration Minister Tony Burke has suggested this would provide an incentive to deport people in order to generate revenue^{ix}.
- 8 Few deportations highlight the 'self-extension' of the executive powers to deport that DIMIA will grant itself, more seriously than the case of Mr A and his daughter Mary¹.

¹ Names changed.

- 9 In July 2003, DIMIA officers² secretly arranged for the removal from Australia of Mary (7 years old) who was in immigration detention with her father, Mr A. She was taken to her mother in Iran. The father and daughter had been in immigration detention since their arrival in Australia at the beginning of 2001. DIMIA did not tell the father they were taking his daughter and made every effort to conceal the fact from him, by first separating him from his daughter by confining him in the management unit at Baxter detention centre, then telling him that she was out shopping while she was being removed from Australia. DIMIA thus ensured that not only could Mr A not exert his legal rights to prove he had lawful custody of his child, but he was not even able to say goodbye to her. DIMIA also ensured that there was no official and proper assessment of what was in the child's best interests.
- 10 Please see attachment 1 for full case history.

Important issues within the case history

- 11 The case put forward by Mr A was, in short – that he was subjected for no apparent reason to the humiliation of being threatened with a strip search in front of his young daughter, that when he objected to the strip search he was put into the punitive Management Unit, threatened with not being able to see his daughter unless he signed a false confession giving the DIMIA manager an excuse for his continued confinement, and his daughter was then being deported under the cover of a lie, without his knowledge.
- 12 By taking this method of removing Mary, DIMIA officers ensured that Mr A did not know she was being removed, took steps calculated to prevent him from attempting to stop the removal and took steps calculated to ensure he could not see her to say goodbye before she was removed.
- 13 Mr A claims that the act of taking Mary away from him was a calculated attempt to pressure him to abandon his appeal for a protection visa and to pressure him to return to Iran voluntarily^x. This allegation has greater weight, since he had been making this claim long before the event took place. Indeed, as early as 2002 he had been telling advocates that Greg Wallis had threatened him repeatedly with this.^{xi}
- 14 Although evidence was produced by the Department during this case to state that Mr A was confined in the management unit because he "became aggressive towards the officers and assaulted two of them."^{xii}, no evidence was produced from the officers who were alleged to have been assaulted. Justice Selway noted that Mr A's version of events was for the most part, uncontradicted^{xiii}. More importantly, neither Greg nor Terrina Wallis contradicted the version of Mary's deportation as put forward by Mr A. In their affidavits for the federal court case brought by Mr A regarding the conditions of his ongoing detention³, neither Greg

² Greg Wallis and Terrina Wallis are the two main DIMIA officers involved in the removal of Mary. Greg Wallis was an officer of DIMIA and the DIMIA Manager of Baxter. His wife, Terrina Wallis was an officer of DIMIA and the Deputy Manager at Baxter, an appointment she received after her relationship with Greg Wallis began. Since the events described in this submission, Greg Wallis has been posted to the Australian Consulate in Beirut, Lebanon.

³ Mr A applied to the Federal Court for orders to be released from confinement within the Management

nor Terrina Wallis denied that Mr A had been placed into the Management Unit under the circumstances he described, and neither denied the manner in which Mary was deported.

- 15 Doctor Gorton's report on his 24 July 2003 assessment of Mr A supports Mr A's allegation that he was lied to by either or both DIMIA and ACM regarding the return of Mary to Iran. The report also shows that either Dr Gorton or the DIMIA officers knew that to deport Mary would cause Mr A psychiatric and emotional harm^{xiv}.
- 16 A psychological assessment⁴ of Mr A conducted on 20 August 2003 found that "The forced removal of Mr A's daughter from Australia has been a major life catastrophe for him." They conclude with "Mr A is one of the most distressed individuals that either assessor has encountered in our clinical careers." Another assessment was conducted by psychiatrists⁵, who reported on 29 August 2003 that Mr A was not suffering a psychotic or major depressive illness, but agreed that Mr A "is likely to be suffering with some features of PTSD [post traumatic stress disorder], together with an acute grief reaction."

Duty of care towards children

- 17 A key article within the United Nations Convention of the Rights of the Child to which Australia is a signatory, is article 3(1) "in all actions concerning children ... the best interests of the child shall be a primary consideration."^{xv} Additionally, article 9(1) states children should not be separated from their parents against their will except when 'necessary for the best interests of the child.'^{xvi}
- 18 These principles are echoed in Commonwealth legislation in the Family Law Act 1975 s67V which states "In deciding whether to make a recovery order in relation to a child, a court must regard the best interests of the child as the paramount consideration."
- 19 Certainly, removal of a child without being permitted to say goodbye to her father would be in breach of United Nations Convention on the Rights of the Child article 3(1).
- 20 The same psychological team who assessed her father also assessed Mary. They found she suffered from:

"Multiple comorbid psychiatric conditions including major depressive disorder, posttraumatic stress disorder, enuresis, an oppositional defiant

Unit at Baxter and relocated to either Villawood or Maribyrnong Detention centres. S799 [2003] Federal Court of Australia. The judge granted such orders but DIMIA appealed the orders in the Full Federal Court FCAFC 93 [2004]. The orders were altered by not determining where DIMIA *could* detain Mr A, instead listing three locations where they *could not*. Justice Selway found that "One gets the impression from Mr Wallis' affidavit that there is a resistance to moving Mr A because it is his wish to be removed. FCAFC 93 Selway [124].

⁴ Psychological assessment conducted by Dr Shakeh Momartin, psychologist with the Psychiatric Research and Teaching Unit at the School of Psychiatry at the University of New South Wales, and Zachary Steel, psychologist.

⁵ Dr Fiona Hawker, consultant psychiatrist, and Associate Professor Norman James, Clinical Director of the Royal Adelaide Hospital Glenside Campus.

disorder... directly attributable to her experiences in detention. It is highly recommended that Mary be managed outside the detention centre environment as continued exposure to the conditions of detention would be expected to lead to a continued deterioration in her mental state or at the very least, a maintenance of her mental state at the current level of psychological distress that is completely unacceptable."^{xvii}

- 21 It is unfortunate that DIMIA did not act on this advice for the best interests of the child – as indeed they have ignored many recommendations for release⁶. It appears that the 'best interests of the child' are upheld only when it suits a policy outcome.
- 22 DIMIA has stated that it contacted the Family and Youth Services (FAYS) of the South Australian state government and "sought support for the removal on the basis that it was in the best interests of the child. DIMIA claims that FAYS, who were familiar with the case, agreed with the Department's decision."^{xviii}
- 23 It is difficult to believe that FAYS, a government agency mandated to protect children would agree to the removal of a child without the custodial parent knowing about it, to another parent without a proper assessment of that parent or the best interests of the child, and without the child being able to say goodbye to her father or be prepared for the shock of the removal⁷.
- 24 It is also difficult to believe that FAYS would agree that DIMIA is in a position to lawfully or knowledgeably determine either a custody dispute or the best interests of a child taking into account child protection laws, which are not the domain of the Department of Immigration.
- 25 It must also be noted that FAYS would be aware of the law in Australia regarding custody disputes, and would be fully aware that neither FAYS nor DIMIA have the authority to determine a custody dispute and remove a child from one parent and give custody to another parent, particularly when that involves removing the child from Australia.

⁶ It should be noted that there have been many notifications to the child protection agencies in NSW, SA, and WA of breaches of state child protection laws within detention centres by both DIMIA and Australasian Correctional Management, the private company which had the contract to run detention centres up to 2004. See the Human Rights and Equal Opportunity Commission's Report on the Inquiry into Children in Immigration Detention, April 2004. In another case, FamCA 610 [2003] the Family Court ordered the release of a family of children from Baxter detention centre as the court found that conditions of the centre breached South Australian child protection laws. DIMIA appealed this decision not on the grounds that child protection laws were not breached, but that the Family Court had no jurisdiction to make orders to remove the children from the abusive environment. See FamCA 591[2003] and HCA 20 [2004]. It is an unfortunate fact for the Australian judicial system that this appeal was upheld. These examples of DIMIA ignoring or appealing against child protection laws gives further weight to views that the allegations against Mr A were part of a wider attempt to force his 'voluntary' repatriation to Iran.

⁷ To date, the actual wording of that advice from FAYS has not been released, but questions on notice have been asked and a response is expected in mid-late December 2005.

Powers to Remove the Child from Australia

26 There are two main issues as to the powers of the Commonwealth to remove this child from Australia. The first is the power to remove a person under the Migration Act, when the person has an ongoing application for a protection visa. Additional to this issue is the complicating fact that in this case the person was being sent back to the country from which that person was claiming asylum. The other issue is the method by which an international custody dispute is settled under Australian law, with additional reference to child protection issues where the best interests of the child are held paramount.

27 Justice Selway noted that the issue needed to be addressed:

“whether there was a power to send Mr A’s daughter back to Iran without some judicial determination that Mr A did not have lawful custody of his child and whether that power could be exercised without affording Mr A the right to be heard.”^{xix}

28 This is the key consideration of this case. Under what powers did DIMIA grant custody of the child from one parent to another without application to the Family Court of Australia?

Removal Powers under the Migration Act

29 The father and daughter had a joint application in the High Court for special leave in relation to their protection visa applications. There are serious questions as to whether s198 (6) of the Migration Act granted DIMIA the power to remove the child while this appeal was pending⁸. Generally DIMIA does not deport until all matters regarding a protection visa application have been finalised, and where notice is given courts will grant an injunction to halt deportations where appeals are in process.

30 Mr A and Mary had a joint protection visa application and appeal to the courts. DIMIA did not deport Mr A. Therefore, Mary’s removal was not a deportation at the end of a visa process under powers conferred by s198 (6) of the Migration Act. Instead, DIMIA was specifically sending the child back as a decision regarding the custody dispute.

31 According to DIMIA, they received legal advice that “unless and until such leave is granted and the jurisdiction of the Court is invoked, there can be no question of removal interfering with judicial proceedings.”^{xx} This wording implies that if leave is granted in the near future, the removal *will* interfere with judicial proceedings and thus be unlawful, but the removal will be an historical event that cannot be changed.

⁸ The power to remove is not unlimited *WAJZ, WAKA, WAGF, WAKB, WAKE and WADX v Minister for Immigration and Multicultural and Indigenous Affairs (no2) [2004] FCA 1332 (14 October 2004)*. And where a person has court proceedings in relation to a visa application there may not be a power to remove: *SRFB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1021 (19 September 2003)*.

32 Additional to the powers to remove at the end of an application for protection visa is the issue of returning the child back to Iran⁹, from where her father removed her on grounds of his persecution. It is unknown at this point, but unlikely that the usual procedures for removal were followed where other United Nations Conventions are assessed for possible breaches¹⁰. Mary would have a future risk of persecution risk, by the fact that she was bring returned to a country where her father would now be considered a traitor.

Removal powers regarding international custody dispute

33 Under international law, there is the Hague Convention on the Civil Aspects of International Child Abduction^{xxi}, to which Australia is a signatory¹¹. Under this convention, signatory countries agree to return children where the courts of one signatory country can show that a child was removed unlawfully to another. However Iran is not a signatory to this convention, so it does not apply in this case.

34 Justice Selway found that "A detainee retains all of his or her civil rights other than those that are only available to a citizen, and other than those taken away by law, either expressly or by necessary implication."^{xxii} Mr A thus has the same parental rights as any other person within Australia's jurisdiction.

35 Under Australian law to arrange the return of a child to a guardian in another country not a signatory to this convention, an application must be made under the *Family Law Act 1975 (cth)*^{xxiii}. The procedure would require a proper determination by the Family Court of the best interests of the child, taking into account the effect that separation from either parent would have on the child^{xxiv}.

36 There was no application to the Family Court to have this custody dispute settled. Indeed, the secretive method by which the child was removed from her father by officers of the Department ensured that he could not assert his right to have the matter determined by the Family Court of Australia.

Culture of extending departmental powers

37 There has been much criticism lately of DIMIA overstepping the boundaries of its legislated powers in order to achieve a policy outcome for political purposes.

38 In the initial court case regrading Mr A's continued confinement within the management unit at Baxter, the department made a submission that "once a person is in lawful immigration detention, the form of that detention is entirely within the Minister's discretion so that a form of detention which is imposed for punitive purposes (even if unwarranted or capricious) is not subject to judicial review,

⁹ Although Iran prefers that the person being returned has signed papers declaring the return is voluntary, there are several cases where Iranians have been removed or attempts (sometimes stopped by injunctions) have been made to remove a person who has not agreed to that removal.

¹⁰ Under the Migration Series Instructions a DIMIA officer must assess other conventions to see if they will be breached by the deportation, such as CAT, ICCPR and CRC.

¹¹ It is interesting to note that the Attorney General's Department states "any dispute as to issues of parental responsibility must be resolved by the courts in Australia. The court will have to consider what is in the best interests of the child" www.ag.gov.au/www/childabduction.nsf

although it may give rise to a claim for damages^{xxv}". Of course, this is entirely against the concept of the separation of powers, enshrined in chapter three of the Australian Constitution which states that only the judiciary can impose punitive detention^{xxvi}. It is unfortunate that Australian tax dollars are paid to making these claims to extend executive powers.

39 Justice Selway responded to this submission:

"The problem is that the counsel who put it may not be the only one who has that view. In particular it would be very troubling if any of those with the power to detain were of the view that their powers were so unqualified." ^{xxv}

40 In the report on his investigation into DIMIA, Mr Palmer found that

"DIMIA officers are authorised to exercise exceptional, even extraordinary, powers. That they should be permitted and expected to do so without adequate training, without proper management and oversight, with poor information systems and with no genuine quality assurance and constraints on the exercise of these powers is of concern. The fact that this situation has been allowed to continue unchecked and unreviewed for several years is difficult to understand." ^{xxvii}

41 He further states:

"There is a serious cultural problem within DIMIA's immigration compliance and detention areas: urgent reform is necessary." ^{xxviii}

42 The Ombudsman's report on the Vivian Alvarez matter stated that:

"It is difficult to form any conclusion other than that the culture of DIMIA was so motivated by imperatives associated with the removal of unlawful non-citizens that officers failed to take into account the basic human rights obligations that characterise a democratic society."

43 A Departmental whistleblower told ABC TV's *Lateline* that people within DIMIA said

"The minister wants me to reject asylum seekers, so I'm going to reject all these because I know that's what the minister and the Government wants." ^{xxix}

44 There is not enough room in this submission to continue which all the available evidence, but it is quite clear that within DIMIA there is an alarming lack of knowledge of, or consideration for, the limits of executive powers when it interferes with a policy objective. This has certainly contributed towards the removal of an asylum seeking child without following due process to uphold her rights and her father's parental rights.

DIMIA's justification for removal

45 DIMIA has attempted to justify the removal by asserting that the mother had custody of the child under Iranian law.

46 In response to a question on notice during Senate Additional Estimates this year, the office of the Immigration Minister stated:

"The mother also presented a divorce certificate stating that her marriage to Mr A ended on 18 April 1999 and that she was given custody of Miss A until the child reached the age of seven. She later advised the Department that she had ongoing custody of the child now that the child had reached the age of seven. All documents that were presented were original documents and certified translations were provided...

...On October 2001, the [Shiraz Family] court handed down an order requiring Mr A to return Miss A to her mother.

47 According to counsel for Mr A, the only custody papers that have been sighted grant Mr A full custody with the mother having visitation rights one day per week until Mary reached the age of seven^{xxx}, at which point under Iranian family law, the mother had no rights except those voluntarily granted by the father.

48 If this is the primary court order in question, then not only did the mother not have full custody, but the access she did have rights to had expired three weeks prior to Mary's deportation when she had turned seven.

Ongoing issues

49 The following questions need to be addressed by DIMIA:

- a. Mr A has a divorce certificate showing he had custody of Mary with the mother only having visitation rights 1 day per week. Which is the correct certificate? Can DIMIA present a version proving this assertion that under the divorce the Mother had custody?
- b. If the mother advised the Department she had ongoing custody after the age on seven, what form did that advice take? Was it verbal or did she present a court order? If so, can DIMIA present a copy of that court order? If the advice was not an official document, why did DIMIA accept it?
- c. The 2001 Shiraz Family court order – was this an order to return Mary to her mother's custody, or simply to resume the access rights which the father asserts was all the mother had?
- d. If the mother did have custody from an Iranian court, was this granted before or after Mr A left Iran due to persecution? If it was after he left, did DIMIA investigate whether an Iranian court would grant the

mother custody simply because the father was now deemed to be a traitor rather than considering the best interests of the child?

- e. DIMIA has long been sceptical about the authenticity of overseas paperwork, particularly from countries such as Iran. Did the Department takes steps to check the papers presented by the mother were genuine?
- f. What form of advice did FAYS give DIMIA regarding Mary's removal? Was FAYS fully briefed as to the situation and what was their full advice?
- g. Why did DIMIA believe it was necessary to lie to the father about the whereabouts of the child in order to remove her?
- h. What general executive power or specified legislated power did the department believe authorised them to remove the child from her father in such a manner?

Conclusion

- 50** Essentially, the DIMIA officers in question assumed the powers of the Family Court by making a custody determination and then asserting it was in the best interests of the child when they are not qualified or authorised to make such child protection assessments.
- 51** The seriousness of the possibility that officers of the Commonwealth arbitrarily removed a child from one parent and removed her to an overseas parent without any legal authority deserves further investigation.
- 52** The key issue is not to determine in this submission whether Mr A or his ex-wife had lawful custody, or whether or not it was in Mary's best interests to be returned to her mother. The point is that neither the author of this submission nor the Department of Immigration has either the expertise or the lawful right to make that determination. That is the province of the Family Court and child protection agencies. Due process should have allowed those agencies to make a determination in Mary's best interests, which would also have upheld Mr A's parental rights.

Endnotes

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- ⁱ Commonwealth Migration Act, 1958
http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118.
- ⁱⁱ Commonwealth Migration Regulations, 1994
http://www.austlii.edu.au/au/legis/cth/consol_reg/mr1994227.
- ⁱⁱⁱ Edmund Rice Centre, 2004, *Deported to Danger: A Study of Australia's Treatment of 40 Rejected Asylum Seeker*, Edmund Rice Centre, Sydney.
- ^{iv} Palmer, M 2005, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Commonwealth of Australia, Canberra.
- ^v Commonwealth Ombudsman, 2005, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Commonwealth of Australia, Canberra.
- ^{vi} *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, p. 166 – 168.
- ^{vii} *Inquiry into the Circumstances of the Vivian Alvarez Matter* pg xii.
- ^{viii} 'Immigration whistleblower claims more blunders', *The Age* 14 June 2005.
- ^{ix} *Immigration Department's deportation bonus payments*, 13 October 2005, ABC Radio AM program, Australia.
- ^x FCAFC 93 Lander [31]. Full Federal Court of Australia. *Secretary, Department of Immigration, Multicultural and Indigenous Affairs v A [2004]*
- ^{xi} Interview with Naleya Everson, advocate
- ^{xii} FCAFC 93 [Lander 71& 73]
- ^{xiii} FCAFC 93 [Selway 15]
- ^{xiv} FCAFC 93
- ^{xv} United Nations Convention on the Rights of the Child, 1989.
- ^{xvi} Human Rights and Equal Opportunity Commission, 2004, *National Inquiry into Children in Immigration Detention*, p. 95.
- ^{xvii} FCAFC 93 [Selway 77-78]
- ^{xviii} Senate Additional Estimates: Legal and Constitutional References Committee, Immigration Multicultural and Indigenous Affairs portfolio. 11 October 2005, Question taken on notice #6.
- ^{xix} FCAFC 93 [Selway 12]
- ^{xx} Senate Additional Estimates: Legal and Constitutional References Committee, Immigration Multicultural and Indigenous Affairs portfolio. 11 October 2005, Question taken on notice #6.
- ^{xxi} Hague Convention - see the Commonwealth Attorney General's website for how this applies in Australia <http://www.ag.gov.au/www/childabduction.nsf>
- ^{xxii} FCAFC 93 [Selway 14]
- ^{xxiii} Family Law Act 1975 (Commonwealth) s 67T and s 67Q

^{xxiv} Family Law Act 1975 (Commonwealth) s 67V

^{xxv} FCAFC 93 [Selway 16]. Case quoted is S799 [2003] Federal Court of Australia,
South Australian District Registry

^{xxvi} Commonwealth of Australia Constitution Act [1900]
<http://www.aph.gov.au/senate/general/constitution/>

^{xxvii} *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, p.
ix.

^{xxviii} *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, p.
ix.

^{xxix} *Immigration official gives insight into department* 13 June 2005, ABC TV
'Lateline', Australia. <http://www.abc.net.au/lateline/content/2005/s1391140.htm>

^{xxx} Interview with Julian Burnside QC, November 2005.