public interest
ADVOCACY CENTRE LTD

Towards Humanity and Decency

Submission to Joint Standing Committee on Migration: Inquiry into Immigration Detention in Australia

29 July 2008

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Table of Contents

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit law and policy organisation that seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC also receives funding from the NSW Government Department of Energy and Water for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's Work on Immigration Detention

PIAC has a long history in advising, representing and advocating for immigration detainees. Between 2002 and 2004, PIAC was the solicitor on the record in eleven habeus corpus applications for the release of immigration detainees from detention. Following the decision of the High Court in *Al-Kateb v Godwin* [2004] HCA 37,
PIAC — along with a number of other advocacy groups across Australia — was instrumental in helping to persuade Federal Members of Parliament that the situation of indefinite immigration detention was no longer tenable. This resulted in changes being made to the immigration detention regime that resulted in all of PIAC's clients who were still being held in indefinite detention being released.

In *Minister for Immigration and Multicultural and Indigenous Affairs v B and B* [2004] HCA 20, PIAC acted for Amnesty International Australia in a successful application for leave to file written submissions as *amicus curiae* ('friend of the court'). This case sought to establish that the Family Court had jurisdiction over children in immigration detention, including the power to release them from detention.

PIAC has also acted for clients whose visas have been cancelled under section 501(2) of the *Migration Act 1958* (Cth) (for committing minor criminal offences), for clients seeking bridging visas, and for unaccompanied minors in relation to their visa protection applications.

In 2006, PIAC campaigned against the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* which sought to introduce offshore processing of asylum seekers. PIAC argued that under the proposed

regime, asylum seekers (particularly children) would be vulnerable to significant human rights abuses and would have no opportunity to seek redress for those abuses.

PIAC has been a Project Partner with Associate Professor Mary Crock of Sydney University in research regarding unaccompanied children who are seeking asylum and the effectiveness of the legal process for these children. This research has resulted in the publication of some landmark reports[1] which have greatly increased public awareness of the treatment and experience of unaccompanied children in immigration detention and have influenced government decision making in the area.

PIAC has also provided submissions to a number of inquiries relating to immigration detention, including a submission to the Senate Legal and Constitutional Committee Inquiry into the provisions of the *Migration Legislation Amendment (Identification and Authentification) Bill 2003* and, more recently, a submission to the People's Inquiry into Immigration Detention.[2]

The Joint Standing Committee on Migration's Inquiry into Immigration Detention

PIAC welcomes the opportunity to make this submission to the Joint Standing Committee on Migration ('**the Committee**'). PIAC commends the broad ranging nature of the Committee's Inquiry.

There is a well-documented history of defective practices and human rights abuses in immigration detention centres (**IDCs**) within Australia.[3] In 1999, the Commonwealth Ombudsman carried out an "own motion" investigation into the management and operation of immigration detention centres, following complaints and a number of reported incidents, including escapes and allegations of assault on detainees. The Ombudsman concluded:

> My investigation revealed evidence at every IDC of self-harm, damage to property, fights and assaults, which suggested that there were systemic deficiencies in the management of detainees, including individuals and groups, staff, women and children.[4]

In January 2002, Woomera Detention Centre was the scene of a number of riots, as well as a prolonged hunger strike by more than 200 detainees. Disturbing allegations were made that officers at Woomera had used excessive force when dealing with detainees and that they had racially abused detainees.

Since then, a series of reports, including reports by the Australian National Audit Office (**ANAO**) and the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (**the Palmer Inquiry**) have

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1 Mary Crock, *Seeking Asylum Alone – Australia: a study of Australian law, policy and practice regarding unaccompanied and separated children*, 2006; Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone – A Comparative Study: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US*, 2007.

2 Public Interest Advocacy Centre, *Immigration Detention in Australia: the Loss of decency and humanity: Submission to the People's Inquiry into Immigration Detention* (2006) http://www.piac.asn.au/publications/pubs/sub200706_20060720.html at 28 July 2008.

3 See for example, M Palmer *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005).

4 Commonwealth Ombudsman, *Report of Own Motion Investigation into the Department of Immigration and Multicultural Affairs Immigration Detention Centres* (2001), 17.

been highly critical of the operations of immigration detention centres and the contracts underpinning those operations.[5]

It is to be hoped that the Committee's Inquiry will lead to a major overhaul of the system of immigration detention in Australia. Cosmetic changes to the system will not suffice, given the long-standing, entrenched nature of the problems that exist.

PIAC's submission will address the following Terms of Reference:

- the criteria that should be applied in determining how long a person should be held in immigration detention;
- options to extend the transparency and visibility of immigration detention centres; and
- options for the provision of detention services and detention health services across the range of current detention facilities, including Immigration Detention Centres (**IDCs**), Immigration Residential Housing, Immigration Transit Accommodation (**ITA**) and community detention.

5 Australian National Audit Office, *Management of the Tender Process of the Detention Services Contract: Department of Immigration and Multicultural Affairs: ANAO Audit Report No 32 2005-2006* (2006); M Palmer, above n 3.

Summary of Recommendations

Recommendation 1:

That asylum seekers only be detained for the purpose of carrying out health, identity and security checks.

Recommendation 2:

That a 90 day time limit on detention should be specified in the Migration Act, 1958 *(Cth) and that any period of detention in excess of 90 days should be subject to review by a judge or magistrate.*

Recommendation 3:

That the current practice of privatisation of immigration detention services should cease and that responsibility for the provision of these services should revert to the Commonwealth.

Recommendation 4:

That the Government should abolish offshore processing of asylum seekers who are intercepted before their boats reach the mainland.

Recommendation 5:

That the FOI Act be amended to allow members of the public to access information about monetary amounts paid by the Department of Immigration and Citizenship to GSL (Australia) Pty Ltd (or any other private operator of immigration detention centres) as well as information about negative and positive performance points allocated to GSL (Australia) Pty Ltd (or any other private operator of immigration detention centres).

Alternatively, that DIAC be required to make this information publicly available on a regular basis, for example by tabling it in Parliament or setting it out in its Annual Report.

Recommendation 6

That (if the current system of privatisation is retained), the Government should establish a statute-based, independent regulator with ongoing responsibility for monitoring the operation and management of immigration detention centres. Such regulator should have the power to make binding orders and should have free and unfettered access to any immigration facility at any time.

Recommendation 7

That (if the current system of privatisation is retained) the Migration Act *be amended to provide for the judicial review of any decisions made by employees of detention centre operators in circumstances where such employees have been designated as officers under the Act.*

Recommendation 8

That any restrictions by DIAC over media scrutiny of immigration detention centres be removed, while allowing individual detainees to retain the right to refuse to be the subject of media attention or public scrutiny on privacy grounds.

Recommendation 9

That (If the current system of privatisation is retained) consideration should be given to appointing a new service provider, preferably one with background in the provision of health or community services, rather than prison services.

Recommendation 10

That a statement of detainee's rights and conditions should be enshrined in regulations to the Migration Act, or in a Charter of Rights. Such regulations or Charter should ensure that the rights and conditions give rise to an enforceable remedy.

Criteria for determining how long a person should be held in immigration detention

PIAC strongly condemns Australia's current system of mandatory detention of asylum seekers. Mandatory detention is a breach of Australia's international obligations, particularly its obligations under article 9 of the International Covenant on Civil and Political Rights (**ICCPR**) not to arbitrarily detain people.

PIAC's work for asylum seekers has made us keenly aware of the devastating mental health effects of detention, particularly on long term detainees and those who are being detained with no prospect of removal to a third country. We note that the Human Rights and Equal Opportunity Commission (**HREOC**) has found that the continued detention of individuals with mental health problems can amount to cruel, inhuman and degrading treatment.[6]

We note the evidence already given to this Committee by Morteza Poorvadi, a former detainee:

> As an ex-detainee, one of the points that I am concerned about is detention – just detention. Detention is necessary for this country. We understand that. But for how long?....If you tell the detainees, "You'll be here for one year, and after one year we will decide what to do with you" that is fine....But when I was in detention I spent four years in there...That is one of the worst things: there is no limit on detention. You sit there every day thinking, 'Will I be deported tomorrow or the next day?'.[7]

In our view, detention of asylum seekers should only be used for health, identity and security checks. These checks should be carried out as quickly as possible, with children, family groups and other vulnerable people being given priority to move through this stage. Where there is no risk to the Australian public, asylum seekers should not be detained.

PIAC supports a 90 day time limit on detention, which should be codified in legislation. Any period of detention longer than 90 days should be reviewed by a judge or magistrate to determine whether there is any further need to detain.

Recommendation 1:

That asylum seekers only be detained for the purpose of carrying out health, identity and security checks.

Recommendation 2:

That a 90 day time limit on detention should be specified in the Migration Act, 1958 *(Cth) and that any period of detention in excess of 90 days should be subject to review by a judge or magistrate.*

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6 Human Rights and Equal Opportunity Commission, *A Last Resort, National Inquiry into Children in Immigration Detention,* April 2004, Chapter 9.

7 Commonwealth of Australia, *Official Committee Hansard, Joint Standing Committee on Migration,* House of Representatives, 7 May 2008, M8 (Mr Morteza Poorvadi).

Transparency and Visibility of Immigration Detention Centres

The right to liberty is a fundamental human right. According to Article 9 of ICCPR, everyone has the right to liberty and security of the person and no one is to be subjected to arbitrary arrest and detention. Immigration detention involves a significant trespass onto the right to liberty. Therefore, it is crucial that the operations of immigration detention centres and services be open to public scrutiny. In this section, we discuss a number of barriers to transparency and accountability in the current immigration detention system, and set out some options for change.

Privatisation of Immigration Detention Services

Opportunities for public scrutiny of the operations of immigration detention have been severely compromised through the process of privatisation. PIAC's concerns about this issue have already been set out at length in our submission to the Peoples' Inquiry into Immigration Detention.[8] We reiterate these concerns to the current Inquiry.

History of Privatisation of Detention Services

The former Commonwealth Government announced its intention to privatise the operations of Australia's immigration detention centres as part of its Budget discussion in August 1996.[9] Until then, the operations of all immigration detention centres and immigration reception and processing centres had been under the control of the Australian Protective Services (**APS**), a Commonwealth Government agency, on behalf of the then Department of Immigration and Multicultural Affairs (**DIMA**). Privatisation was seen as a means of cutting costs and improving efficiency in the provision of immigration detention services.

In February 1998, the Commonwealth (represented by DIMA) entered into a contract with a private corporation, Australasian Correctional Services Pty Ltd (**ACS**), for it to operate seven immigration detention centres around Australia. Although it was ACS that contracted with DIMA to provide the service, the actual service provider was a subsidiary of ACS, Australasian Correctional Management Pty Ltd (**ACM**).

ACS's contract with DIMA was for an initial period of three (3) years with extension provisions. However, in 2001 DIMA elected not to extend the contract, on the basis that ACM was not necessarily able to provide 'the best value for money' in its operation of detention facilities.

On 27 August 2003, following a tender process, the Commonwealth signed a new contract (**the Detention Services Contract**) with Group 4 Falck Pty Ltd (**Group 4**). Group 4 subsequently changed its name to Global Solutions Limited (Australia) Pty Ltd (**GSL**). GSL's contract was for four years, with an option to renew for a further three years.

In July 2005, the Palmer Inquiry found that the Detention Services Contract with GSL was flawed and did not allow for the delivery of the immigration detention policy outcomes that were expected by the Government.[10] The Palmer Inquiry recommended that the Department of Immigration, Multicultural and

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8 Public Interest Advocacy Centre, above n 2.

9 P Flood, *Report of Inquiry into Immigration Detention Procedures* (2001) para 3.2. Bente Molenaar and Rodney Neufeld, 'The Use of Privatised Detention Centers for Asylum Seekers in Australia and the UK' in Andrew Coyle, Allison Campbell and Rodney Neufeld (eds) *Capitalist Punishment: Prison Privatisation and Human Rights* (2003) 129.

10 M Palmer, above n 3, 176.

Indigenous Affairs (**DIMIA**) seek guidance from the Australian National Audit Office (**ANAO**) on reviewing the Detention Services Contract with GSL.[11]

In February 2006, an independent review of the Detention Services Contract found that changes were required to the contract and that the Department's management and monitoring of the contract needed to be improved.[12] The review suggested that such contract changes could be used as a basis for a new tender for the Detention Services Contract. It also recommended that health and psychological services be provided under a separate contract.

On 31 October 2006, the former Minister for Immigration and Multicultural Affairs announced that management of health and psychological services in immigration detention had been transferred to the direct control of Immigration Department.[13] Changes to the Detention Services Contract were also announced:

> In amendments to the detention services contract with detention services provider Global Solutions Limited (GSL), a new performance monitoring system is also being introduced with a greater emphasis on quality improvement.[14]

On 24 May 2007, the Department of Immigration and Citizenship (**DIAC**) released the following three Requests for Tender for the provision of services to Australia's immigration detention facilities:

- Detention Services for Immigration Detention Centres (**IDCs**);
- Health Care Services for People in Detention; and
- Detention Services for Immigration Residential Housing (**IRHs**) and Immigration Transit Accommodation (**ITAs**).[15]

So far as we are aware, no decision has yet been made by the Commonwealth in relation to these tenders. In the meantime, GSL's contract has been extended until December 2008.[16]

No Public Scrutiny of Detention Services Contract

The arrangements involving detention of asylum seekers raise issues involving human rights and Australia's obligations under international law, and accordingly, should be subject to public scrutiny. We note that in early 2006, the Detention Services Contract between GSL and DIMA and the accompanying Immigration Detention Standards (**IDS**) were available through the Department's website, thereby allowing the media and members of the public to scrutinise the private administration of Australia's detention centres to some extent. However, we have recently been informed by DIAC that the Contract and the IDS are no longer publicly available. It is therefore impossible to determine whether the "new performance monitoring system" announced by DIAC in October 2006 now forms part of the contract with GSL, and if so, how it operates. It is also not clear whether any of the IDS have changed, and what role

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11 Ibid, 180.

12 Mick Roche, *Detention Services Contract Review: and independent report by Mick Roche to the Department of Immigration and Multicultural Affairs*, February 2006.

13 Ryan Rebutica, Department of Immigration and Multicultural Affairs Press Release, 'Immigration Takes Direct Control of Detention Health Services' 31 October 2006, http://express-press-release.net/30/Immigration%20Takes%20Direct%20Control%20of%20Detention%20Health%20Services.php, at 24 July 2008.

14 Ibid.

15 Australian Government, Department of Immigration and Citizenship, Detention Services and Health Care Request for Tender (RFT) Process http://www.immi.gov.au/about/contracts-tenders/detention-services/_pdf/advert-13-14-april-2007.pdf, at 28 July 2008.

16 Commonwealth of Australia, *Standing Committee on Legal and Constitutional Affairs, Estimates (Additional Budget Estimates)*, Senate, 19 February 2008, 91 (Mr Andrew Metcalfe, Secretary, Department of Immigration and Citizenship).

they play, if any, in the contract. Thus, there is no means of assessing the degree to which management and operation of immigration detention facilities protects detainees' rights, complies with Australia's international obligations or accords with community standards.[17]

Regulation and "Capture"

Academics studying the regulation of private industry have developed the theory of 'capture'. One such academic, Harding, describes 'capture' as a situation in which 'regulators come to be more concerned to save the interests of the industry with which they are in regular contact than the more remote and abstract public interest'.[18] Degrees of capture can vary between industries. The more extreme the capture, the less effective the regulator can be. Three risk factors that tend to lead to capture are:

- a contractual, rather than a statutory basis for regulation;
- situations in which the regulatory agency regulates a small number of private companies; and
- situations where there is frequent contact between the regulatory agency and the private company, such as where regulators are based at the same site as the company.[19]

All three of these factors are present in the relationship between DIAC and GSL. First, there is no statutory basis for the regulation of GSL's conduct. The *Migration Act* only regulates powers that the Minister can give GSL employees to act in ways that would otherwise be unlawful, such as strip-searching detainees. It does not provide a framework for general regulation of the private detention industry, so DIAC must conduct regulation as a matter of contract enforcement.

Secondly, DIAC primarily regulates only one company in the private detention industry: GSL.[20] Thirdly, DIAC staff who are located in detention facilities have a particular responsibility for monitoring GSL's conduct. These are precisely the staff who are most likely to be "captured", a situation that can only be exacerbated by the remoteness of some centres.

An even more serious problem identified by Harding in relation to the regulation of the private prison industry is:

> [I]t is a case of the agency delegating the accomplishment of its formal goals and the discharge of its responsibilities to others. Failure by the delegates is tantamount to failure by the agency itself. All criticism is akin to self-criticism. The regulator is the principle operator, thus has a vested interest in its delegates appearing to be doing a satisfactory job.[21]

This accurately describes the relationship between DIAC and GSL. The Government's policy of mandatory detention and DIAC's treatment of detainees have been constantly under attack for many years by advocacy groups, the media, and international commentators. In this environment, DIAC has a vested interest in ensuring that it appears that GSL is doing a good job. Mandatory detention has become such a divisive issue that it can be expected that anyone seeking to criticise practices at detention centres is perceived by DIAC as 'the enemy'. This mentality is evidenced by the importance placed on keeping the media away from detention centres, an issue that is discussed below.

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17 We note that DIAC also refers on its website to a Service Delivery Model (**SDM**) that reflects its "new approach to delivering services to people in immigration detention". However, it is unclear whether the SDM forms part of the existing Detention Services Contract with GSL: see *Department of Immigration and Citizenship* "The Service Delivery Model" http://www.immi.gov.au/about/contracts-tenders/detention-services/_pdf/sdm.pdf at 28 July 2008.

18 Richard W Harding, *Private Prisons and Public Accountability* (1997) 33.

19 Ibid, 37.

20 We note that DIAC now has direct control over subcontractors previously used by GSL to provide health and psychological services: see n 13.

21 Richard Harding, above n18, 48.

Paranoia surrounding media or public scrutiny of the conduct at and management of detention centres demonstrates that DIAC is an entirely captured regulator, with a vested interest in ensuring that GSL appears to be satisfactorily performing the Detention Services Contract in a way that conforms to community standards. DIAC is not only an inappropriate regulator for the private immigration detention industry; it is the least appropriate body to regulate the industry.

The Need to End Privatisation of Immigration Detention Services

PIAC contends that there is no evidence that the privatisation of the operations of immigration detention has resulted in the more efficient and economic provision of these services. On the contrary, it has resulted in a large number of costly inquiries and the expenditure of millions of dollars in the pre-tendering processes, tender evaluation, contract negotiation and termination payments.[22]

Even more disturbingly, it has resulted in breaches of the human rights of detainees, and a decrease in the accountability and transparency of the provision of immigration detention services.

We note that while in opposition, the Australian Labor Party expressed a commitment, on a number of occasions, to return the management of detention centres to the public sector.[23] We urge the Government to follow through with this commitment by terminating the privatisation of immigration detention services. This would save money, provide a direct line of accountability to the Minister, and would help to restore public confidence in the immigration detention system.

Recommendation 3:

That the current practice of privatisation of immigration detention services should cease and that responsibility for the provision of these services should revert to the Commonwealth.

Offshore Processing

PIAC welcomes the changes to Australian Government policy that have resulted in the end of the 'Pacific solution' whereby individuals seeking to enter Australia without documentation were moved to a processing facility on Nauru to have their claims assessed.

However, we are concerned that it now appears that the Government will continue to process claims of some asylum-seekers offshore, using the detention facility on Christmas Island.[24]

Christmas Island is one of the many islands to the north of Australia which have been excised from the Migration Zone. The new Christmas Island detention centre was built at a cost of more than $396 million,[25] and is said to include a high-security section and capacity to lock down each cell individually.[26]

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22 Australian National Audit Office, *Management of the Tender Process of the Detention Services Contract: Department of Immigration and Multicultural Affairs: Audit Report No 32 2005*-06 (2006).

23 *Official Website of the Australian Labor Party,* ALP National Platform and Constitution, 2007, Chapter Thirteen – Respecting Human Rights and a Fair Go for All at [153] http://www.alp.org.au/platform/chapter_13.php#13human_rights_and_responsibilities at 28 July 2008; Tony Burke, Doorstop Interview: Detention Centre Contracts, Parliament House Canberra (28 February 2006) http://www.alp.org.au/media/0306/dsiimm010.php at 28 July 2008.

24 Commonwealth of Australia, *Standing Committee on Legal and Constitutional Affairs, Estimates (Additional Budget Estimates)*, Senate, 19 February 2008, 86 (Senator Chris Evans, Minister for Immigration and Citizenship).

In our view, the Government is simply seeking to replace the 'Pacific solution' with an 'Indian Ocean' solution. Offshore processing removes the operations of immigration detention from scrutiny by the Australian public, the media and advocacy groups. The remote location of Christmas Island means that it will be difficult and expensive for bodies like the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman to carry out their oversight functions. The remote location also dramatically impedes the ability of lawyers and community organisations to provide support to detainees. There is an increased risk that people will be detained indefinitely, and that children will be detained.

The fundamental purpose of offshore processing is to deny people rights which they might have in domestic or international law if they reached the Australian mainland. This is a failure to uphold Australia's obligations in international law in good faith and reflects an incorrect but pervasive view that asylum seekers are inherently 'unlawful' and therefore without rights. Asylum seekers should not be diverted to remote detention centres with limited oversight or access to legal assistance. They should be treated equally under the law, regardless of where they arrive in Australia, or where their claim is processed. Ideally, they should be accommodated on the Australian mainland while their claims for refugee status are assessed.

Recommendation 4:

That the Government should abolish offshore processing of asylum seekers who are intercepted before their boats reach the mainland.

Freedom of Information

The ability to access information about the operations of government is an important tool for allowing the public to hold government, and private organisations that are working with government, accountable. Without access to information about detention centres the ability to effectively use formal and informal accountability mechanisms is severely limited.

The *Freedom of Information Act 1982* (**FOI Act**) does not allow members of the public to access information from private companies, such as GSL. However, it does allow access to documents held by government departments and agencies, including DIAC. This would include information that DIAC holds about GSL's operations of Australia's detention centres, such as incident reports.

However, the FOI Act has a number of exceptions protecting certain information from public scrutiny. This includes information relating to a corporation's business affairs[27] and information that a government department has obtained in confidence.[28] The Detention Services Contract[29] makes many of the monetary

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25 Ibid, 85 (Mr Jeff Lamond, First Assistant Secretary, Detention and Offshore Services Division, Department of Immigration and Citizenship).

26 Rachel Evans "Rudd Labor Continues Mandatory Detention" 3 May 2008, at http://www.greenleft.org.au/2008/749/38735 at 28 July 2008,

27 *Freedom of Information Act 1982* (Cth), s 43.

28 Ibid, s 45.

29 In this Submission, information about the provisions of the Detention Services Contract is based on a copy of that Contract obtained by PIAC from the Department's website in 2006. We note that the Contract is no longer available on the Department's website, nor does it appear to be publicly available elsewhere. For the purposes of this Submission, we have assumed that the relevant provisions remain unchanged.

amounts in the contract confidential to GSL.[30] This type of commercial information would probably also be covered by the business affairs exception in the FOI Act. Lack of access to this information makes it extremely difficult for the public to assess whether GSL is paid a fair or competitive price for the services that it offers under the contract, and to assess the government's economic justification for the privatisation of detention centres.

The Detention Services Contract also makes confidential to GSL the number of negative performance points that GSL receives for failure to conform to each of the performance measures in the Immigration Detention Standards and the number of positive points if GSL meets its business plan.[31] This effectively makes it impossible for the public to assess the relative importance that DIAC and GSL had contractually assigned to protecting the detainees' rights and living standards, as opposed to running the centres as efficient businesses.

Recommendation 5:

That the FOI Act be amended to allow members of the public to access information about monetary amounts paid by the Department of Immigration and Citizenship to GSL (Australia) Pty Ltd (or any other private operator of immigration detention centres) as well as information about negative and positive performance points allocated to GSL (Australia) Pty Ltd (or any other private operator of immigration detention centres).

Alternatively, that DIAC be required to make this information publicly available on a regular basis, for example by tabling it in Parliament or setting it out in its Annual Report.

Scrutiny by Government and Quasi-Government Bodies

The Detention Services Contract recognises three governmental or quasi-governmental groups as having a legitimate role in scrutinising conditions in Australia's immigration detention centres. These are the Commonwealth Ombudsman, HREOC and the Immigration Detention Advisory Group (**IDAG**).

Of these, only IDAG has a mandate relating specifically to detention centres. IDAG can also visit detention centres without notice. However, because IDAG's function is to privately advise the Minister it is impossible to evaluate how effective IDAG is in promoting the rights of detainees and assisting the Minister in regulating GSL's conduct. More importantly, it must be recognised that IDAG does not provide any form of public accountability mechanism; it does not allow the public to scrutinise GSL or DIAC's behaviour.

While HREOC and the Commonwealth Ombudsman rely on the Commonwealth Government for funding, their investigative powers and systems for ensuring their independence are enshrined in the legislation under which they are established. Both the Ombudsman and HREOC have complied reports about conditions in Australia's immigration detention centres and these reports have included many adverse findings.[32] Their existence and their capacity to scrutinise GSL and DIAC should be welcomed. However, neither body is able to make binding recommendations, and this acts as a serious limitation on their ability to hold the private immigration detention industry accountable. Both bodies have very broad, general

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30 Detention Services Contract, Schedule 11: Commonwealth's and Service Provider's Confidential Information.

31 Ibid.

32 For example: Human Rights and Equal Opportunity Commission, *Report of an Inquiry into a Complaint by Mr AV of a Breach of his Human Rights while in Immigration Detention, HREOC Report No 35,* (2006); Commonwealth Ombudsman, above n 4.

mandates and it would be neither practical or responsible for either body to comprehensively scrutinise the immigration detention industry at the expense of their broader areas of responsibility.

In a number of jurisdictions, the problem of monitoring private correctional facilities has been dealt with by the creation of independent watchdog bodies, such as the Inspector of Custodial Services in WA and The Office of Correctional Services in Victoria. These bodies have been established to monitor the management of correctional facilities within their respective states. They have the power to inspect prisons at any time without giving notice, and are backed up by legislation that provides significant penalties for hindering inspections or for victimising people who assist inspections.[33]

We acknowledge the important work carried out by IDAG, HREOC and the Commonwealth Ombudsman in monitoring immigration detention. However, we also note the limitations of these bodies. Ideally, there should be a statute-based, independent regulator with ongoing responsibility for monitoring the operation and management of immigration detention centres. This regulator should have the power to make binding recommendations.

Recommendation 6

That (if the current system of privatisation is retained) the Government should establish a statute-based, independent regulator with ongoing responsibility for monitoring the operation and management of immigration detention centres. Such a regulator should have the power to make binding orders and should have free and unfettered access to any immigration facility at any time.

Administrative Law

Administrative law allows individuals to challenge the lawfulness of actions and decisions of the executive government. It is an important accountability mechanism. The grounds of review are limited; most fundamentally, administrative law does not allow a challenge to the merits of a decision. Examples of grounds upon which a decision may be challenged include that the decision was made for an improper purpose; that the decision maker took into account irrelevant considerations; or that the decision is 'so unreasonable that no reasonable authority could ever have come to it.'[34] Judicial review of Commonwealth executive decisions can be sought at common law, or under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**).

The privatisation of Australia's detention centres has made it more difficult for detainees to use administrative law as a mechanism for ensuring accountability of the detention provider. In *Neat Domestic Trading v AWB* [2003] HCA 35, the High Court held that since private corporations have a duty under the *Corporations Act 2001* (Cth) to pursue their own commercial interests, their decisions cannot be subject to administrative review.[35] Although the ultimate authority to detain asylum seekers rests with DIAC, and DIAC retains 'ultimate responsibility for immigration detainees'[36] GSL still has considerable power over the daily lives of detainees. Most of the decisions GSL makes in relation to detainees are not made pursuant to any statutory power and are governed only by the IDS. This includes decisions about detainees' food,

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33 *Prisons Act, 1981* (WA) section 58.

34 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Green MR.

35 The *Neat* case has been the subject of much criticism, including by Justice Michael Kirby, who has described the outcome of the case as "alarming" and "occasioning a serious reduction in accountability for the exercise of governmental power": see *Griffith University v Tang* [2005] HCA 7 at [100].

36 Detention Services Contract, Schedule 3: Immigration Detention Standards, Performance Measures and the Performance Linked Fee Matrix, 3-1: Principles Underlying Care and Security.

education, recreation, opportunities for religious observance and basic care needs such as clothing, toiletries and blankets. Detainees are unable to seek review of these decisions, no matter how improper or unreasonable, under administrative law.

Some of the powers that GSL employees exercise over detainees, such as the power to strip search them[37] are powers under the *Migration Act*. The Minister for Immigration can confer these powers upon GSL employees by designating them officers under the Act.[38] The ADJR Act allows judicial review of decisions 'of an administrative character...made under an enactment'.[39] A decision by a GSL employee to strip search a detainee is a decision made under the *Migration Act*. However, in *Neat*, the majority of the High Court found that a decision made by a private company, but under an enactment, was not subject to review under the ADJR Act.[40] Because this was not the focus of the majority's reasoning, it is not possible to say conclusively whether this applies to *all* decisions made pursuant to a statutory power by a private company. However, the institutional approach adopted by the majority in *Neat*, which focuses on the private nature of the company, rather than the public nature of the power being exercised, suggests that this reasoning would apply to the decisions of GSL employees under the *Migration Act*. That is, a GSL employee's decision to strip search a detainee would not be considered an administrative decision and would be immune from review under the ADJR Act.

Recommendation 7

That (if the current system of privatisation is retained) the Migration Act *be amended to provide for the judicial review of any decisions made by employees of detention centre operators in circumstances where such employees have been designated as officers under the Act.*

Media Scrutiny

In recent years, DIAC (formerly DIMA and DIMIA) has exerted a high degree of control over the scrutiny of detention centres by members of the public and the media. This has further impeded the process of pubic accountability. Under the Detention Services Contract, GSL is obliged not to communicate with the media or members of the public about any aspect of its operation of Australia's detention centres without DIAC's written consent.[41] When media have visited detention centres in the past, they have been subject to very stringent conditions, including having the Department view all video footage at the conclusion of the tour.[42]

The Immigration Detention Standards designate certain incidents as 'minor', 'major' or 'critical'.[43] The rating given to a particular type of incident determines the timeframe within which GSL must report the incident to DIAC in order to comply with the Immigration Detention Standards (critical incidents must be reported within one hour, major incidents within two hours and minor incidents within twenty four hours). The presence of media at a detention centre is classified as a 'critical incident'. Incredibly, this is in

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37 *Migration Act, 1958* (Cth), s 252A.

38 Ibid, s 5.

39 *Administrative Decisions (Judicial Review) Act 1977,* (Cth), s 3.

40 *Neat Domestic Trading v AWB* [2003] HCA 35, [64], McHugh, Hayne and Callinan JJ.

41 Detention Services Contract, Clause 11.9.1.

42 *ABC Television: Media Watch* Agreement for Media Tour of Woomera Immigration Reception and Processing Centre, July 2002. http://www.abc.net.au/mediawatch/documents/Woomera_Media_Tour_Agreement_July_2002.pdf at 28 July 2008.

43 Detention Services Contract, Schedule 3: Immigration Detention Standards, Performance Measures and the Performance Linked Fee matrix, Attachment A: Incidents.

the same category as incidents such as a detainee's death, a mass breakout, a riot, a hostage situation and a bomb. Media presence must be reported to DIAC with a higher priority than an actual or suspected case of unlawful detention, or voluntary starvation by a minor, both of which are classified as 'major' incidents.

Departmental practice in this area is difficult to reconcile with the practice of the former DIMIA of permitting journalists to accompany DIMIA officers on 'raids' involving the arrest of prohibited non-citizens.[44] PIAC is currently acting for a former detainee who was photographed on one of these raids and effectively identified in an article that was subsequently published in a Sydney newspaper about the raid. PIAC's client has alleged breaches of several of the Information Privacy Principles (**IPPs**) under the *Privacy Act 1988* (Cth).

Recommendation 8

That any restrictions by DIAC over media scrutiny of immigration detention centres be removed, while allowing individual detainees to retain the right to refuse to be the subject of media attention or public scrutiny on privacy grounds.

Options for the provision of detention services and detention health services across the range of current detention facilities

Appropriateness of GSL as the provider of immigration detention services

If privatisation of detention services does continue, PIAC has strong reservations about whether GSL should continue to be involved in the provision of these services. In our view, the track record of GSL in Australia and the United Kingdom is a matter of grave concern.

In announcing its contract to operate immigration detention centres in Australia, GSL referred to its 15 years' experience in operating immigration centres in the United Kingdom. However, in March 1997, riots occurred at GSL's[45] UK asylum detention centre, Campsfield House. The subsequent prosecutions of nine Campsfield detainees in relation to the riots were dropped after the trial judge found that GSL security officers had fabricated evidence given against the detainees, and were in fact responsible for some of the property damage that had occurred during the riot.[46]

In 2002, a riot at another GSL detention centre in the UK, Yarls Wood, resulted in a serious fire. The riot began as a result of detainees' frustration over their inadequate access to health care. The British Prisons and Probations Ombudsman's report also raised concerns about inadequate staffing numbers and inadequate training.[47]

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44 Martin Wallace, "Catch of the day: Special Investigation – Immigration raids seize 11 people at Sydney's most famous restaurants" *Daily Telegraph*, 14 May 2004, 1.

45 GSL was then known as Group 4 Falk Pty Ltd.

46 *R v Secretary of State for the Home Department, ex parte Quaquah*, QBD (Administrative Court) C/1028/00, 1 September 2000; *R v An Immigration Officer, ex parte Quaquah*, QBD (Crown's Office List), The Times, 21 January 2000.

47 Stephen Shaw, *Report of the Inquiry into the disturbance and fire at Yarl's Wood Removal Centre* (2004).

In March 2005, GSL UK suspended 15 of its staff after the BBC broadcast undercover footage of staff at the Oakington asylum detention centre physically and sexually assaulting detainees, boasting about condoning violence towards detainees, using racist language and describing how men of certain ethnicities were arbitrarily held in high security units.[48] A British MP has attributed this to 'an endemic failure by GSL to properly recruit, train and supervise its staff'.[49] The British Prisons and Probations Ombudsman conducted an investigation in response to the BBC programme, which found abuse and inappropriate use of physical force by GSL staff.[50]

Similarly, the performance of GSL in Australia has done little to inspire confidence in its ability to carry out immigration detention services in a manner that upholds the dignity of detainees. We note the following:

- In July 2005, DIMIA conducted an inquiry into the mistreatment of five detainees in September 2004 that occurred during their transfer from the Maribyrnong centre in Melbourne to the Baxter centre in South Australia. The inquiry found that the car used to transport the detainees was 'unsafe and inhumane' with air-conditioning design faults. It also found that the detainees were humiliated and treated in an 'inhumane and undignified manner' including being manhandled and denied food, water and medical treatment by GSL staff during the eight hour journey. The need for medical treatment arose in part through the inappropriate use of force by GSL officers.[51]

- A subsequent report into the above incident by HREOC found that the detainees suffered abuse of human rights during the first part of the journey.[52] HREOC found that the conduct and conditions of the journey were in breach of the detainees' human rights pursuant to Articles 7 (subjected to degrading treatment) and 10(1) (not treated with humanity and with respect for the inherent dignity of the human person) of the *International Covenant on Civil and Political Rights* (ICCPR). In addition, certain acts towards one of the detainees constituted separate breaches of his human rights pursuant to Articles 10(1) and 23(1) (protection of family by the State) of the ICCPR.

- In 2006, GSL Australia was fined almost $200,000 over a practical joke that humiliated and hurt a prisoner at Port Phillip Prison. The incident involved the prisoner hiding a package of supposed contraband inside his body, then being strip-searched by officers, who were in on the "joke".[53]

- In January 27 2008, an Indigenous elder from Warburton collapsed and died after being transported for over 4 hours in a prison van operated by GSL. A witness is reported to have heard one of the guards tell a hospital doctor that it was "bloody hot" in the back of the van. There is

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48 Simon Jenkins, 'The Shameful Face of Going Private' *Evening Standard* (London) 3 March 2005.

49 *Asylum deal rethink call* (2005)thisisoxford.co.uk http://archive.thisisoxfordshire.co.uk/2005/3/7/4794.html at 28 July 2008.

50 Stephen Shaw, *Inquiry into allegations of racism and mistreatment of detainees at Oakington Immigration Reception Centre and while under escort* (2005) Home Office Immigration and Nationality Directorate, 9.

51 Keith Hamburger, *Findings and Recommendations from Report of Investigation on behalf of the Department of Immigration and Multicultural and Indigenous Affairs Concerning Allegations of Inappropriate Treatment of Five Detainees during Transfer from Maribyrnong Immigration Detention Centre to Baxter Immigration Detention Facility* (2005).

52 Human Rights and Equal Opportunity Commission, *Report into a Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia (Department of Immigration and Citizenship, formerly the Department of Immigration and Multicultural and Indigenous Affairs) and GSL (Australia) Pty Ltd, HREOC Report No. 39* (2007)

53 Paul Heinrichs "Prison operator fined over joke strip-search of inmate" *The Age* 12 March 2006

> some suggestion that the van's air-conditioning system may have not been operating properly at the time.[54]

It would appear that part of the reason for its troubled history in the provision of immigration detention services stems from GSL's background as a provider of prison services, which are, by their nature, very different to immigration services. Upon being contracted to the management of Australia's immigration detention centred, GSL stated on its webpage:

> Mandatory detention is not imprisonment. The critical difference is the absence of punishment. Detainees are part of an administrative process to determine their status: there is no question of punishment. Inside the parameter of the centres, detainees enjoy relative freedom and the presence of families and single persons of both sexes makes the centres very different from prisons.[55]

The practical experience has been, however, that GSL staff (many of whom have worked as prison guards in GSL's prisons) have failed to heed this difference, and have tended to treat immigrant detainees no differently to prison inmates. In promotional material GSL describes its line of business as "Corrective Centres in Australia".[56] This is indicative of a culture that is focussed on imprisonment, rather than administrative detention.

It is inappropriate for the Commonwealth to contract out immigration detention services to corporations with a background in prison management. This practice has led to the entrenchment of a prison culture in immigration detention centres that is proving difficult to shift. The skills and management techniques developed in the context of a prison operation are incompatible with a supposedly non-punitive immigration detention regime, where detainees include asylum seekers who have committed no crimes and may be suffering the effects of trauma and torture. (That said, PIAC also has ongoing concerns about the privatisation of prisons and the impact that this has on the quality of services and the accountability of those managing such facilities).

PIAC is concerned that the Government saw fit to award the current contract to provide immigration detention services to GSL, given its background in operating in high-security prisons and its track record of gross failures to maintain human rights standards in British Asylum Detention Centres. We are also concerned that the Government saw fit to agree to extend the contract to December 2008, despite the evidence of clear breaches of human rights by GSL.

In PIAC's view, GSL is entirely inappropriate as the private operator of immigration detention centres in Australia.

We note that while in Opposition, the Australian Labor Party called for the termination of the contract with GSL on the basis of GSL's record of human rights abuses and failure to deal adequately with the mental health problems of detainees.[57] We urge the Government to now follow through with this commitment.

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54 Paige Taylor "Death in custody guard told of 'bloody hot' van" *The Australian*, 31 January 2008.

55 GSL (Australia) Pty Ltd, *GSL (Australia) Pty Ltd Contracts and Services* (2006) <http://www.gslpl.com.au/gsl/contracts/contracts.asp> at 10 July 2006 (note that this no longer appears on GSL's website).

56 *CareerOne*, GSL (Australia) Company Information <http://jobs.careerone.com.au/texis/company?compid=470681f342a20>at 28 July 2008.

57 *Official Website of the Australian Labour Party*, Tony Burke, Doorstop Interview: Detention Centre Contracts, Parliament House Canberra (28 February 2006) http://www.alp.org.au/media/0306/dsiimm010.php at 28 July 2008.

Recommendation 9

That (If the current system of privatisation is retained) consideration should be given to appointing a new service provider, preferably one with background in the provision of health or community services, rather than prison services.

Ensuring that Human Rights are upheld in the Provision of Detention Services

Clause 2.4 of the Detention Services Contract requires GSL to comply with the Immigration Detention Standards (**IDS**). The IDS were developed by DIMA in consultation with HREOC and the Commonwealth Ombudsman. They are set out in a lengthy schedule to the contract. Corresponding 'standards' and 'performance measures' are set out in a number of different areas.

While the IDS may help to ensure that people in immigration detention are treated with respect and dignity, they are not enshrined in legislation and do not provide people in immigration detention with access to effective remedies for alleged breaches of their human rights.

As a matter of contract law, it is impossible for detainees to enforce the provisions of the IDS. Although GSL is bound by these provisions, the doctrine of privity means that only the parties to a contract may enforce it. In Australia, there may be a limited exception to this rule where a contractual promise is made for the benefit of a third party.[58] However, if such an exception exists, it is probably limited to situations where the third party has ordered its affairs in reliance on an expectation that the contractual promise will be fulfilled. The provision of the Detention Services Contract that requires GSL to adhere to the IDS was made for the benefit of detainees; however, they are imprisoned against their will, and thus could hardly be said to have ordered their affairs in reliance on that provision. Consequently, only the Commonwealth Government can legally enforce the Detention Services Contract.

Given that there is no mechanism for detainees to enforce GSL's compliance with the IDS, it cannot meaningfully be said that the standards give detainees any legal rights.

Aspects of the IDS do not provide sufficient guidance on what service providers must do to ensure conditions of detention comply with international human rights standards. In addition, the mechanisms for scrutinising whether or not the service provider complies with the IDS are inadequate. This is because the IDS standards on monitoring and reporting place responsibility for monitoring compliance with the IDS on the service provider.

In PIAC's view, the minimum standards that should apply to all persons in immigration detention should be set out in a more prescriptive form, such as in regulations made pursuant to the *Migration Act*, or in a general Charter of Rights. This would provide people in detention with opportunities to seek redress for violations of their rights. It could also help to foster a human rights culture in government departments and ensure both public companies and private companies contracted to provide detention services provide those services within a human rights framework.

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58 *Trident General Insurance v McNiece Bros* (1988) 165 CLR 107.

Recommendation 10

That a statement of detainee's rights and conditions should be enshrined in regulations to the Migration Act, or in a Charter of Rights. Such regulations or Charter should ensure that the rights and conditions give rise to an enforceable remedy.

Conclusion

It has been said that:

> The strength of a liberal democracy is measured not by how it treats the majority but by how it cares for minorities and those at the margins of society. The best tests for humanity and decency are conducted in its dark places: in prisons, psychiatric hospitals, and in institutions for failed asylum seekers and other migrants.[59]

It is to be hoped that the current Inquiry will provide the impetus for the development of a new Australian immigration detention system that meets these tests for humanity and decency. In our view, this can best be achieved by imposing strict limits on detention, by abolishing practices such as offshore detention and the privatisation of detention services, by establishing an effective independent regulator for immigration detention and by ensuring that immigration detention standards are codified and enforceable.

59 Stephen Shaw, above n 47, 3.