

Chapter 17

Major Findings and Recommendations of the Inquiry

Contents

17.	Major Findings and Recommendations of the Inquiry	849
17.1	The Inquiry's major findings	849
17.2	Reasons for the Inquiry's major findings	851
17.2.1	Major finding 1(a): Failure to ensure that detention of children is a measure of last resort and for the shortest appropriate period of time	851
17.2.2	Major finding 1(b): Failure to ensure that the best interests of the child are a primary consideration	852
17.2.3	Major finding 1(c): Failure to treat children with humanity and respect	854
17.2.4	Major finding 1(d): Failure to ensure appropriate assistance to asylum-seeking children to enjoy the maximum possible development and recovery from past trauma	855
17.2.5	Major finding 2: Cruel, inhuman and degrading treatment regarding the release of children with mental health problems	855
17.2.6	Major finding 3: Failure to ensure appropriate services and conditions in detention centres	855
17.3	The Inquiry's recommendations	856
17.4	Reasons for the Inquiry's recommendations	857
17.4.1	Recommendation 1: Children should be released from detention centres and residential housing projects within four weeks of the tabling of this report	859
17.4.2	Recommendation 2(a): Australia's laws should incorporate a presumption against the detention of children	860
17.4.3	Recommendation 2(b): Australia's laws should require independent assessment of the need to detain children within 72 hours of any initial detention	862
	(a) Australia's laws could permit short-term detention to conduct preliminary health, security and identity checks, subject to independent review	862
	(b) Independent assessment of the need to detain for these or any other purposes should occur within 72 hours	863

17.4.4	Recommendation 2(c): Australia's laws should provide for prompt and periodic review of the legality of continuing detention	865
17.4.5	Recommendation 2(d): Australia's laws should incorporate fundamental principles on detention to guide courts and independent tribunals	867
	(a) The principle of family unity in making decisions regarding detention of children	867
	(b) Maximum time limits on the period of detention for children	868
17.4.6	Recommendation 2(e): Australia's laws should be amended so that bridging visas are readily available to families and unaccompanied children	868
	(a) Bridging visas can allow for conditions to be imposed on children and parents released into the community	869
	(b) Children released on bridging visas should be provided appropriate services in the community	872
17.4.7	Recommendation 3: An independent guardian should be appointed for unaccompanied children and they should receive appropriate support	873
17.4.8	Recommendation 4: Australia's laws should codify the minimum standards of treatment of children in detention centres	877
17.4.9	Recommendation 5: Australia should review the impact of 'Pacific Solution' and 'excision' measures on children	880
17.5	The Department's main objections to the Inquiry's recommendations	880
17.5.1	Introducing systematic review of the need to detain will slow down visa processing and clog courts	881
17.5.2	General statistics on absconding suggest that all children must be detained to ensure availability for processing	882
17.5.3	The elimination of mandatory detention may result in more children and families coming illegally to Australia	883
17.5.4	It costs too much to support children in the community	884
17.5.5	It is too difficult to codify protections for children in detention in legislation	884
17.5.6	There is nowhere to put unauthorised arrivals	885
17.6	Action taken by the Department and ACM in response to the Inquiry's findings and recommendations	885
17.6.1	Action taken by the Department	885
17.6.2	Action taken by ACM	888
	Endnotes	891

17. Major Findings and Recommendations of the Inquiry

This chapter addresses the following issues:

- 17.1 The Inquiry's major findings
- 17.2 Reasons for the Inquiry's major findings
- 17.3 The Inquiry's recommendations
- 17.4 Reasons for the Inquiry's recommendations
- 17.5 The Department of Immigration and Multicultural and Indigenous Affairs' (the Department's) main objections to the Inquiry's recommendations
- 17.6 Action taken by the Department and Australasian Correctional Management Pty Limited (ACM) in response to the Inquiry's findings and recommendations.

17.1 The Inquiry's major findings

In addition to the detailed findings in each of Chapters 5-16, the Inquiry has made the following major findings in relation to Australia's mandatory immigration detention system as it applied to children who arrived in Australia without a visa (unauthorised arrivals) over the period 1999-2002.

Major finding 1

Australia's immigration detention laws, as administered by the Commonwealth, and applied to unauthorised arrival children, create a detention system that is fundamentally inconsistent with the *Convention on the Rights of the Child* (CRC).

In particular, Australia's mandatory detention system fails to ensure that:

- (a) **detention is a measure of last resort, for the shortest appropriate period of time and subject to effective independent review (CRC, article 37(b), (d))**

A last resort?

- (b) the best interests of the child are a primary consideration in all actions concerning children (CRC, article 3(1))
- (c) children are treated with humanity and respect for their inherent dignity (CRC, article 37(c))
- (d) children seeking asylum receive appropriate assistance (CRC, article 22(1)) to enjoy, 'to the maximum extent possible' their right to development (CRC, article 6(2)) and their right to live in 'an environment which fosters the health, self-respect and dignity' of children in order to ensure recovery from past torture and trauma (CRC, article 39).

Major finding 2

Children in immigration detention for long periods of time are at high risk of serious mental harm. The Commonwealth's failure to implement the repeated recommendations by mental health professionals that certain children be removed from the detention environment with their parents amounted to cruel, inhumane and degrading treatment of those children in detention (CRC, article 37(a) – see Chapter 9).

Major finding 3

At various times between 1999 and 2002, children in immigration detention were not in a position to fully enjoy the following rights:

- (a) the right to be protected from all forms of physical or mental violence (CRC, article 19(1) – see Chapter 8)
- (b) the right to enjoy the highest attainable standard of physical and mental health (CRC, article 24(1) – see Chapters 9, 10)
- (c) the right of children with disabilities to 'enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community' (CRC, article 23(1) – see Chapter 11)
- (d) the right to an appropriate education on the basis of equal opportunity (CRC, article 28(1) – see Chapter 12)
- (e) the right of unaccompanied children to receive special protection and assistance to ensure the enjoyment of all rights under the CRC (CRC, article 20(1) – see Chapters 6, 7, 14).

17.2 Reasons for the Inquiry's major findings

The Inquiry finds that both the legislation that requires the immigration detention of children who arrive in Australia without a visa, and the administration of that legislation by the Commonwealth, have resulted in numerous and repeated breaches of fundamental principles of the CRC.

The Inquiry's findings in relation to particular rights of children in areas such as refugee protection, safety in detention centres, physical and mental health, care for children with disabilities, education, recreation, religion, culture and special protection for unaccompanied minors in detention, and the evidence for those findings, have been set out in detail in Chapters 7-16 of this report.

Major finding 1 draws together the Inquiry's findings in Chapter 6 on Australia's Detention Policy and the Inquiry's findings regarding the individual areas of concern in Chapters 7-15, to assess whether Australia's system of immigration detention, as a whole, breaches the rights of children under the CRC. In particular, the Inquiry's first major finding addresses the overarching rights in the CRC which are discussed in Chapter 4 on Australia's Human Rights Obligations.

The Inquiry's second and third major findings highlight specific breaches of the CRC that have been the subject of earlier chapters.

17.2.1 Major finding 1(a): Failure to ensure that detention of children is a measure of last resort and for the shortest appropriate period of time

As Chapter 6 on Australia's Detention Policy sets out, the provisions of the *Migration Act 1958* (Cth) (the Migration Act) and Migration Regulations create a system that is exactly the opposite of what is required by article 37(b) and (d) of the CRC, which states that detention of children should be a measure of last resort, for the shortest appropriate period of time and promptly reviewable in the courts.

The system of immigration detention established by Australia's immigration detention laws makes the detention of children who arrive in Australia without a visa mandatory, indeterminate and effectively unreviewable. The United Nations body that supervises detention regimes around the world, the Working Group on Arbitrary Detention, stated that these features make Australia's immigration detention system unique:

[T]o the knowledge of the delegation, a system combining mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge is not practised by any other country in the world.¹

The result of Australia's mandatory immigration detention laws is that children remain in detention for unacceptably long periods. At its worst, one child was detained for almost five and half years before being released into the community on a protection visa. Children in detention as at 26 December 2003 had spent an average of one year, eight months and 11 days in detention.²

17.2.2 Major finding 1(b): Failure to ensure that the best interests of the child are a primary consideration

If the Migration Act and Migration Regulations, as applied by the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) and the Department, did not result in the automatic and long-term detention of children, not only would there be no breach of article 37(b) and (d), but most of the other breaches identified by the Inquiry would simply not occur. This fact suggests that the laws fail to ensure that the best interests of the child are a primary consideration in all decisions affecting children – including the decision to detain, the location and the manner of detention.

For example, as Chapter 6 explains, the best interests of the child are usually met by allowing children to be with their parents *and* to live without any restrictions to their liberty. The fact that Australia's detention laws, as applied by the Department, do not permit such a result demonstrates a breach of the best interests principle.

If children were not in detention centres for long periods of time they would not be suffering from the mental health and development problems caused by that environment (Chapter 9). If children were not in detention centres they would not be exposed to fires, riots, tear gas, water cannons and mass self-harm (Chapter 8). If children were not in detention centres they could seek the health care appropriate to their needs (Chapters 9, 10) and go to the same schools as other similar children in the community (Chapter 12). If children with disabilities were not in detention centres they could seek the services and support they needed in a manner that facilitated their integration into the general community (Chapter 11). If children were not in detention centres they would have greater access to lawyers for advice on their asylum claim (Chapter 7). If unaccompanied children were not in detention centres their effective guardian would be State child protection authorities, who have relevant care qualifications and can provide independent advice and support throughout the visa application process (Chapters 6, 7, 14).

Thus the evidence before the Inquiry unequivocally proves what is otherwise a common perception – detention centres are no place for children. The introduction of a mandatory detention policy that requires detention of children irrespective of their individual circumstances strongly suggests that the Commonwealth cannot have made the best interests of the child a primary consideration when enacting these laws. This is confirmed by the parliamentary debates and the explanatory memoranda relating to the introduction of mandatory detention provisions into the Migration Act, which make no mention of children.³

The Inquiry therefore finds that the introduction of laws requiring the mandatory detention of children is a breach of article 3(1) of the CRC because the best interests of children were not a consideration at all, and therefore could not have been a primary consideration. The continuation of these laws, particularly in the light of clear evidence as to the impact of detention on children, amounts to an ongoing breach.

Further, while the Inquiry recognises that the options for the release or transfer of children from detention centres are limited by the laws in place, the Minister and the Department failed to adequately use the discretion available to address the problems arising from prolonged periods in detention centres. Of particular importance is the power to make decisions regarding the location and manner of detention – this power includes the Minister's ability to declare any place in the community to be a place of detention and the power to transfer both unaccompanied children and children with their parents to those places.

The Inquiry is particularly concerned that children were not transferred into the community with their parents in response to the consistent recommendations of mental health professionals that this occur as a matter of urgency. In fact, as at December 2003, only two families had ever been transferred to a place of alternative detention in the community. The Inquiry acknowledges that the Woomera Residential Housing Project, introduced in 2001, and the housing projects that were opened in Port Hedland and Port Augusta in 2003, provide improved physical environments. However, these projects do not solve the problem because the movement of children and the autonomy of parents regarding everyday decisions like health care and education continue to be restricted. Further, this initiative does not permit children to live with their fathers.

There are other instances where the failure to promptly use the power to transfer unaccompanied children and families out of detention centres created serious human rights concerns. For example, despite the increasing tension in the remote detention centres from as early as 1999, there were no attempts to remove unaccompanied children into foster care in the community until January 2002, when some unaccompanied children became involved in hunger strikes, lip-sewing and a suicide pact. Despite overcrowding in detention centres in 2001, there was no consideration of transferring families out of the centres at that time. Children with serious disabilities remained in remote detention centres for years despite the apparent difficulties in promptly accessing the appropriate disability services in those areas. Children from particular cultural and religious groups were not transferred to facilities closer to their communities in order to increase access to relevant clergy and instruction. Children with family in the community were not transferred into the custody of that family nor were they transferred to facilities close to that family. The difficulties in providing adequate recreational opportunities within detention did not appear to be a consideration in deciding whether children should be transferred into the community.

The Department also had a discretion regarding the services provided and the policies in place within detention centres. Negotiations to ensure that children routinely went to external schools only commenced in 2002. No special procedures were in place to protect children during violent disturbances. These are just some of the many examples discussed throughout this report that demonstrate the Department's failure to make the best interests of the child a primary consideration in decisions affecting the manner in which children were detained.

A last resort?

The Inquiry concludes that, as a whole, the Minister and the Department failed to administer the Migration Act and Regulations in a manner that ensured that the best interests of children were a primary consideration in all decisions impacting on them and therefore breached article 3(1) of the CRC.

17.2.3 Major finding 1(c): Failure to treat children with humanity and respect

The conditions in detention centres, taken as a whole over the period of the Inquiry, also failed to ensure that children were treated with 'humanity and respect for the[ir] inherent dignity', taking into account the needs of their age, in accordance with article 37(c) of the CRC.

The conditions in remote detention centres are harsh environmentally and physically. The absence of trees and grass in some centres and the detention behind razor wire had an obvious impact on children and their parents. The pervasive environment of despair that existed in certain detention centres at various times between 1999 and 2002 was observed directly by the Inquiry and was the subject of submissions and oral evidence. However, these matters alone do not breach human rights. In finding a breach of article 37(c), the Inquiry has also carefully considered the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the JDL Rules) which set helpful standards against which to consider conditions in detention.

The following matters have been identified by the Inquiry as being inconsistent with the JDL Rules throughout this report: instances of obtrusive head count procedures; periods during which children were called by number rather than name; the absence of clear procedures to ensure the special protection of children when tear gas, water cannons and other security measures were used; the failure to make routine assessments regarding the mental health of children on arrival in order to ensure that the appropriate services were provided (for instance torture and trauma assessments); instances where detention staff used offensive language around children; the absence of specific guidelines regarding the use of medical observation rooms for children; inadequate provision of preventative and remedial dental and ophthalmological care; periods of great overcrowding; instances of unsanitary toilet facilities; the failure to promptly assess the needs of children with disabilities and provide them with the appropriate aids, adaptations and services; the failure to promptly send children to community schools and ensure education appropriate to the cultural and language needs of children in detention; and the failure to ensure an appropriate curriculum for children above the compulsory school age. Finally, there was a failure to act upon repeated recommendations from health professionals that certain children be removed from detention centres in order to protect their mental health (see Major Finding 2).

All these factors result in a breach of article 37(c) of the CRC.

17.2.4 Major finding 1(d): Failure to ensure appropriate assistance to asylum-seeking children to enjoy the maximum possible development and recovery from past trauma

All the factors that contribute to a breach of articles 3(1) and 37(c) of the CRC also result in a breach of articles 6(2), 22(1) and 39 which together require that children seeking asylum receive the appropriate assistance to enjoy, 'to the maximum extent possible,' the right to development and 'an environment which fosters the health, self-respect and dignity of the child' in order to ensure recovery from past trauma. The long-term detention of children in detention centres is a long way from the nurturing environment contemplated by the CRC. The residential housing projects only offer marginal improvement on detention centres in this regard.

17.2.5 Major finding 2: Cruel, inhuman and degrading treatment regarding the release of children with mental health problems

As set out in the above sections, Australia's immigration detention laws, and the manner in which they were administered between 1999 and 2002, meant that some children were in detention for long periods of time. In some cases this long-term detention has caused extremely serious mental health problems for children. Chapter 9 sets out these problems and describes examples where the Department failed to facilitate the removal of certain children and their parents from a closed detention environment in the face of repeated recommendations of mental health professionals. Major Finding 2 reiterates the finding in Chapter 9 that this behaviour constitutes cruel, inhuman and degrading conduct.

17.2.6 Major finding 3: Failure to ensure appropriate services and conditions in detention centres

Major Finding 3 concerns the conditions within detention centres which are discussed in earlier chapters in this report. Those chapters set out why the Department's administration of Australia's detention centres resulted in breaches of children's rights relating to safety (Chapter 8), mental health (Chapter 9), physical health (Chapter 10), children with disabilities (Chapter 11), education (Chapter 12) and unaccompanied children (Chapter 14).

17.3 The Inquiry's recommendations

Recommendation 1

Children in immigration detention centres and residential housing projects as at the date of the tabling of this report should be released with their parents, as soon as possible, but no later than four weeks after tabling.

The Minister and the Department can effect this recommendation within the current legislative framework by one of the following methods:

- (a) transfer into the community (home-based detention)
- (b) the exercise of Ministerial discretion to grant humanitarian visas pursuant to section 417 of the Migration Act
- (c) the grant of bridging visas (appropriate reporting conditions may be imposed).⁴

If one or more parents are assessed to be a high security risk, the Department should seek the urgent advice of the relevant child protection authorities regarding the best interests of the child and implement that advice.

Recommendation 2

Australia's immigration detention laws should be amended, as a matter of urgency, to comply with the *Convention on the Rights of the Child*.

In particular, the new laws should incorporate the following minimum features:

- (a) There should be a presumption against the detention of children for immigration purposes.
- (b) A court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention (for example for the purposes of health, identity or security checks).
- (c) There should be prompt and periodic review by a court of the legality of continuing detention of children for immigration purposes.
- (d) All courts and independent tribunals should be guided by the following principles:
 - (i) detention of children must be a measure of last resort and for the shortest appropriate period of time
 - (ii) the best interests of the child must be a primary consideration
 - (iii) the preservation of family unity
 - (iv) special protection and assistance for unaccompanied children.

- (e) **Bridging visa regulations for unauthorised arrivals should be amended so as to provide a readily available mechanism for the release of children and their parents.**

Recommendation 3

An independent guardian should be appointed for unaccompanied children and they should receive appropriate support.

Recommendation 4

Minimum standards of treatment for children in immigration detention should be codified in legislation.

Recommendation 5

There should be a review of the impact on children of legislation that creates ‘excised offshore places’ and the ‘Pacific Solution’.

17.4 Reasons for the Inquiry’s recommendations

The Inquiry acknowledges that Australia has a legitimate interest in maintaining the integrity of its borders and its immigration system. However, as discussed in Chapter 4, Australia also has a responsibility to pursue these objectives in a manner that is consistent with the human rights of children. The current mandatory detention regime fails to meet that responsibility.

There are clearly measures that can be taken by the Department to improve the conditions and services provided to children within detention centres. Those are evident from the findings in Chapters 5-15 which have, for example, identified shortcomings in protecting the safety of children, physical and mental health care, education and recreational facilities in detention.

The Inquiry recommends that the Department carefully consider the manner in which children are detained, in light of the Inquiry’s earlier findings, in order to avoid some of the continuing breaches of human rights identified throughout this report.

However, the Inquiry does not seek to make detailed recommendations regarding each of the specific areas. This is because improvements in those areas, on their own, would not prevent ongoing breaches of the human rights of children in immigration detention. The heart of the problem is the system of mandatory detention

A last resort?

itself and there must therefore be fundamental changes designed to improve the system. It is these fundamental changes to the system, rather than changes that limit the extent and seriousness of breaches of human rights within that system, that are the focus of the Inquiry's recommendations.

There have been many models of alternative detention proposed by different community groups and international organisations since the introduction of the mandatory detention legislation in Australia in 1992. However, none of those models have focussed on the detention of children and their parents.

This Inquiry does not seek to reinvent a model, nor does it seek to develop the precise structure of a new system. The Inquiry recognises that any reform of the current system will require a consultation process that takes into account a large variety of factors, including issues that have not been considered by this Inquiry. For instance there may need to be a consideration of issues relating to the detention of single males and the budgetary implications of any new system, amongst other things.

However, no matter what additional considerations may be required, a proper deliberative process must operate within a framework that embodies the features necessary to ensure that the rights of children are protected. The Inquiry therefore sets out below what should be the key features of any new laws that seek to protect the human rights of children, without attempting to prescribe the exact parameters.

The primary reference point for any new laws must be the fundamental protections in the CRC. In particular the principles that detention of children be a measure of last resort and for the shortest appropriate period of time; the best interests of the child be a primary consideration; the principle of family unity; and the principle of special protection and assistance for unaccompanied children. The following sections indicate how these principles should, as a minimum, translate into practice.

The Inquiry also extracts relevant parts of the United Nations High Commissioner for Refugees (UNHCR) *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers* (UNHCR Detention Guidelines), with which the Department states immigration detention in Australia is consistent.⁵ Further, it refers to the practices of other nations and the proposals set out in submissions to the Inquiry which serve as useful starting points for the development of a new model.

17.4.1 Recommendation 1: Children should be released from detention centres and residential housing projects within four weeks of the tabling of this report

The amendment of laws may take some time. Those children currently in detention should not be subjected to continuing breaches of their fundamental rights while that process takes place.

The Inquiry is especially concerned that most of the children in detention at the end of 2003 have been there for more than two years and are therefore at great risk of serious mental harm. The Inquiry also recognises that some children have been detained for shorter periods – for example visa overstayers. However under the CRC all children are entitled to be detained for the shortest appropriate period of time. The Inquiry therefore calls for all children, and their parents, who are in detention centres or housing projects as at the tabling of this report to be released as soon as possible, but within four weeks as a maximum.

The Inquiry notes that while residential housing projects are an improvement on detention centres, they are still closed detention facilities. Importantly, children are separated from their fathers who must remain in detention centres (see Chapter 6 on Australia's Detention Policy).

Where children are accompanied by their parents, as is the case for most children in detention as at December 2003, parents should be released with their children in order to preserve family unity. The only exception might be where the Department has assessed one or more parents to be a high security risk. In these circumstances the Department should seek the advice of the relevant child protection authority as to the best interests of the child and implement that advice. When seeking the child protection authority advice, the Department should make it clear that it is in a position to effect release of children and their parents.

Under the current legislative framework, release of children and their parents from detention centres and housing projects is most easily achieved by transfer to a home-based place of detention in the community or the grant of a humanitarian visa (pursuant to section 417 of the Migration Act).⁶ However, bridging visas may also be available in some circumstances.⁷

In the event that there are new arrivals prior to the amendment of any laws, the Minister and the Department should utilise the discretions available within the existing legal framework in order to minimise the time that children spend in detention centres. In particular, the Minister and Department should promptly and generously apply the bridging visa regulations and the facility to transfer to home-based places of detention. To this end, the Inquiry recognises the introduction of Migration Series Instructions in December 2002 which attempt to place greater priority on these alternatives for unaccompanied children in particular. However, the Inquiry notes that a year later there were still around 90 children in detention centres or housing projects – most of whom have been in detention for more than two years. Mental health experts have urged the release of some of those children (with their parents)

A last resort?

to no avail. The Inquiry also recognises the creation of two new residential housing projects in late 2003, but once again cautions against the use of these compounds as an appropriate solution to the problems facing children in long-term detention.

17.4.2 Recommendation 2(a): Australia's laws should incorporate a presumption against the detention of children

There should be a presumption against detention.

UNHCR Detention Guidelines, guideline 3

Children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children.

UNHCR, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (UAM Guidelines), para 7.6

[M]inors who are asylum seekers should not be detained... All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.

UNHCR Detention Guidelines, guideline 6

The principle of detention as a last resort in the CRC does not mean that children can never be detained, but it does require that all alternatives to detention be fully explored prior to detaining a child. As Chapter 6 on Australia's Detention Policy sets out, Australia's mandatory detention system inherently breaches the principle of detention as a measure of last resort for children because it contains an irrebuttable presumption that all unauthorised arrival children must be detained.

Thus, in order to rectify the ongoing breach of the principle of detention as a last resort, a new model of detention should replace the current presumption that all unlawful non-citizens – whether child or adult – *must* be detained, with a presumption that children *should not* be detained.

While this would require the amendment of existing Australian laws, it is not a radical proposal. Australia's laws already incorporate an implicit presumption against the detention of all adult and child asylum seekers who arrive *with* a visa and subsequently become unlawful (authorised arrivals). Furthermore, Australia is one of the very few countries in the world that has a mandatory detention system. In terms of international practice, mandatory detention is the exception, not the rule.

The United Kingdom, Belgium, France, Germany and Norway are just a few examples of countries that provide for the *possibility* of detention but do not *require* detention of all unauthorised arrivals. Furthermore, many nations have adopted rules and regulations that strictly limit the circumstances under which children may be detained, including Canada, Sweden, Finland, Ireland, Norway, Denmark and Belgium.⁸

The United States, which does have a mandatory detention system, has enacted legislation providing special measures for unaccompanied children. The US *Homeland Security Act of 2002* (the Homeland Security Act) provides that 'unaccompanied alien children' be transferred into the care of the Office of Refugee Resettlement for prompt placement into the community.⁹ Further, the *Unaccompanied Alien Child Protection Act of 2003* (the US Bill), which was before the US Senate as at December 2003, seeks to prohibit the placement of unaccompanied children in an adult detention facility or a facility housing delinquent children (except where the child exhibits violent or criminal behaviour).¹⁰

The United Kingdom has rules which prevent the detention of unaccompanied children except in the most exceptional circumstances. For instance, where they arrive outside business hours, children may be detained overnight.¹¹

Canada recently introduced legislation – the *Immigration and Refugee Protection Act* – which explicitly 'affirm[s] as a principle that a minor child shall be detained only as a measure of last resort'.¹² Canada's Immigration Manual on Detention states that:

Where safety or security is not an issue, the detention of minor children is to be avoided whether unaccompanied or accompanied by a parent or legal guardian.¹³

For unaccompanied children in Canada:

the preferred option is to release with conditions to the care of child welfare agencies, if those organizations are able to provide an adequate guarantee that the minor child will report to the immigration authorities as requested.¹⁴

In Sweden, unaccompanied children may not be detained at all and accompanied children cannot be detained if they have a guardian or parent lawfully in the community. However, if all alternatives to detention have been explored and rejected, a child accompanied by his or her parents may be detained if an asylum claim will be decided under an accelerated procedure and it is highly probable that the case will be rejected. An accompanied child may also be detained if he or she has previously failed to comply with reporting requirements and presents a serious flight risk prior to removal. In either case, the period of detention is limited to 72 hours, with the possibility of a 72-hour extension in exceptional circumstances.¹⁵

As noted in Chapter 6 on Australia's Detention Policy, the Department has sought to make a distinction between the need to detain unaccompanied children and children who arrive with their families (although, in fact, Australia's mandatory detention legislation makes no such distinction – all must be detained). The rationale given for this distinction is that the principles of family unity and the best interests of the child require accompanied children to be detained because their parents must be detained.¹⁶

However, the principle of detention as a last resort means that the presumption against detention applies equally to all children irrespective of whether they are with their parents. Whether the circumstances of the parents, taking into account

A last resort?

matters such as health, security and identity concerns, require the detention of parents, and whether or not the detention of one or more parents requires the detention of their children, needs to be determined on a case-by-case basis, as discussed below.

17.4.3 Recommendation 2(b): Australia's laws should require independent assessment of the need to detain children within 72 hours of any initial detention

(a) Australia's laws could permit short-term detention to conduct preliminary health, security and identity checks, subject to independent review

The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. In conformity with Ex[ecutive] Com[mittee] Conclusion No 44, the detention of asylum seekers may only be resorted to, if necessary:

- (i) to verify identity...
- (ii) to determine the elements on which the claim for refugee status or asylum is based...
- (iii) in cases where asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum...
- (iv) to protect national security and public order.

UNHCR Detention Guidelines, guideline 3

The Department rightly states that the execution of basic health, security and identity checks is an important element of maintaining a secure immigration system. Indeed, the need to conduct this process is the Department's rationale for distinguishing between the need to detain unauthorised arrivals as opposed to authorised arrivals. The Department argues that because authorised arrivals have already obtained a visa for entry, they will have undergone these preliminary checks and therefore do not need to be detained for those purposes.¹⁷

The Inquiry recognises that many unauthorised asylum seekers arrive in outlying areas of Australian territory such as Ashmore Reef. The unavailability of health and other facilities in such places makes it particularly difficult to immediately conduct these preliminary checks. While it is the Inquiry's view that many unaccompanied children and families would voluntarily submit to any transportation and other procedures necessary to conduct these preliminary checks, the Inquiry acknowledges that it may become necessary to briefly detain children who arrive without any documentation regarding identity and medical history. Many of the submissions to the Inquiry which considered alternative models of detention also agreed that detention for the purposes of preliminary health, identity and security checks was permissible.¹⁸

UNHCR characterises health, security and identity checks as 'exceptional grounds' for detention which should not be routinely applied to all asylum seekers. Thus,

according to UNHCR, detention for these reasons should only occur after an individual assessment reveals the need to detain in order to achieve those purposes.¹⁹

In Canada, while adults are rarely detained for the purpose of identity checks, if they are detained, the continuing need to detain must be reviewed within 48 hours.²⁰ It appears that under the new Canadian legislation children would not be detained even for these purposes.²¹ Moreover, of the 338 children who were detained before the introduction of the new legislation, 75 per cent were detained for less than a day.²²

Sweden also allows for the detention of adults to establish identity but limits the length of detention for identity checks to 48 hours, with the possibility for extension in exceptional circumstances. Children are not generally detained for these purposes.²³

The United Kingdom does not permit detention of unaccompanied children for the purpose of preliminary checks but appears to permit detention of adults and families for the purposes of conducting assessments of identity and flight risk.²⁴ The decision to detain for these purposes must be reviewed within 24 hours.

The UNHCR Detention Guidelines also permit detention for the purposes of determining the elements of the claim in exceptional circumstances. It is important to note that this ground only justifies detention to obtain 'essential facts from the asylum seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim'.²⁵ It does not permit detention for the duration of the refugee status determination process, as currently occurs in Australia under the Migration Act.

(b) Independent assessment of the need to detain for these or any other purposes should occur within 72 hours

There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention...these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved their lawful and legitimate purpose.

UNHCR Detention Guidelines, guideline 3

In order to comply with article 37(b) of the CRC, the need for, and period of, detention (for the purposes of health, identity or security checks, or any other purpose) must be closely supervised by an independent body. This does not mean that children can never be detained for these purposes, just that an independent body assesses whether the unaccompanied child or family must be detained while the Department completes its checks.

This process is very similar to the bail application procedures that are regularly conducted by Australia's juvenile justice system when a child is arrested. While 72

A last resort?

hours is longer than the time in which most bail hearings occur,²⁶ the Inquiry has taken into account international practice regarding preliminary checks, and the fact that there may be logistical difficulties in transporting the relevant authorities to outlying areas like Ashmore Reef (or transporting the new arrivals to appropriate locations).

The unaccompanied child or children and their parents must have a right to be heard in all hearings relating to their detention. They must also be informed of the right to obtain legal representation, and have an opportunity to access such representation.

If the Department has been unable to complete its security checks within 72 hours, it might ask the tribunal or court to order continuing detention of the particular children and their parents until those checks are completed.²⁷ The principles of detention as a last resort and the best interests of the child would require the tribunal or court to consider, for example, whether appropriate reporting or residency requirements, or some form of surety, could address the Department's concerns in the case of that particular family. If the Department has health concerns then quarantine in a hospital until the disease has been cleared may be more appropriate than detention in a remote facility.

On the evidence before the Inquiry, case-by-case assessment of flight and security risks would, more likely than not, fail to rebut a presumption against detention of children. The Department has not provided any statistics or studies that suggest that unaccompanied children and families who are seeking asylum (as opposed to all other unlawful non-citizens, like visitor overstayers) represent a substantial flight risk (see section 17.5.2 below).

Furthermore, evidence before the Commonwealth Parliament Joint Standing Committee on Foreign Affairs, Defence and Trade revealed that not one asylum seeker detainee screened by the Australian Security and Intelligence Organisation (ASIO) between July 2000 and August 2002 – adult or child – was found to be a security risk.²⁸

In any event, factors that do *not* justify detention of any child under any circumstances include: (a) the need to send a message of deterrence to potential asylum seekers, and (b) the need to finally determine an asylum claim prior to releasing children into the community.²⁹

It is also relevant to note that even under Australia's current Migration Act, detention may take a variety of forms. Currently in Australia, for authorised arrivals, detention for the purposes of identity checks usually takes the form of being in the presence of an immigration officer – either in an airport or an immigration office – for a matter of hours. There is no apparent reason why the same circumstances could not apply to unauthorised arrivals if the only purpose of detention is to record this information. In any event, there seems to be no good reason to detain unaccompanied children and families in remote detention facilities for these purposes.

The absence of individual risk assessments in the current detention system for unauthorised arrivals has been one of the primary concerns of many organisations

making submissions to the Inquiry. This was also highlighted by the Human Rights and Equal Opportunity Commission (the Commission) in its 1998 report, *Those who've come across the seas*.³⁰

One of the main features of the alternative model of detention proposed by Justice for Asylum Seekers (JAS) is the inclusion of an individual risk assessment. JAS has developed a comprehensive model that deals with both adults and children. Its model suggests that, on arrival, every person should undergo a 'psychosocial risk assessment' which examines the health, psychological, security and absconding risks associated with individual asylum seekers. Depending on the outcome of that assessment, individuals should either be released on a structured community release program or be kept in closed detention centres.³¹ JAS recommends that unaccompanied children and pregnant single women receive immediate security clearance and that accompanied children and their primary carers be released from detention as soon as possible.³²

17.4.4 Recommendation 2(c): Australia's laws should provide for prompt and periodic review of the legality of continuing detention

If detained, asylum-seekers should be entitled to the following minimum procedural guarantees:

- (i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order in a language and in terms they understand
- (ii) to be informed of the right to legal counsel. Where possible they should receive free legal assistance
- (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuance of detention, which the asylum-seeker or his representative would have the rights to attend
- (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any finding made...

*UNHCR Detention Guidelines, guideline 5*³³

In addition to a prompt individualised assessment of the need to detain in the first place (see section 17.4.3 above), article 37(d) of the CRC requires that there be an opportunity to seek review of any decision to detain in 'a court or other competent, independent and impartial authority'. The Inquiry believes that such review is most appropriately provided in the Australian context by a court.

Australian criminal law provides for such protections by permitting any child kept in custody after initial bail proceedings to reapply for bail at any time during the period of detention. By contrast, under the current immigration detention system, a child who has committed no crime at all, but who arrives in Australia without a visa to seek asylum, has no meaningful ability to challenge his or her detention (see Chapter 6 on Australia's Detention Policy).

A last resort?

Laws that incorporate the features described above should therefore provide for:

1. a hearing within 72 hours before a court or independent tribunal in order to determine the need to detain unaccompanied children and children with their parents beyond that period (see section 17.4.3 above)
2. the opportunity to seek prompt judicial review should the court or tribunal decide that detention of children was necessary
3. the opportunity for periodic and ongoing judicial review.

Children must be informed of the right to obtain legal representation, and have access to representation, at all hearings relating to their detention.

Many countries that allow for the detention of asylum seekers have implemented the features set out in the UNHCR guidelines set out above, although the time limits applied vary substantially. The international practice suggests that, for adults, review should occur at least every four weeks. The Inquiry recommends that review of the detention for unaccompanied children and families be more frequent.

In Canada, a person may appeal immigration detention at any time. A senior immigration officer must immediately review an initial detention decision taken by another officer. Within 48 hours, the Immigration Review Board (IRB) – an independent administrative tribunal – must review the decision of the senior immigration officer. If detention does continue, the IRB decision must again be reviewed within seven days and then at least every 30 days.³⁴

Under Swedish law, all detainees have a right to appeal the decision to detain at any time, but there are also provisions for automatic review. For children the review must occur within 72 hours and their detention may only be extended for another 72 hours. For adults, detention for identity checks must be reviewed within 48 hours and thereafter review must occur within two weeks unless the detention order is related to refusal-of-entry or expulsion orders, in which case review must occur within two months. If review does not take place within these periods, the detention order automatically ceases to apply.³⁵

In Denmark, the initial decision to detain is also reviewed by a court within 72 hours. Any further detention must be reviewed every four weeks. Negative decisions may be appealed to higher courts.³⁶

In the Netherlands, judicial review occurs within 10 days. Detained asylum applicants receive legal aid from either the private bar or from the state-funded Foundation for Legal Aid.³⁷

In the United Kingdom, initial decisions by immigration officers to detain are reviewed automatically within 24 hours, then again after a week and thereafter monthly, but such review is undertaken by the Immigration Service, rather than an independent authority. Detainees may request a bail hearing after eight days of detention but do not have a statutory right to such a hearing. Asylum seekers are also entitled to seek judicial review or file an application for a writ of habeas corpus; however, this

is rare due to the high burden of proving that the detention is unlawful, as opposed to unnecessary, in the circumstances of the case.³⁸

Finally, in the United States, while asylum seekers may apply for parole from detention, the application is made to the Immigration and Naturalisation Service (INS) which is the detaining authority. Changes made by a 1996 immigration law mean that refusal of parole by the INS cannot be challenged in the federal courts.³⁹

17.4.5 Recommendation 2(d): Australia's laws should incorporate fundamental principles on detention to guide courts and independent tribunals

If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort and for the shortest period of time...

UNHCR Detention Guidelines, guideline 6

New laws regarding immigration detention should ensure that courts or independent tribunals assessing the need to detain children are required to have regard to the following four fundamental principles:

1. detention of children must be a measure of last resort and for the shortest appropriate period of time
2. the best interests of the child must be a primary consideration
3. the preservation of family unity
4. special protection and assistance for unaccompanied children.

(a) The principle of family unity in making decisions regarding detention of children

Amongst other things, the combination of the first three of these fundamental principles means that an independent tribunal or court must carefully consider whether it is appropriate to detain the parents of particular children, given that children should only be detained in exceptional circumstances. For example, in the event that a parent is found to be a security risk, the automatic consequence should not be that his or her children are detained – strict reporting requirements on parents may both address the risk and permit children to be at liberty with their parents. If the circumstances are so serious that parents must be detained, the court might consider detaining one parent only, leaving the other parent to look after the children in the community. While the process and decisions may not be easy, anything less would be inadequate to meet the minimum standards set out in the CRC.

Under Swedish law, where an asylum seeker child is accompanied by two parents and there are concerns about security or identity, then one parent may be detained while the rest of the family is released and required to report regularly to the authorities.⁴⁰ Unaccompanied children and children accompanied by one parent will usually not be detained even if that parent or guardian is deemed a flight risk, but they may be subject to strict reporting requirements.⁴¹

(b) Maximum time limits on the period of detention for children

Some of the alternative models of detention proposed by Australian community groups suggest that there be a maximum permissible period for which unauthorised arrivals may be detained. For instance, in 1996 a Detention Reform Co-ordinating Committee submitted a draft alternative model to the Minister for Immigration and Multicultural Affairs which suggested a 90-day maximum period of detention. This model was endorsed in the Commission's 1998 report, *Those who've come across the seas*. The 2001 Commonwealth Parliament Joint Standing Committee on Foreign Affairs, Defence and Trade report recommended a time limit of no longer than 14 weeks for asylum seekers who have received security clearances.⁴² The Conference of Leaders of Religious Institutes suggests an outer limit of 60 days.⁴³ The Amnesty International School's Network suggests a six-week maximum but recommends that the type of detention be secure community housing rather than a closed facility.⁴⁴ The Law Institute of Victoria suggests a maximum of four weeks.⁴⁵

While these models suggest that processing times should be shorter for children and their parents, the Inquiry is wary of setting any acceptable time limits for the detention of children. The Inquiry is of the view that the overwhelming priority when addressing the issue of detention of children is to ensure compliance with the four fundamental principles listed above. It is the view of the Inquiry that a combination of a presumption against detention and effective and regular judicial review of any rebuttal of that presumption, as described below, is a more appropriate method of providing safeguards against long-term detention, than an outside time limit.

If, however, a new detention model were to be introduced with a maximum time limit, the Inquiry would strongly recommend that such a period be substantially shorter for children and their parents than for single adults. In the case of unaccompanied children detention should be limited to no more than a few days. The limits placed on detention of children by other countries as set out in 17.4.2 above are instructive in this regard.

17.4.6 Recommendation 2(e): Australia's laws should be amended so that bridging visas are readily available to families and unaccompanied children

Alternatives to detention of an asylum seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum seeker concerned and prevailing local conditions. Alternatives to detention which may be considered are as follows:

- (i) Monitoring Requirements...
- (ii) Provision of a Guarantor/Surety...
- (iii) Release on Bail...
- (iv) Open Centres...

UNHCR Detention Guidelines, guideline 4

In recognition of the drastic nature of the deprivation of a child's liberty, criminal justice systems have devised many different methods of keeping track of children and their parents without imprisoning them. Many groups have applied these principles to asylum seekers – who are not accused or convicted of any crimes – in order to develop various alternatives to detention.

The Migration Regulations currently provide for the issue of bridging visas which enable release into the community. Bridging visas are routinely issued to children and families who arrive in Australia with a visa and apply for asylum on arrival (authorised arrivals). Bridging visas are also available, in theory, to unauthorised arrivals. Indeed the Australian Parliament's Joint Standing Committee on Migration report of 1994, *Asylum, Border Control and Detention*, clearly envisaged that bridging visas would provide the flexibility needed to release certain unauthorised arrivals from detention. The report highlighted the Committee's particular concern about the detention of children.⁴⁶

However, as Chapter 6 on Australia's Detention Policy demonstrates, the bridging visa regulations applying to unauthorised arrivals have failed, in practice, to provide the intended flexibility. Between 1999 and 2002 only one bridging visa was granted to an unauthorised arrival unaccompanied child, one to a mother and her two children (the father stayed in detention), and one to a full family. This is the result of overly strict regulations and a failure by the Department to vigorously pursue their application in the case of vulnerable individuals or family groups.

Submissions made to this Inquiry⁴⁷ and to the 1994 Joint Standing Committee on Migration,⁴⁸ as well as the alternative model proposed by the Commission in *Those who've come across the seas*, all suggest that the extension of the current bridging visa regulations to unauthorised arrivals would be an efficient mechanism to facilitate children's release from detention. This Inquiry has also found that the Migration Regulations would need to be amended to enable unauthorised arrival children and their families to qualify for a bridging visa in accordance with the requirements of the CRC. Furthermore, directions would need to be issued to Departmental officers that require them to actively pursue the grant of bridging visas.

Again, this is not a radical proposal. It simply requires the amendment of bridging visa rules so that they apply to children who are unauthorised arrivals in the same way that they currently apply to authorised arrivals.

(a) Bridging visas can allow for conditions to be imposed on children and parents released into the community

The Department rightly highlights its concern that asylum seekers, including children and their families, be available for refugee processing procedures and, in the event that they are unsuccessful, for removal. While the Inquiry has not received any evidence that suggests that children or families are generally a high flight risk (see section 17.5.2 below), it is clearly appropriate that the Department be able to monitor the whereabouts of people pending determination of their immigration status.

A last resort?

The Inquiry received many submissions suggesting various conditions that could be placed on the release of asylum seekers in order to ensure their availability for processing and removal, without keeping children and their parents in detention centres.⁴⁹ Most of those submissions propose measures such as reporting, residency or surety requirements. These options closely mirror those available under the current bail laws for children accused of crimes. They are also already catered for by the current bridging visa regulations, although they have almost never been used in the case of unauthorised arrival children.

Some of the submissions to the Inquiry suggest the possibility of open hostels which could provide basic accommodation and allow free movement during the day with the option of imposing some curfew requirements. Such hostels might also make residency a condition for collecting social welfare benefits as occurs in some European reception centres. Other alternatives include release into the care of community agencies and ordinary Australian families.⁵⁰

The Department itself has developed a model that allows unaccompanied children to be transferred to 'home-based detention'. These transfers to the community do not amount to release from detention, rather they create *alternative forms* of detention, and therefore the transfers are accompanied by stringent conditions in order to maintain 'immigration detention'. Nevertheless, the transfers represent a positive preliminary step towards developing *alternatives to* detention in closed facilities. The Woomera Residential Housing Project and the expansion of that project to Port Augusta and Port Hedland provide a less useful model for any investigation into alternatives to detention due to the continuing restrictions on freedom of movement.

The United States trialled an Appearance Assistance Program (AAP) which permitted a limited number of asylum seekers, who would otherwise have been mandatorily detained, to be released on parole. The program provided for a variety of tracking mechanisms depending on the characteristics of the individuals. Some of the conditions that were imposed included residency requirements and proof of community ties. If the asylum seekers did not know people in the community, the AAP sought the assistance of community groups to help establish ties. The AAP also provided a caseworker system to assist people in understanding the legal process and attend court hearings. Asylum seekers could report by phone or in person. This trial was successful in both reducing costs and increasing compliance rates.⁵¹

In Canada, the immigration authorities can negotiate with asylum seekers as to what the appropriate conditions will be, subject to the approval of an independent tribunal. The conditions may include a financial bond. However, recognising that many asylum seekers may not be able to afford a bond, the Toronto Bail Program was developed to provide supervision as an alternative.⁵²

In Europe, the European Council on Refugees and Exiles (ECRE) issued a research paper in 1997 on the practical alternatives to the detention of asylum applicants and rejected asylum seekers.⁵³ The various options discussed in that paper include supervised release of children to local child welfare agencies, supervised release

to community organisations and individual citizens and other general restrictions on the place of residence, reporting requirements and open centres. The ECRE paper suggests that the provision of a monetary bond may not be appropriate for asylum seekers because of their likely financial situation. It is clear that bonds will almost never be appropriate for unaccompanied children.

ECRE urges that the conditions attached to these non-custodial measures be guided by the *United Nations Standard Minimum Rules for Non-Custodial Measures* (the Tokyo Rules). The guiding principle of these Rules is that the human rights of the individual should be weighed up against the overall concerns of society.⁵⁴

Many European countries have implemented one or several of the options mentioned in the ECRE research paper. For example, in the United Kingdom, asylum seekers – adults and children alike – are routinely released on bail. They are also housed in open detention centres.⁵⁵ In Denmark, asylum seekers are first referred to reception centres run by the Danish Red Cross and later housed at accommodation centres. In both cases, people are free to leave the centre but must return in the evening.⁵⁶

In Sweden, children who arrive with their families are initially taken to the Carslund Refugee Reception Centre where they can come and go freely, although they may be subject to reporting requirements. After a short period of time they are offered housing and social support in the community. They must visit the reception office (close to where they are housed) at least monthly for their allowance, news on their application and needs and risk assessments. The Swedish Migration Board assigns each asylum seeker a caseworker to make these assessments and to refer clients for medical care, counselling and other services. Unaccompanied children are housed in a supervised group home.⁵⁷

Various release options were considered in *Those who've come across the seas*, as well as the model based on the *Charter of Minimum Requirements for Legislation Relating to the Detention of Asylum Seekers*, which was endorsed by the Australian Council of Churches and 16 other community and statutory organisations.⁵⁸ The Independent Education Union has also developed a model in its paper, *Refugee and Asylum Seeker Policy in Australia*,⁵⁹ as has the Conference of Leaders of Religious Institutes (NSW) in its paper, *Australia's Humanitarian Program for People Seeking Protection in Australia*.⁶⁰

The JAS submission to the Inquiry draws upon the Swedish experience in particular, as well as recommendations from *Those who've come across the seas*, to suggest that whatever the conditions imposed, a caseworker ought to be appointed to each family from the moment of arrival to such time when the asylum seeker is either granted a protection visa or returned to his or her country of origin. It is the view of JAS that this feature would go a long way to addressing the risk of absconding while at the same time ensuring the proper care of children and their families.

The JAS submission describes the role of the caseworker to be:

- informing asylum seekers of their rights, compliance requirements and refugee status determination processes

A last resort?

- making individual needs assessments regarding social welfare, community and health support
- providing referrals to medical specialists
- preparing people for, and informing them of, immigration outcomes, including the possibility of having to return to their country of origin.⁶¹

JAS describes the likely outcomes of such a system in Australia to include:

- assisting the Department to make informed decisions as to whether asylum seekers should remain in detention or whether they are able to be released into the community
- improved ability to track asylum seekers in the community
- ensuring continuity of care and ongoing social and welfare support
- improved outcomes on return and settlement.⁶²

The possibility of replacing detention with bonds, sureties and community sponsorship was considered and rejected by the Commonwealth Parliament's Joint Standing Committee on Migration in 1994 (the 1994 Committee).⁶³ In the light of the evidence before this Inquiry and the other research that has been conducted since that time, it is the Inquiry's view that a fresh consideration of the issue is warranted, and is unlikely to result in the same conclusion, especially when applied to children and their parents. For instance, the 1994 Committee was concerned that absconding would be a serious problem,⁶⁴ but the Department has been unable to provide any evidence that children and families are a high flight risk. Moreover, a number of measures that might reduce any such risk, such as the caseworker model suggested by JAS, and now used in the United States and Sweden, were not considered by the 1994 Committee.

The 1994 Committee also expressed concern about the costs of running such a scheme. This is clearly an important question that must be the subject of serious analysis. However, the high costs of mandatory detention should not be forgotten: early research suggests that the costs of a supervised release scheme would be substantially lower than the costs of running detention facilities.⁶⁵ For example, a JAS-commissioned report estimates that a proposed alternative model could cost 18 per cent less than the current mandatory detention system.⁶⁶

(b) Children released on bridging visas should be provided appropriate services in the community

Whatever model, or combination of models, is adopted, the Commonwealth must also ensure that children are in a position to enjoy their rights once in the community. The 1994 Committee report emphasised the importance of providing appropriate support arrangements.⁶⁷

Chapter 16 on Temporary Protection Visas highlights some of the Inquiry's concerns regarding the level of services provided to children post-detention. That chapter

emphasises that all of the rights under the CRC, including education, health care, mental health care and an adequate standard of living, apply to asylum-seeking children whether or not they are in detention.

Chapter 16 also finds that the services provided to the very few unauthorised arrivals released on bridging visas fall short of the levels required by the CRC. Evidence received by the Inquiry, from non-profit organisations assisting the large numbers of authorised arrival asylum seekers in the community, suggests that those children and families also face serious difficulties.

The difficulties encountered by asylum-seeking families in the community highlight the potential problems for detainee families released on bridging visas under the model proposed by the Inquiry, unless appropriate changes are made.

The Inquiry recommends that the problems faced by asylum-seeking families in the community be addressed as a matter of priority and that consultations be undertaken with experts and the community groups that assist them.

17.4.7 Recommendation 3: An independent guardian should be appointed for unaccompanied children and they should receive appropriate support

Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency with the asylum countries. Otherwise, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision...A legal guardian or adviser should be appointed for unaccompanied minors.

UNHCR Detention Guidelines, guideline 6

It is suggested that an independent and formally accredited organization be identified/established in each country, which will appoint a guardian or adviser as soon as the unaccompanied child is identified. The guardian or adviser should have the necessary expertise in the field of childcaring, so as to ensure that the interests of the child are safeguarded, and that the child's legal, social, medical and psychological needs are appropriately covered during the refugee status determination procedures until a durable solution for the child has been identified and implemented. To this end, the guardian or adviser would act as a link between the child and existing specialist agencies/individuals who would provide the continuum of care required by the child.

UNHCR UAM Guidelines, para 5.7

The Inquiry has addressed the heightened responsibility of the Department towards unaccompanied children throughout this report. That responsibility arises in two primary areas. First, to ensure that unaccompanied children have an independent advocate throughout the refugee status determination process (see Chapter 7). Second, to ensure the appropriate care of unaccompanied children (see Chapters 6, 14).

A last resort?

Many of the problems faced by children in detention stem from the detention itself. However, a substantial number of difficulties also arise as a result of a conflict of interest in the Minister and his or her Departmental delegates as guardians for unaccompanied children. Their lack of child care qualifications has also proved to be problematic.⁶⁸

The present *Immigration (Guardianship of Children) Act 1946* (Cth) (IGOC Act) provides that the Minister is the guardian of all unaccompanied children at all times. However, the Minister has delegated his power to Departmental officials and to officials of State child welfare authorities. As a matter of practice, Departmental officials are the effective guardian while children are in detention centres, and State child welfare authorities are the effective guardian once children are in the community. If unaccompanied children were routinely released into the community, under the current arrangements their interests would be protected by having State authorities as the effective guardian from the moment of arrival in Australia.⁶⁹

However, the Inquiry recommends that Australia's laws be amended so that the Minister is no longer the legal guardian of unaccompanied children. This is the only way to ensure that the role of the Minister (and the Department) as visa decision-maker and detention authority is separated from the role of advocate for the best interests of unaccompanied children.

The Refugee Council of Australia (RCOA) submission includes a detailed proposal as to how a new guardianship arrangement might work. The RCOA suggests that guardianship be transferred from the Minister for Immigration to the Minister for Children and Youth Affairs which would engage the federal Department of Family and Community Services (FaCS) in the care of unaccompanied children. The RCOA also recommends that direct responsibility be delegated to members of a panel of advisers which would be funded by FaCS but staffed by a community organisation.⁷⁰ Under this model the responsibilities of the independent adviser would include:

- to act as an advocate for the minor and to ensure that all decisions made in relation to the minor are in his/her best interests;
- to ensure that the minor has suitable care, accommodation, education, language support and healthcare;
- to ensure that the minor is not placed in any situation that would place him/her at risk of psychological trauma, physical danger or sexual abuse;
- to ensure that the child has competent and child-responsive representation to deal with his/her asylum claim and/or other legal matters;
- to act as a mentor to the minor and provide guidance and support;
- to contribute to finding a durable solution in the minor's best interests;
- to provide a link between the minor and the various organizations that might provide services to him/her: DIMIA, ACM (not just centre management but also health workers, teachers and welfare staff), other Government agencies (Centrelink, community services, education, health etc) and community welfare agencies;
- to monitor any foster or care arrangements; and

- to assist the minor with family tracing and reunification.⁷¹

International practice also provides instructive models. In the United Kingdom, the Immigration Service can grant temporary (usually four years) admission to an unaccompanied child and refers him or her to the Department of Social Services (DSS) which is then bound to look after the child under the *Children's Act 1989*.⁷²

Under the UK Children's Act, local authorities are required to provide accommodation, education, advice and assistance and other services needed by unaccompanied children in the same way as they would for any other child deprived of parental care. They may place the child in a foster home, community home or other suitable care arrangements.

In addition to the basic care of the DSS, there is a well-developed system of support for unaccompanied children through the asylum process. Within 24 hours of claiming asylum, the Home Office sends the details of all unaccompanied children to the Panel of Advisers for Unaccompanied Refugee Children at the UK Refugee Council.⁷³

The Panel is funded by the Home Office but run by a community group. Its role is to provide independent guidance and support to unaccompanied children throughout the asylum process. The Panel does not provide legal advice but will ensure that children have suitable legal assistance. Advisers can attend interviews with the children and will explain the process to them so that they can make informed decisions. It will also help children access legal, health and social services. The Panel might also introduce the children to community groups and the Red Cross for the purposes of family tracing.⁷⁴

In the United States, the Immigration and Naturalisation Service (INS) had the responsibility for the care of unaccompanied children until 2002. US organisations criticised this system on similar grounds that Australian organisations have criticised the Australian system, namely, that juvenile officers at the INS did not have child care qualifications and their status as immigration officials creates a conflict of interest.⁷⁵ The US Homeland Security Act transferred the responsibility for 'unaccompanied alien children' from the INS to the Office of Refugee Resettlement of the Department of Health and Human Services (the Office). The functions of the Office include:

- coordinating and implementing the care and placement of unaccompanied children
- ensuring that the interests of the child are considered in decisions relating to the care and custody of unaccompanied children
- identifying a sufficient number of qualified individuals, entities and facilities to house unaccompanied children
- reuniting unaccompanied children with their parents
- conducting investigations and inspections of facilities and other entities in which unaccompanied children reside.⁷⁶

A last resort?

When making placement decisions, the Office must take into account the need to ensure that unaccompanied children will appear for all hearings. The Office is encouraged to use the refugee children foster care system set up in the United States.⁷⁷

The US Bill regarding Unaccompanied Alien Children, which is before the US Senate, adds that children should be transferred to the custody of the Office within 72 hours of apprehension and promptly placed in the care of a parent, legal guardian or 'state-licensed juvenile shelter, group home, or foster care program willing to accept physical custody of the child'.⁷⁸

The draft legislation also requires the Office to develop regulations which ensure that unaccompanied children receive appropriate food, education, medical care, mental health services (including torture and trauma services) and access to phones, lawyers, interpreters, recreational programs, spiritual and religious services.⁷⁹

In Canada, legislation and guidelines state that a designated representative should be appointed to all children as soon as possible.⁸⁰ The guidelines emphasise that the designated representative does not have the same role as the legal representative (to which children also have a right). The designated representative must have the following qualifications:

- be over 18 years of age
- have an appreciation of the nature of the proceedings
- not be in a conflict of interest situation with the child claimant such that the person must not act at the expense of the child's best interests and
- be willing and able to fulfil the duties of a representative and to act in the best interests of the child.

In addition, the linguistic and cultural background, age, gender and other personal characteristics of the designated representative are factors to consider.

The duties of the designated representative in the context of refugee status determination are to:

- obtain a lawyer for the child
- instruct the lawyer or to help the child to do so
- make other decisions with respect to the proceedings or to help the child make those decisions
- inform the child about the various stages and proceedings of the claim
- assist in obtaining evidence in support of the claim
- provide evidence and be a witness in the claim

- act in the best interests of the child.⁸¹

Some other useful models include those in the Netherlands, Norway, Italy and Sweden, all of which appoint independent advisers to unaccompanied children.⁸²

17.4.8 Recommendation 4: Australia's laws should codify the minimum standards of treatment of children in detention centres

States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Convention on the Rights of the Child, article 3(3)

Conditions of detention for asylum seekers should be humane with respect for the inherent dignity of the person. They should be prescribed by law.

UNHCR Detention Guidelines, guideline 10

Where appropriate, States should incorporate the Rules [for the Protection of Juveniles Deprived of their Liberty] into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles. States should also monitor the application of the Rules.

JDL Rules, rule 7

In the event that asylum-seeking children are detained, it is important to ensure transparent and effective mechanisms are in place to avoid a recurrence of the series of breaches of human rights that have been identified throughout this report.

As outlined in Chapter 5, which discusses the mechanisms for protecting children's rights in immigration detention centres, there are a variety of standards that apply, including:

- the Immigration Detention Standards (IDS) included in the contractual agreement between ACM and the Department
- ACM policy documents developed pursuant to the IDS
- internal Departmental guidelines intended to assist the Department's detention centre managers
- Memoranda of Understanding (MOUs) between the Department and State agencies
- Commonwealth and State laws.

As the preceding chapters demonstrate, this combination of standards has failed to provide adequate protection to children in immigration detention.

In the Inquiry's view, there are several reasons why this mixing pot of standards

A last resort?

failed to result in compliance with the standards that Australia has agreed to under the CRC, namely:

1. Indeterminate detention of children makes the protection of children an almost impossible task.
2. The IDS were insufficiently precise to provide an adequate platform for accountability and failed to fully encapsulate the rights set out in the CRC.
3. The lack of clarity in the role, responsibility and powers of State government agencies vis-à-vis the Department has resulted in substantial gaps in the protection of the rights of child detainees. The development of MOUs in response to this uncertainty has been slow and haphazard.
4. There has been no transparency regarding accountability to the contractual standards. The performance measures attached to the IDS were withheld from the public on the basis of commercial confidentiality, as was the implementation of those measures.
5. The Department's contractual monitoring systems were developed in an ad hoc manner and the staff responsible for implementing them had no experience or training in child welfare or rights.
6. Australia's laws do not provide a remedy for detainees (either through the courts or through the Commission) upon a breach of the minimum standards set out in the IDS or CRC. This reduces the incentive for compliance.

It is unclear to the Inquiry why the Commonwealth has not approached the operation of detention centres in a more comprehensive manner. In particular, it is unsatisfactory that after more than a decade of administering a mandatory detention policy, the primary guidance from the Parliament regarding detention is the text of sections 189 and 196 of the Migration Act which simply require the detention and release of persons in specified circumstances. There is no Commonwealth legislation setting out the minimum standards of treatment of children while in detention, and no legislative guidance as to what the content of any standards should be.⁸³

Thus, the development of standards and systems for immigration detention has been left to the internal systems of the Department. In practice, this has taken place through commercial agreements with detention services providers, ad hoc arrangements with State authorities and Departmental guidelines. As detainees are not parties to such agreements, they have no enforceable rights to be treated in accordance with the standards and have no direct remedy for a failure to meet those contractual standards.⁸⁴ Similarly, child detainees have no enforceable remedy for a breach of the human rights protected by the CRC or the *International Covenant on Civil and Political Rights* (ICCPR) because the Commonwealth Parliament has not enacted legislation that provide for remedies for a breach of these treaties.

In the Inquiry's view, if the Commonwealth intends to continue to detain children

and their parents, whether for short or long periods, specific legislation and regulations should be enacted which set out the rights of detainees, the responsibilities of the body administering the detention centre and the remedies available for any breach. This should apply irrespective of whether there is a private or public detention services provider.

The Inquiry acknowledges that the Department has taken a preliminary step towards codification by developing new IDS which will apply from 2004 to its new services provider (Group 4 Falck). However, any improvements in these standards will still fail to provide the accountability and remedies to which detainees are entitled upon breach of their human rights.⁸⁵

Once again, the legislative codification of standards is not a radical proposal. It is already a feature of the State juvenile gaol system. In New South Wales, for example, in addition to legislation on special procedures regarding the decision to detain children, there is specific legislation regarding the services to be provided to children who are detained in juvenile detention centres.⁸⁶ That legislation covers such matters as the treatment of detainees, health and medical attention, and education and training. Victoria and Tasmania have incorporated statutory charters of prisoners' rights into their legislation. Other Australian States have also enacted guidelines on the treatment of child inmates.⁸⁷

As a part of the process of enacting such legislation or making such regulations, the respective roles and responsibilities of the Commonwealth and the States in relation to children in immigration detention should be clearly established. For example, new legislation should clarify the role of State legislation and the jurisdiction and powers of State authorities in the areas of child protection, physical and mental health and education.

In the Inquiry's view, the content of any Commonwealth legislation regarding the minimum standards of treatment of children and remedies for breach of those standards should be closely guided by the rights set out in the CRC. Guidance should also be taken from the JDL Rules, which have already done much of the work of applying fundamental human rights to the detention environment for children.⁸⁸ The *UN Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules), the *UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* and the *UN Standard Minimum Rules for the Treatment of Prisoners* are also instructive. The Australasian Juvenile Justice Administrators (AJJA) *Standards for Juvenile Custodial Facilities* (1999) are informed by the Beijing Rules. The Immigration Detention Guidelines published by the Commission in March 2000 may also be a useful reference.

Any new legislation should also require that Department officials actively consider detaining children and their parents in the type of home-based detention that was

A last resort?

created for unaccompanied children in 2002, rather than in closed detention facilities. The Migration Series Instructions issued by the Department in December 2002 offer a good starting point for such legislation; however, the text should be broadened to explicitly include children accompanied by their parents and incorporated into a form that permits enforcement.

17.4.9 Recommendation 5: Australia should review the impact of ‘Pacific Solution’ and ‘excision’ measures on children

Although the Inquiry was not in a position to visit the detention facilities in Nauru and Papua New Guinea, the Inquiry is concerned that the application of the so-called ‘Pacific Solution’ to child asylum seekers may result in serious breaches of the CRC.

As Chapter 6 on Australia’s Detention Policy and Chapter 7 on Refugee Status Determination set out, the Inquiry is particularly concerned about the increased risk of indeterminate detention and refoulement for children detained in Australia’s ‘excised offshore places’ (e.g. Christmas Island) and for children transferred by Australian authorities to Nauru and Papua New Guinea. Moreover, as Chapter 16 on Temporary Protection Visas describes, there are also serious risks of the breach of the principle of family unity in the execution of the ‘Pacific Solution’ measures, particularly when part of a family is detained overseas and part in Australia.

The Department justifies the ‘Pacific Solution’ as an effective strategy for protecting Australia’s borders and dealing with people smugglers.⁸⁹ However, the Inquiry remains concerned that this strategy may be at the sacrifice of the fundamental rights of children.

The Inquiry therefore urges the Parliament to reassess the application of the ‘Pacific Solution’ and ‘excision’ measures to asylum-seeking children and their families.

17.5 The Department’s main objections to the Inquiry’s recommendations

The Department’s response to the first draft of this report indicated strong disagreement with the recommendations proposed by the Inquiry.

Generally speaking, the Department’s objections are the result of a fundamental difference in perspective between the Inquiry and the Department as to what is required by international human rights law.

Briefly summarised, the Inquiry takes the view that because deprivation of liberty is such a drastic measure to impose on an individual, the need to detain must be justified in the case of each and every child. While the purposes of the Government’s policy may be a relevant factor in this assessment, it will not be determinative of the issue. The Inquiry’s view is supported by international bodies including the United Nations Human Rights Committee, the United Nations Working Group on Arbitrary Detention, the United Nations Human Rights High Commissioner’s Special

Representative who visited Australia in 2002 and many Australian experts giving written and oral evidence to the Inquiry.

The Department, on the other hand, is of the view that detention need only be justified in a general sense. The Department has stated that the fact that there are legitimate goals driving the Government's policy justifies the blanket detention of a defined group of people.⁹⁰

The specific objections that arise as a result of this fundamental divergence in perspective can be grouped into the following six categories:

- 17.5.1 Introducing routine and systematic review of the need to detain in the individual circumstances of an unaccompanied child or family will clog courts and slow down visa processing
- 17.5.2 General domestic and international statistics on absconding suggest that all children must be detained to ensure availability for processing and removal
- 17.5.3 The elimination of mandatory detention may result in more children and families coming illegally to Australia
- 17.5.4 It costs too much to support children in the community during visa processing
- 17.5.5 It is too difficult to codify protections for children in detention in legislation
- 17.5.6 There is nowhere to put unauthorised arrivals.

The Inquiry does not accept that any of these objections override the fundamental human rights protection of individual liberty. Indeed, the long-term detention of children seems particularly inappropriate when one takes into account that more than 90 per cent of these children are found to be refugees and eventually end up in the community on protection visas.

The Inquiry addresses each of the Department's concerns in turn.

17.5.1 Introducing systematic review of the need to detain will slow down visa processing and clog courts

The Department has argued that the introduction of mechanisms to review the need to detain will 'lead to impractical and legally and administratively complex arrangements for detention'.⁹¹

The process of protecting individual liberty need be no more complex than applying the existing criminal procedure laws to unauthorised arrivals (even though they have not committed a crime). While there may be a need to increase the number of administrative and/or judicial decision-makers to facilitate this process, additional expense does not excuse the Commonwealth from the obligation to ensure the

A last resort?

protection of individual liberties.

Similarly, the fact that an individual assessment of the need to detain may slow down the visa process does not justify the blanket detention of all unauthorised arrival children. To draw another parallel, this would be the same as arguing that no person accused of a crime should be permitted to apply for bail because it interrupts the 'main business' of determining whether or not the person is guilty.

17.5.2 General statistics on absconding suggest that all children must be detained to ensure availability for processing

The Department argues that if the laws were amended to include the features suggested by the Inquiry, there will be no way to ensure the availability of unauthorised arrival asylum seekers for processing and removal.

In support of this assertion, the Department cites statistics on disappearances by asylum seekers in countries that do not have detention. However, the Inquiry has not been persuaded by these figures.

First, the Department acknowledges that nations are reluctant to publish information on absconding rates and therefore relies on statistics from media sources. For example, the Department cites the paper, the *London Telegraph*, in support of the statistic that 276,000 asylum seekers have absconded in Britain over the past 12 years. Even if these statistics were reliable, they do not distinguish between unauthorised arrivals and authorised arrivals, nor do they distinguish between children and adults.

Second, despite repeated requests by the Inquiry, the Department has not been able to support its concerns about absconding in Australia, or elsewhere, with statistics that specify the rate at which child asylum seekers and their parents – as opposed to adults generally – have disappeared into the community. Indeed, the Department has told the Inquiry that its extensive statistical databases are not able to break down such figures. Despite this fact, the Commonwealth has enacted laws that presume that all children and families who arrive without a visa are a flight risk.

In the meantime, a 2003 report commissioned by JAS which considered evidence on absconding in Australia, the United Kingdom and the United States concluded that families with children are the least likely to be a flight or security risk.⁹²

Third, the Department has provided statistics regarding absconding by those authorised arrivals who have failed their asylum process. As Chapter 3, Setting the Scene, highlights, an average of 92.8 per cent of the unauthorised arrival children who applied for a refugee protection visa between 1999 and 2003 succeeded in their asylum claims. Therefore, the risk of absconding after a failed asylum claim is not relevant to 9 out of 10 children in detention.

As genuine applicants have less incentive to abscond, it would seem that unauthorised arrival children are less likely to disappear. Thus the justification for

the detention of all unauthorised arrival children on the grounds that they will not otherwise be available for processing is unconvincing.

However, even if the Department could provide reliable statistics on the general rate of absconding by children and their families, this would not be sufficient to justify the blanket detention of *all* unauthorised arrival families, just those particular families whose individual circumstances indicate a serious risk of disappearing. Even then international law requires the Commonwealth to explore other methods of controlling flight risk prior to detaining a child or family.

This is because the protection of individual liberty is such a fundamental right that it should only be taken away if an individual's circumstances are such that there is no other choice but to detain – this is especially so in the case of children. If the basic protection of individual liberty were any less than this, a government could declare entire categories of people to be a risk to the community without any opportunity to defend their right to liberty.

Therefore, while the Inquiry acknowledges the need to ensure availability of asylum seekers for processing and removal, it has not been convinced that the only means of ensuring such availability is by the blanket detention of all unauthorised arrival children and families.

17.5.3 The elimination of mandatory detention may result in more children and families coming illegally to Australia

The Department argues that a presumption against the detention of children:

could potentially result in large numbers of children and their parents seeking to enter Australia in an unauthorised fashion.⁹³

The Inquiry understands the Department's concerns to be twofold. First, the removal of mandatory detention might result in increased numbers of unaccompanied children and families arriving in Australia by boat. Second, by giving preferences to children this will create a 'pull factor' for unaccompanied children and families to put their lives at risk by taking the dangerous sea voyage to Australia.

The Department has not provided the Inquiry with any evidence suggesting that there is a connection between Australia's mandatory detention policy and the numbers of boat arrivals. In fact, as Chapter 3, Setting the Scene, notes, the statistics on unauthorised arrivals since 1992 demonstrate that asylum seekers have continued to arrive by boat despite the existence of a mandatory detention system since that time.

However, even if there was evidence of a connection between Australia's detention policy and the decreasing numbers of arrivals, it would still be a violation of children's human rights to continue that policy. As set out in Chapter 4 on Australia's Human Rights Obligations and Chapter 6 on Australia's Detention Policy, while Australia is entitled to protect its borders, it must do so within the bounds of international human rights law. The protection against arbitrary detention means that Australia can only

A last resort?

detain a child if the deprivation of liberty is a proportionate response to achieving a legitimate aim. If the purpose of Australia's system of mandatory detention is to deter, then it clearly violates children's rights because it deprives one child of freedom for the purpose of stopping another from making a journey to Australia.

The increasing number of asylum seekers is not just an issue for Australia, it is a global problem. Australia should consider the approach of nations like Canada and Sweden when determining a more appropriate response to unauthorised arrivals. Legislation in the United States regarding unaccompanied children also provides constructive guidance. Australia should also consider the advice of Australian experts, such as the members of JAS. The substance of the various models is described in section 17.4 above.

17.5.4 It costs too much to support children in the community

The Department has argued that the cost of supporting asylum seeker families in the community and tracking down those who disappear, is too great to justify a change in policy. It cites the findings of the 1994 Committee report in support of this argument.

First, as set out above, there is no reliable evidence proving that absconding by children and families will be high.

Second, in making this argument the Department fails to compare the financial costs of having families in the community with the financial cost of detention. It also fails to consider the long-term social costs of keeping children in detention – both for the children themselves and for the Australian community which has to bear the responsibility of dealing with children who have been negatively affected by detention.

The Inquiry does not have sufficient information before it to express a concluded view on the relative financial costs of keeping children in detention, compared with supporting them in the community. However, studies on these issues that were completed as recently as 2003, suggest that a supervised release scheme would be substantially cheaper than detention in places like Woomera (see section 17.4.6 above). The Inquiry questions the weight that can be attached to the findings of the 1994 Committee, which are now 10-years-old, and suggests that the Department conduct a full investigation into the current relative costs of the various options outlined above.

In any event, while cost is clearly an important consideration in developing a new model, it cannot be used to justify continuing breaches of children's fundamental right to liberty.

17.5.5 It is too difficult to codify protections for children in detention in legislation

In responding to the Inquiry's suggestion that there be a legislative codification of the minimum standards in detention facilities the Department states that the Inquiry:

does not acknowledge the inherent difficulties of such an approach, including identification of areas to be codified and to what minimum standard.⁹⁴

The Inquiry is seriously concerned by this statement for three reasons. First, the difficulties involved in ensuring the protection of children's rights is insufficient reason to avoid the task. Second, it is of concern to the Inquiry that, ten years after the introduction of mandatory detention, the Department is still unclear as to what minimum standards should be met in running detention centres. Third, there is already similar legislation applying to State-run prisons and juvenile detention centres.

The Inquiry readily acknowledges that the protection of children's rights is a complicated task, made all the more difficult by the additional responsibilities that come with detaining children in a closed environment. However, this is all the more reason to ensure a full and frank debate in Parliament as to what standards must be met.

17.5.6 There is nowhere to put unauthorised arrivals

The Department has suggested that it would not know where to put unauthorised arrivals if they were not in detention centres:

in a country as geographically large and culturally diverse as Australia, there would be issues about where children [released into the community] would be placed and with whom, health, education, financial support ...⁹⁵

However, it is the Inquiry's view that Australia's geography and multicultural society makes it all the more likely that asylum seekers could be accommodated in the community. Indeed, many community groups have offered to support asylum seekers and refugees and assist them in finding accommodation. Special schools have been established to address particular issues facing new arrivals to Australia. Moreover, since more than 90 per cent of the children are eventually given protection visas and released into the community, services will eventually need to be provided to these children in any case.

In any event, the Inquiry reiterates that the existence of logistical challenges do not justify the blanket detention of all unauthorised arrival children and families.

17.6 Action taken by the Department and ACM in response to the Inquiry's findings and recommendations

Pursuant to section 29(2)(e) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the Inquiry invited the Department and ACM to advise it as to whether they have taken, or are taking, any action as a result of the findings and recommendations made by the Inquiry and, if so, the nature of that action. The Department and ACM responded on 6 February 2004. The relevant parts are extracted below.⁹⁶

17.6.1 Action taken by the Department

The Department stated that many of the Inquiry's findings and recommendations 'relate to the legal and policy settings for immigration detention' and that 'these are matters for response by the Government'.

However, the Department also sought to address certain issues relating to its administration of the immigration detention laws. Much of the Department's response reiterates issues that have already been brought to the attention of the Inquiry. However, the Department also provided the following relevant information regarding general measures that it has taken, or will take, in order to improve the circumstances in which children are detained.

First, the Department states that it is 'continuing to seek further opportunities to manage our legal obligations in an innovative way, which responds to the evolving needs of children in immigration detention'.

The Department also states that as at 6 February 2004 there were only 17 unauthorised boat arrival children still in mainland detention centres. This figure does not include children on Christmas Island or Nauru, nor does it include children detained in residential housing projects or alternative places of detention in the community. The Department stresses that it is 'working actively to establish appropriate alternative arrangements for children'.

The Department highlights that:

- A very significant change has taken place during the past two years, as the Department has developed Residential Housing Projects, worked with community groups to establish alternative detention arrangements and to support prospective bridging visa applicants, and worked with child welfare authorities to support unaccompanied and other vulnerable minors in foster care arrangements.
- The Department is working actively to develop further options for children, including consideration of metropolitan Residential Housing Projects and a wider range of arrangements with community groups.

In response to Major Finding 1, the Department provided the following relevant information regarding its application of Australia's laws to unauthorised arrival children:

- [M]any people in immigration detention may not be eligible for consideration of a bridging visa because they do not meet the requirements of the regulations. In that context, the Department has offered all eligible women and children the opportunity to move to a Residential Housing Project. Some have declined.

Major Findings and Recommendations

- ... Residential Housing Projects are now available in Port Augusta, Port Hedland and Woomera. Further projects are being considered in metropolitan areas.
- This focus on meeting children's individual needs was also enhanced in the development of the new Immigration Detention Standards (IDS), which form part of the contract with the detention services provider...
- A case management approach to respond to individual needs has also been introduced at the Baxter Immigration Detention Facility (IDF), with a view to expanding this at other centres. This approach will further enhance the focus on providing appropriate support to children and their families.

With respect to Major Finding 2, the Department stresses that 'mental health is a much broader and more complex issue than detention'. The Department also states that:

- Within this context, the Department and services provider have sought to ensure that, whenever possible, the effects of risk factors are minimised and protective factors are maximised or enhanced. Protective factors, to a large extent, focus on supporting parents to in turn support their children, ensuring good school environments and good physical health.
- For example, the Department has established arrangements with State education authorities for children to attend schools in the local community. The majority of school-age detainee children are now spending a large portion of their waking hours each week outside the detention facility, learning and interacting with Australian children.
- The benefits of Residential Housing Projects, described above, are also particularly relevant to this finding. Contrary to the report's description, there is clear evidence that Residential Housing Projects can assist individuals who are having difficulties coping in an immigration detention facility.
- There has been a marked increase in the proportion of long-term detainee women and children who are accommodated in alternative detention arrangements. Of this group, approximately 15% were in alternative detention in July 2003 and as at 21 January 2004, 43% were in alternative detention. The majority are in Residential Housing Projects. A small number are in community based detention arrangements, where a Housing Project is not appropriate to meet their specific needs.
- In response to emerging and evolving mental health needs, children in immigration detention are provided with a standard of mental health services that is comparable to those available in the Australian community. As described earlier, the Department works closely with the detention services provider and specialists to ensure appropriate responses to individual needs. State child welfare authorities are also closely involved in any cases involving children.

A last resort?

- As in the community, individual cases can be complex and health professionals will not always agree on the best treatment plans. Where this occurs, the Department works closely with the families involved and relevant specialists to develop a treatment plan which is practical and can be implemented.

Finally, the Department states that by limiting its findings to the period 1999-2002, Major Finding 3 'focuses on a period of time that no longer bears any comparison to current immigration detention of children, families and adults'. The Department goes on to make submissions suggesting that it did the best it could in the circumstances during that period of time. Those submissions have already been considered in the body of this report.

The Department's response also mentions that many children who were the subject of Australia's detention laws over the second half of 2003 were compliance cases (for example visa overstayers) and those children spent little or no time in detention centres. As this report focuses on the laws, acts and practices regarding unauthorised arrival asylum seekers, rather than visa overstayers, the Inquiry has not extracted that material.

17.6.2 Action taken by ACM

ACM highlights that it will not have responsibility for the operation of immigration detention centres from the end of February 2004:

ACM therefore responds to the Inquiry's findings and recommendations in its capacity as the service provider for much of the period of this Inquiry and to the extent of its ability to implement any recommendations pertinent to ACM.

ACM also stresses that the Inquiry's findings and recommendations relate primarily to the legislative and administrative framework of detention which are not relevant to ACM. In particular:

Because [the Inquiry's] recommendations relate exclusively to legislative and policy matters that are not pertinent to ACM, ACM does not make any comment.

However, ACM does address certain aspects of the Inquiry's findings. In relation to the reasons supporting Major Finding 1(c), ACM made the following relevant comments:

Instances of obtrusive head counts

ACM procedures have been developed to ensure head counts are as unobtrusive as possible. Obtrusive head counts were only conducted during or immediately following incidents of major detainee disturbances. However ACM as service provider can and will review procedures to ensure the needs of children are better addressed in situations requiring obtrusive head counts.

Periods during which children were called by number

This practice occurred in some but not all detention centres. An instruction

was issued in 2002 to ensure detainees were not referred to by number. Detention centre managers were instructed to scrutinise compliance with the instruction.

The absence of clear procedures to ensure the special protection of children when tear gas, water cannons and other security measures were used

ACM considers that the principles contained in existing procedures for security including the use of chemical agents and the use of force relates to and provides for maximum protection of all detainees, including children. It is implicit in these procedures that the use of force is proportionate to the circumstances of the incident concerned and therefore the best interests of children are inherent in the policies and their implementation.

Nonetheless, where ACM is the service provider it can and will review procedures in accordance with any Departmental policy changes or directions in relation to additional strategies for protecting children during major detainee disturbances where the use of security measures is critical to ensuring the safety of all detainees, staff and members of the public...

The absence of specific guidelines regarding the use of medical observation rooms for children

It has never been routine practice to use medical observation rooms for children. In the one case relied on by the Inquiry, a medical observation room was used for a teenage boy who was assessed by professionals as highly suicidal. In this case the age and needs of the child were taken into account in practice.

However, where ACM is the service provider it can and will review procedures to codify in writing procedures specific to the use of medical observation rooms for children if required.

Inadequate provision of preventative and remedial dental and ophthalmological care

ACM provided services in accordance with then current service requirements that, with hindsight, did not contemplate lengthy periods of detention for children. Where ACM is the service provider ACM will liaise with the Department to establish required service standards relevant to the length of a child's time in detention.

Unsanitary toilet facilities

The maintenance of sanitary toilet facilities has been an ongoing challenge due to the combination of cultural differences in the detainee population and the infrastructure of detention centres. Daily hygiene inspections have been introduced by ACM. The provision of culturally appropriate toileting facilities is a matter not within the responsibility or control of the service provider.

The failure to promptly assess the needs of children with disabilities and provide them with the appropriate aids, adaptations and services

ACM disagrees with this finding...

A last resort?

ACM does acknowledge difficulties in engaging State disability organisations to provide assistance and where ACM is the service provider its policies can and will be changed to ensure immediate assistance is sought from these agencies.

The failure to promptly send children to community schools and ensure education appropriate to the cultural and language needs of children in detention

ACM has complied with all agreements between DIMIA and State educational jurisdictions for children in detention to attend external schools and will continue to facilitate the attendance of children in accordance with the relevant agreements where ACM is the service provider.

ACM makes no comment on Major Finding 2. With respect to Major Finding 3, ACM limits its comments to certain specific findings in Chapters 8, 9, 10 and 11.

Regarding Chapter 8 on Safety, ACM addresses the Inquiry's concern that the security standards do not highlight the priority that should be given to the protection of children. While pointing out that there are some practical barriers to ensuring that operational policies and procedures expressly acknowledge the best interests of the child, ACM states that:

Where ACM is the service provider it could and will accommodate child specific security procedures and corresponding practices if required.

Regarding Chapter 9 on Mental Health, ACM disagrees with the Inquiry's findings that there were no routine mental health assessments of children and that there were insufficient mental health staff. ACM therefore states that it does not intend to take any action in response to those findings.

ACM notes the Inquiry's findings that there were no clear guidelines regarding the use of medical observation rooms for children and states that:

Where ACM is the service provider it can and will codify in writing procedures specific to the use of medical observation rooms for children if required.

ACM disagrees that the suicide prevention systems focussed on immediate prevention of harm rather than holistic therapeutic care.

With respect to Chapter 10 on Physical Health, ACM disagrees with the Inquiry's finding that:

[F]ood is not tailored to the needs of children and has been variable over the period. Moreover, there is no evidence that individual nutritional assessments of children were conducted over the period of time covered by the Inquiry, in order to ensure that any pre-existing nutritional deficiencies were being addressed. The provision of baby formula and special food for infants has been uneven.

ACM therefore states that it does not intend to take any action in response to that

finding.

Finally, regarding Chapter 11 on Children with Disabilities, ACM asserts that it provided the best possible services to those children taking into account the confines of detention. However:

ACM acknowledges the historical difficulties in engaging State disability organizations to provide assistance to children in detention. Where ACM is the service provider ACM policies can and will be changed to ensure immediate assistance is sought from these agencies.

Endnotes

- 1 UN Economic and Social Council, *Civil and Political Rights, including the question of torture and detention: Report of the Working Group on Arbitrary Detention: Visit to Australia*, 24 October 2002, E/CN.4/2003/8/Add.2. See also World Organisation Against Torture (OMCT), Press Release, 1 February 2002, 'OMCT approaches the UN concerning detained asylum seekers', available at www.omct.org.
- 2 DIMIA, Response to Second Draft Report, 27 January 2004. The exact figure provided is 619 days.
- 3 See in relation to the *Migration Reform Act 1992* (Cth) the parliamentary debates on 4 November 1992, House of Representatives Hansard, p2620; 11 November 1992, House of Representatives Hansard, p3141 and the Explanatory Memorandum to the *Migration Reform Bill 1992*. See also, in relation to the *Migration Legislation Amendment Act 1994* (Cth) the parliamentary debate on 24 March 1994, House of Representatives Hansard, p2166 and the Explanatory Memorandum to the *Migration Legislation Amendment Bill 1994*.
- 4 See Chapter 6 on Australia's Detention Policy for a detailed discussion of these three mechanisms for release under the current legislative framework.
- 5 DIMIA, Submission 185, p16.
- 6 The discretion under s417 of the Migration Act only applies to children who have claimed refugee status.
- 7 See further Chapter 6 on Australia's Detention Policy.
- 8 UNHCR, Submission 153, para 10.
- 9 *Homeland Security Act of 2002* (the Homeland Security Act), s462.
- 10 US Bill S1129, *Unaccompanied Alien Child Protection Act of 2003* (the US Bill), s103.
- 11 UK Home Office, Immigration and Nationality Directorate, Unaccompanied Asylum Seeking Children Information Note. The Home Office Minister reiterated this in the Standing Committee of the House of Commons (HC Standing Committee A, col 545, 3.12.92), cited in 'Representing Unaccompanied Refugee Children in the Asylum Process', Children's Legal Centre Information Sheet, *childRIGHT*, December 1994, No 112, p11.
- 12 Canada, *Immigration and Refugee Protection Act 2002*, s60. The new law was passed on 28 June 2002, at <http://www.cic.gc.ca/english/irpa/>, viewed 23 November 2003.
- 13 Citizenship and Immigration Canada, *Immigration Manual*, Chapter ENF20: Detention, cl 5.10, Detention of minor children (under 18 years of age), at <http://www.cic.gc.ca/manuals-guides/english/enf/enf20e.pdf>, viewed 23 November 2003.
- 14 Citizenship and Immigration Canada, *Immigration Manual*, Chapter ENF20: Detention, cl 5.10.
- 15 Swedish Network of Refugee and Asylum Support Groups, Submission 298, p1.
- 16 See for example, DIMIA Submission 185, p16; Minister for Immigration and Multicultural and Indigenous Affairs, Border Protection: Children in Detention, 29 April 2002, at www.minister.immi.gov.au/borders/detention/children_detention.htm, viewed 23 November 2003.
- 17 DIMIA, Submission 185, p7. Note, however, the extent of the checks conducted on visa applications varies greatly depending on the country of origin. For example, British citizens can apply for their visa online and be granted a visa on the same day, notified by email.
- 18 See, for example, International Commission of Jurists, Submission 128; Australian Lawyers for Human Rights, Submission 168; Southern Communities Advocacy Legal and Education Service (SCALES), Submission 176; Amnesty International, Submission 194; Justice for Asylum Seekers

A last resort?

- (JAS), Submission 243.
- 19 UNHCR, Submission 153, p4.
- 20 Citizenship and Immigration Canada. Backgrounder # 4: Detention Provisions Clarified, at <http://www.cic.gc.ca/english/press/01/0103-bg4.html>, viewed 23 November 2003.
- 21 Regulations to be made pursuant to the new legislation do not list the need to pursue identity checks as one of the considerations to be taken into account. See Castan Centre, Submission 60, p10.
- 22 Women's Commission for Refugee Women and Children, Protecting the Rights of Children: The Need for US Children's Asylum Guidelines, December 1998, p19, at [http://www.womenscommission.org/reports/ under 'United States'](http://www.womenscommission.org/reports/under%20United%20States), viewed 23 November 2003.
- 23 Swedish Network of Refugee and Asylum Support Groups, Submission 298, p2.
- 24 UK *Nationality, Immigration and Asylum Act 2002*.
- 25 UNHCR, Submission 153, para 5.
- 26 *Children (Criminal Proceedings) Act 1987* (NSW), s9 – a child must be brought before a court 'as soon as practicable' after arrest. See also, for example, *Children and Young Persons Act 1989* (Vic), s 129(1) – a child must be brought before the court within 24 hours of arrest. See further Kids in Detention Story, Submission 196, Law Section, pp37-38.
- 27 The Department states that average time for security processing in 2001-2002 was 57 days, with the longest period being 242: DIMIA, Response to Draft Report, 14 July 2003.
- 28 Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Subcommittee, Public Hearings into Aspects of the Human Rights and Equal Opportunity Commission Annual report 2000-01, 22 August 2002, Transcript of Evidence, p38, at <http://www.aph.gov.au/house/committee/jfact/HREOC/HREOCIndex.htm>, viewed 23 November 2003.
- 29 See further Chapter 6 on Australia's Detention Policy.
- 30 See for example, UNHCR, Submission 153; Amnesty International, Transcript of Evidence, Sydney, 15 July 2002, p76. HREOC, *Those who've come across the seas*, 1998, pp55-56.
- 31 JAS, Submission 243, p8.
- 32 JAS, Submission 243, p15.
- 33 See also UNHCR, Submission 153, para 6.
- 34 Citizenship and Immigration Canada, *Immigration Manual*, Chapter ENF20: Detention, cl 5.10; Lawyers Committee for Human Rights, *Country by Country Review of Detention Procedures and Practices*, 2002, pp20-21, at http://www.lchr.org/refugees/reports/cntry_rev_02/country_reps.htm, viewed 23 November 2003.
- 35 G Mitchell, *Asylum Seekers in Sweden: an integrated approach to reception, detention, determination, integration and return*, August 2001, p7, at <http://www.fabian.org.au/NEW%20PAPERS/2001/Protocol.html>, viewed 23 November 2003.
- 36 Uniya Jesuit Social Justice Centre, *Overview of Denmark's Asylum System*, February 2003, p3, 10, at <http://www.uniya.org.au/research/index.html>, viewed 23 November 2003.
- 37 Uniya Jesuit Social Justice Centre, *Overview of the Netherlands' Asylum System* February 2003, p3.
- 38 Lawyers Committee for Human Rights, *Country by Country Review of Detention Procedures and Practices*, 2002, p117.
- 39 Lawyers Committee for Human Rights, *Country by Country Review of Detention Procedures and Practices*, 2002, p122.
- 40 Swedish Network of Refugee and Asylum Support Groups, Submission 298, p13; Mitchell, *Asylum Seekers in Sweden*, August 2001, p8.
- 41 Swedish Network of Refugee and Asylum Support Groups, Submission 298, p12.
- 42 Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Report on Visits to Immigration Detention Centres*, June 2001, Recommendation 10, pxii. The Committee also recommended that the Department negotiate with appropriate community groups to examine the feasibility of developing a sponsorship scheme for detainees who have not been processed within this time limit, Recommendation 12, pxiii. Recommendations available at <http://www.aph.gov.au/house/committee/jfact/IDCVisits/IDCreccs.htm>, viewed 23 November 2003.
- 43 Conference of Leaders of Religious Institutes, *Working Paper on Australia's Humanitarian Program for People Seeking Protection in Australia*, 17 September 2002.
- 44 Amnesty International School's Network, Submission 284, p1.
- 45 Law Institute of Victoria, Submission 170.
- 46 Joint Standing Committee on Migration (JSCM), *Asylum, Border Control and Detention*, 1994, paras 4.162, 4.176-4.177, 4.181.

Major Findings and Recommendations

- 47 See for example Kids in Detention Story, Submission 196; International Commission of Jurists, Submission 128; Australian Lawyers for Human Rights, Submission 168; SCALES, Submission 176; Amnesty International, Submission 194; JAS, Submission 243; Law Institute of Victoria, Submission 170; Australian Education Union, Submission 226; Save the Children (Australia), Submission 108; Amnesty International Schools Network Queensland, Submission 284.
- 48 JSCM, *Asylum, Border Control and Detention*, 1994, paras 4.62-4.65.
- 49 See for example Kids in Detention Story, Submission 196; International Commission of Jurists, Submission 128; Australian Lawyers for Human Rights, Submission 168; SCALES, Submission 176; Amnesty International, Submission 194; JAS, Submission 243; Law Institute of Victoria, Submission 170; Australian Education Union, Submission 226; Save the Children (Australia), Submission 108; Amnesty International Schools Network Queensland, Submission 284.
- 50 See especially JAS, Submission 243.
- 51 E Sullivan, F Mottino, A Khashu, and M O'Neil, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Vera Institute of Justice, August 2000 at www.vera.org, viewed 20 January 2004.; Human Rights First, *In Liberty's Shadow – US Detention of Asylum Seekers in the Era of Homeland Security*, 2004, pp41-42 at http://www.lchr.org/asylum/libertys_shadow/Libertys_Shadow.pdf viewed 20 January 2004. See also Stephen Columbus, Submission 287.
- 52 Lawyers Committee for Human Rights, *Country by Country Review of Detention Procedures and Practices*, 2002, p22.
- 53 ECRE, *Research Paper on Alternatives to Detention*, 1997, at http://www.ecre.org/policy/research_papers.shtml, viewed 23 November 2003. See also, ECRE, Position Paper on the Detention of Asylum Seekers (1996), at <http://www.ecre.org/positions/detain.shtml> and ECRE, Position Paper on Refugee Children, 1996, at <http://www.ecre.org/positions/children.shtml>, viewed 23 November 2003.
- 54 ECRE, *Research Paper on Alternatives to Detention*, 1997, section D.
- 55 Lawyers Committee for Human Rights, *Country by Country Review of Detention Procedures and Practices*, 2002, p118.
- 56 Uniya Jesuit Social Justice Centre, *Overview of Denmark's Asylum System*, February 2003.
- 57 Mitchell, *Asylum Seekers in Sweden*, August 2001, p3; KIDS Submission 196, Law Section, pp68-71.
- 58 See HREOC, *Those who've come across the seas*, 1998, p247.
- 59 Independent Education Union, *Refugee and Asylum Seeker Policy in Australia*, 2002.
- 60 Conference of Leaders of Religious Institutes, *Working Paper on Australia's Humanitarian Program for People Seeking Protection in Australia*, September 2002.
- 61 JAS, Submission 243, pp21-22.
- 62 JAS, Submission 243, p22.
- 63 JSCM, *Asylum, Border Control and Detention*, 1994, paras 4.66-4.90 and 4.168-4.172.
- 64 JSCM, *Asylum, Border Control and Detention*, 1994, para 4.172.
- 65 See for example, JAS, Submission 243; Stephen Columbus, Submission 287; E Sullivan, F Mottino, A Khashu, and M O'Neil, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Vera Institute of Justice, August 2000, ppiii, 8; ECRE, *Research Paper on Alternatives to Detention*, 1997.
- 66 The profile of the JAS model envisages asylum seekers in various stages of detention, hostel and community release accommodation options, and includes the costs of a proposed case management system. The report notes that there are significant variations within the current costs of detention and that similar variations are likely to apply in the implementation of an alternative model, depending on such factors as specific security needs. Milbur Consulting, *Improving Outcomes and Reducing Costs for Asylum Seekers*, March 2003.
- 67 JSCM, *Asylum, Border Control and Detention*, 1994, para 4.179.
- 68 See for example, UNICEF Australia, Submission 180, p9; SCALES, Submission 176, pp17-22; Refugee Council of Australia (RCOA), Submission 107; NSW Council for Civil Liberties, Submission 104, pp5-8.
- 69 Some groups have expressed concern about the ability of State authorities to fulfil that role given the inadequate funding and support. See for example, RCOA, Submission 107, p8.
- 70 This is based on the British model, where a Children's Panel provides non-legal advice to unaccompanied children. See UK Refugee Council, Support & Advice for Unaccompanied Refugee Children, <http://www.refugeecouncil.org.uk/refugeecouncil/what/what002.htm>, viewed 14 February

A last resort?

- 2004.
- 71 RCOA, Submission 107, p14.
- 72 A copy of this Act may be found at www.legislation.hmso.gov.uk.
- 73 UK Home Office, Immigration and Nationality Directorate, Unaccompanied Asylum Seeking Children Information Note.
- 74 UK Panel of Advisors for Unaccompanied Refugee Children, Team Standards, current May 2002.
- 75 Women's Commission for Refugee Women and Children, Hearing before the Senate Judiciary Subcommittee on Immigration on the Treatment of Children in INS Custody, 28 February 2002, at http://www.womenscommission.org/take_action/testimony.html, viewed 23 November 2003; Presbyterian Church USA, Taking Care of Unaccompanied Foreign Born Children, at <http://www.pcusa.org/washington/issuenet/crrl-020308.htm>, viewed 23 November 2003.
- 76 Homeland Security Act, s462(b)(1).
- 77 Homeland Security Act, s462(b)(2)-(3).
- 78 US Bill S1129, *Unaccompanied Alien Child Protection Act of 2003* (the US Bill), ss101-102.
- 79 US Bill, s103. See also Human Rights First, *In Liberty's Shadow – US Detention of Asylum Seekers in the Era of Homeland Security*, 2004, p38 at http://www.lchr.org/asylum/libertys_shadow/Libertys_Shadow.pdf viewed 20 January 2004.
- 80 Canada, *Immigration and Refugee Protection Act 2002*, s167. The substance of this provision was also contained in s69(4) of the Canadian *Immigration Act 1985*.
- 81 Canada, Immigration and Refugee Board, *Child Refugee Claimants: Procedural and Evidentiary Issues*, Ottawa, 30 September 1996, at http://www.cisr.gc.ca/en/about/guidelines/child_e.htm; Canadian Immigration and Refugee Board, New IRB Guidelines on Child Refugee Claimants, Press Release, 26 August 1996, at http://www.cisr.gc.ca/en/news/press/1996/9602_e.htm, both viewed 23 November 2003. See also SCALES, Submission 176, pp36-37.
- 82 See RCOA, Submission 107, pp8-12; SCALES, Submission 176, pp39-40.
- 83 The exception is in sections 252A-252B of the Migration Act which include special provisions regarding the strip search of children. Section 273 of the Migration Act provides that regulations may be made regarding the operation of detention centres but only one regulation has been made. That regulation concerns medical treatment for persons who refuse consent (Migration Regulations, reg 5.35)
- 84 Where such a failure constitutes a breach of human rights, there is, however, the ability to make a complaint to the Commission which can investigate and make recommendations to Parliament: see HREOC Act, ss 11(1)(f) and 29.
- 85 As the new IDS were not in force during the period covered by the Inquiry, it has not conducted a detailed analysis of the adequacy of those standards.
- 85 *Children (Detention Centres) Act 1987* (NSW), *Children (Detention Centres) Regulation 2000* (NSW).
- 87 See further, Kids in Detention Story, Submission 196, Law Section, pp35-37. Queensland has an independent visitors program to monitor the treatment of children in juvenile detention facilities.
- 88 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, rule 7: 'States should incorporate the Rules into their legislation or amend it accordingly and provide effective remedies for their breach, including compensation when injuries are inflicted on juveniles. States should also monitor the application of the Rules'.
- 89 DIMIA, Response to Draft Report, 14 July 2003.
- 90 These differences are explored in further detail in Chapter 6 on Australia's Detention Policy.
- 91 DIMIA, Response to Draft Report, 14 July 2003.
- 92 Milbur Consulting, *Improving Outcomes and Reducing Costs for Asylum Seekers*, a report commissioned by JAS, March 2003, p49, at www.melbourne.catholic.org.au/ccjdp/pdf/ImprovingOutcomesCoverA3.pdf, viewed 23 November 2003.
- 93 DIMIA, Response to Draft Report, 14 July 2003.
- 94 DIMIA, Response to Draft Report, 14 July 2003.
- 95 DIMIA, Response to Draft Report, 14 July 2003.
- 96 See Appendix 3 for the full response from the Department and Appendix 4 for the full response from ACM.