Submission No. 80

Date Received

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25 July 2008

Dr Anna Dacre
Committee Secretary
Joint Standing Committee on Migration
House of Representatives
Parliament House
CANBERRA ACT 2600

By email: jscm@aph.gov.au

Dear Dr Dacre

Please find attached a submission by the Human Rights Council of Australia to the Joint Standing Committee's Inquiry into Immigration Detention in Australia.

In the 60th Anniversary Year of the Universal Declaration of Human Rights, the Human Rights Council believes that this Inquiry is timely and appropriate, and a significant opportunity to ensure that Australia's future policy and practice in Immigration Detention reflects the values of human dignity that Australia has played a significant role in developing.

Thank you for the opportunity to make a submission on these important human rights issues. The Human Rights Council would be pleased to discuss the submission further if requested.

Yours sincerely

Andrew Naylor
Chairperson

HUMAN RIGHTS COUNCIL OF AUSTRALIA

SUBMISSION TO THE AUSTRALIAN PARLIAMENT'S JOINT STANDING COMMITTEE ON MIGRATION INQUIRY INTO IMMIGRATION DETENTION IN AUSTRALIA

JULY 2008

Introductory Comments

Australian law requiring the indefinite detention of asylum seekers who arrive without travel documentation violates Australia's international human rights obligations. The implementation of the law has been inhumane and arbitrary. The processing and detention regime has developed in piecemeal fashion from 1989, becoming progressively harsher and more unreasonable.

The policy of arbitrary detention was apparently driven by the intention to deter asylum seekers from arriving in Australia. The failure of this policy was evidenced in the growing number of refugees arriving in Australia seeking asylum through the 1990s. The decline in numbers can be attributed to a range of factors but not the increasingly harsh and arbitrary detention regime that developed over this period.

Some of the worst aspects of the regime have been changed since the election of the Rudd Labor Government in November 2007. The processing centres outside Australia have been closed. The policy of temporary protection has been ended. However, the basic structure of the regime remains in place.

Conditions of immigration detention in Australia also fall below the requirements of international human rights standards. Improvements in the conditions will be of benefit to all detainees, not only to asylum seekers.

The review of immigration detention in Australia can and should recommend a comprehensive change to the current law, policy and practice relating to immigration detention by recommending that

- the Immigration Act be amended to end mandatory detention of these asylum seekers
- the conditions of detention for those held temporarily in detention be improved to comply with international standards
- the Human Rights and Equal Opportunity Commission be mandated to undertake inspections of detention facilities without notice and to hold "human rights clinics" in detention centres to receive and investigate complaints by detainees, with appropriate additional resources for these additional responsibilities
- Australia ratify without further delay the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and provide for national and international monitoring of detention centres as required by the Optional Protocol
- the governmental administrative arrangements for asylum seeker determinations and management of detention centres be changed to reflect the legal nature of these functions.

This submission from the Human Rights Council of Australia outlines the basis for these recommendations.

The Human Rights Council of Australia

The Human Rights Council of Australia Inc is a private non-government organisation that promotes understanding of and respect for human rights for all persons without discrimination through adherence to the International Bill of Rights and other human rights instruments, internationally and within Australia.

The Council was established in 1978 and for many years, under the leadership of James Dunn, has been an important link between the Australian human rights movement and human rights activists in other parts of the world. The Council is affiliated with the International League of Human Rights and has United Nations Special Consultative Status through accreditation by the Economic and Social Council.

The objectives of the Council are

- to promote a better understanding and the implementation of human rights
- to monitor and make public the performance of governments in complying with their international human rights obligations
- to contribute particularly to the promotion and protection of Human Rights in Australia and the Asian-Pacific region
- to promote the further development of Australian policy with respect to human rights

The list of the Council's members is at appendix 1.

The Human Rights Council of Australia Inc is a non-profit organisation incorporated under the *Associations Incorporation Act 1984* (NSW).

This submission

This submission will make comments and recommendations in relation to the first three of the terms of reference of the inquiry into immigration detention in Australia by the Joint Standing Committee on Migration, namely

- the criteria that should be applied in determining how long a person should be held in immigration detention
- the criteria that should be applied in determining when a person should be released from immigration detention following health and security checks
- options to expand the transparency and visibility of immigration detention centres.

It will not deal with the final three terms of reference:

- the preferred infrastructure options for contemporary immigration detention
- 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 and

- options for additional community-based alternatives to immigration detention by
  a) inquiring into international experience;
  b) considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework;
  c) comparing the cost effectiveness of these alternatives with current options.

However, the Human Rights Council of Australia draws the attention of the Inquiry to the concerns that the Council and others raised under the OECD Guidelines on Multinational Enterprises in relation to the operations of detention service provider, Global Solutions Limited (GSL). These concerns were raised in a complaint (Specific Instance) to the Australian National Contact Point (Treasury) that led to a mediation process between the complainants and GSL and a number of agreed outcomes between the complainants and GSL (see Appendix 3).

Challenges arise when particularly human rights sensitive functions of the state are contracted out by the state to the private sector. These include maintaining clear lines of accountability and ensuring clear understanding by all service providers of their responsibilities in relation to state obligations under international human rights law.

Criteria for detention and release

Official human rights institutions, both national and international, have examined the system of mandatory detention of asylum seekers who arrive in Australia without travel documents and found it to violate Australia's obligations under international human rights law. The most comprehensive examinations have been undertaken by the Human Rights and Equal Opportunity Commission pursuant to its responsibilities under the *Human Rights and Equal Opportunity Commission Act 1986*. It has provided its findings in two major reports,[1] in reports of periodic inspections of immigration detention centres,[2] in guidelines and policy statements,[3] and in submissions to parliamentary and governmental inquiries.[4]

Internationally, independent expert committees that monitor Australia's performance of its human rights obligations under treaties it has ratified have made findings against Australia in relation to the immigration detention regime and recommendations for its reform.[5] The Human Rights Committee has found against Australia in several cases of

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[1] *Those who've come across the seas: detention of unauthorised arrivals* 1998 and *A last resort? The national inquiry into children in immigration detention* 2004.

[2] 1998-99, 2006 and 2007.

[3] See http://humanrights.gov.au/about/media/speeches/human_rights/index.html. Also see *Immigration Detention Centre Guidelines* 2000.

[4] See http://humanrights.gov.au/legal/submissions/indexsubject.html#refugees.

[5] See the most recent Concluding Observations on Australia by each of the treaty monitoring committees: the Human Rights Committee in 2000, the Committee on the Rights of the Child in 2005, the Committee on

complaint by detainees.[6] The concerns of the UN Working Group on Arbitrary Detention and of Justice Bhagwati, Regional Advisor to the High Commissioner for Human Rights, should also be noted.

These assessments of the detention policy on the basis of international human rights standards are the same as those derived from essential ethical principles. In adopting and then repeatedly tightening the mandatory detention regime, Australia Governments were pursuing a policy goal of dissuading those seeking asylum from coming to Australia for that purpose. To achieve this goal they sought to make the process of seeking asylum so harsh for asylum seekers that it would be worse than enduring profound suffering in countries of origin or in countries of transit. The goal was accorded absolute priority in public policy making. The fact that the means of pursuing it violated human rights obligations and basic principles of ethics was immaterial. Equally immaterial was the fact that the vast majority of those who sought asylum here were found to be genuine refugees with a right under international law to protection. The regime established to pursue the goal of deterrence is not only unlawful in international law; it is inhumane and therefore unethical. It has imposed and continues to impose unnecessary and unjustifiable suffering on human beings who have committed no crime, but sought to avail themselves of their right to asylum. The cruel irony is that the unlawful and unethical mandatory detention regime does not work. It did not stop the boats coming. It did not and does not deter asylum seekers.

Detention then is justified only where it can be demonstrated, to the satisfaction of a court, to be reasonable and necessary on the basis of an individual assessment of the situation of each asylum seeker. Criteria for decisions on whether to release a detainee from detention or retain the person in detention should be based on international human rights obligations, including as reflected in Australian law,[7] and ensure that Australia does not breach the human rights of detainees. In particular, detention cannot be arbitrary or unlawful.[8] It cannot be discriminatory on any proscribed ground.[9] It can be imposed on children only in their best interests and as a measure of last resort and for the shortest appropriate period of time.[10] It cannot separate children from their parents and siblings except where separation is in the best interests of the individual child.[11] It must be subject to effective review in the courts.[12]

Recommendation 1

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the Elimination of Racial Discrimination in 2006, the Committee on the Elimination of Discrimination Against Women in 2006, and the Committee Against Torture in 2008.

[6] See *A v Australia*, Communication 560/1993, the first of a series of decisions by the Human Rights Committee under the International Covenant on Civil and Political Rights.

[7] *Human Rights and Equal Opportunity Commission Act 1986.*

[8] International Covenant on Civil and Political Rights Article 9.

[9] International Covenant on Civil and Political Rights Article 2.1, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women.

[10] Convention on the Rights of the Child Articles 37(b).

[11] Convention on the Rights of the Child Articles 5, 9 and 18.

[12] International Covenant on Civil and Political Rights Article 9.4.

The Human Rights Council of Australia recommends that

1.1 the grounds on which persons may be detained in immigration detention should be consistent with human rights requirements and prescribed in legislation

1.2 asylum seekers should be subject to being detained only when detention is a necessary and reasonable and proportionate means of achieving at least one of the following legitimate aims:
- to verify identity
- to determine the elements on which the claim for refugee status or asylum is based
- to address the deliberate destruction of identification documents for the purpose of misleading immigration authorities
- to protect public health or public safety

1.3 detention of children and their families should be imposed only as a measure of last resort and only for the shortest period of time and only where it is in the best interests of the individual child

1.4 detention of other persons with special needs, including women at risk of violence or exploitation and persons with health or psychological needs, should be imposed only in exceptional circumstances
- where detention is in the interests of the detainee or
- where detention is necessary for reason of public health or public safety

and no other alternative suitable for the individual detainee is available

1.5 no person should be held in immigration detention for more than 72 hours except under an order of a court or independent tribunal and detention should be subject to regular review and reconsideration by a court or independent tribunal that has power to order continuation of the detention, where necessary and reasonable and proportionate, or to order release

1.6 every detainee should have the right and opportunity to seek effective judicial review of detention at any time without delay with the possibility of release from detention if the court or tribunal finds the detention unnecessary or unreasonable or disproportionate.

The transparency and visibility of immigration detention centres

The Human Rights and Equal Opportunity Commission's inspections of immigration detention centres have disclosed major deficiencies in the management and operation of the centres over the past decade.[13] Three factors have operated to shield detention centres from scrutiny.

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[13] See the reports of inspection in 1998-99, 2006 and 2007. as well as the reports *Those who've come across the seas: detention of unauthorised arrivals* 1998 and *A last resort? The national inquiry into children in immigration detention* 2004.

First, the Commission has undertaken its inspections with the assistance and cooperation of the relevant department (variously named over the years) and the detention authorities, not under an explicit statutory power to enter and inspect. Second, there are strict limitations on community access to detention centres, imposed on the basis of the privacy of the detainees but operating to shield conditions in detention centres from public oversight and political accountability. Third, most asylum seekers have been detained in detention centres located in very remote, inaccessible parts of Australia[14] and outside Australia,[15] far away from media and public sight.

The improvement of conditions in detention centres, to a level commensurate with Australia's human rights obligations, requires a far higher level of official, media and public scrutiny. This will require changes in the practices and attitudes of departmental officers and centre managers and staff. Past experience indicates that this will only be possible with significant changes to the changes to the law.

Recommendation 2

The Human Rights Council of Australia recommends that

2.1 the Migration Act be amended to provide that immigration detainees must be accorded conditions in detention consistent with Australia's human rights obligations

2.2 the *Human Rights and Equal Opportunity Commission Act 1986* be amended to provide the Commission with the power to enter and inspect immigration detention centres without notice and to conduct "human rights clinics" in centres to take and investigate complaints from detainees, with appropriate additional resources for these additional responsibilities

2.3 the *Human Rights and Equal Opportunity Commission Act 1986* be amended to require the Commission to report annually on the consistency or otherwise of conditions in immigration detention centres with Australia's international human rights obligations

2.4 a local community advisory committee, with committee members having authority to enter and inspect the centre and speak with detainees, be established for each detention centre to monitor conditions in the centre and report to the Human Rights and Equal Opportunity Commission in relation to them

2.5 a residents committee be established in each detention centre to advise the relevant department, the centre operators and managers and the Human Rights

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[14] Christmas Island, outside Derby WA (Curtin air force base), in Port Hedland WA and outside Woomera SA.

[15] Milne Bay, Papua New Guinea and Nauru.

and Equal Opportunity Commission on the views of residents in relation to conditions in the centre

2.6 the Australian Parliament's Joint Committee on Migration undertake a program of regular inspections of immigration detention centres and present a report for debate to both houses of Parliament on these periodic inspections.

Transparency and visibility of detention centres will also be enhanced through Australia's ratification of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Optional Protocol establishes a system for domestic and international inspection and monitoring of conditions and practices in places of imprisonment or detention to provide greater protection against torture and cruel, inhuman and degrading treatment and punishment. It requires the acceptance of inspections by the international independent expert Sub-committee of the Committee Against Torture and the appointment of domestic monitoring and inspecting mechanisms. The Australian Government has indicated that it will ratify the Optional Protocol but it has not yet done so.

Recommendation 3

The Human Rights Council of Australia recommends that

3.1 Australia ratify without further delay the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

3.2 The Australian Government provide for national and international monitoring and inspection of detention centres as required by the Optional Protocol.

Governmental administrative arrangements

Governmental administrative arrangements have allocated responsibility for asylum seeker determination and for management of detention centres to the immigration department, variously named over the decades. In recent years, the department with this responsibility has also had responsibility for a large number and wide range of governmental programs. Under the Howard Government, the principal program areas of the Department of Immigration and Multicultural and Indigenous Affairs were population change, border protection, migration program, humanitarian program, multicultural affairs and indigenous affairs. The present Department of Immigration and Citizenship has a narrower scope but still retains responsibility for

- the entry and stay of people through the migration, temporary entry, refugee and humanitarian programmes
- border security and integrity
- effective compliance with programs and the resolution of status of people
- the management of detention facilities and amenities
- the management with integrity of the offshore asylum seekers program
- ensuring compliance with international protection obligations
- managing and providing services for
    - settlement
    - translating and interpreting
    - promoting and conferring Australian citizenship
    - promoting the benefits of a united and diverse society.[16]

The development of alternative approaches to immigration provides a timely opportunity to examine the most appropriate way to organise government administration to ensure that the objectives of these programs are met. The administrative arrangements by which the determination of refugee status and the management of detention facilities lie within the immigration department have contributed to the problems with the system. These responsibilities are at odds with the other principal responsibilities of the department.

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[16] Department of Immigration and Citizenship *The DIAC Plan 2007-08* page 6.

- Immigration is an area of governmental policy and national discretion. It is part of a broader population policy. Refugee determination is a legal question, involving the implementation of international and domestic legal obligations.
- The conduct of detention centres is an issue of justice, not an immigration matter.

In its 1998 Report *Those who've come across the seas: Detention of unauthorised arrivals* the Human Rights and Equal Opportunity Commission recommended that processing of asylum seekers and refugee claims belonged more appropriately in the Attorney-General's Department as these claims flow from Australia's obligations to domestic and international law rather than discretionary decisions about the size and composition of the migration program.[17]

> *There is a fundamental difference between immigration decisions and determination of refugee status. Immigration is properly a matter of government policy. Subject to human rights considerations, including the principle of non-discrimination, each state is entitled to decide its own approach to immigration...*
>
> *Determination of refugee status is however a matter of law, not policy. Whether or not someone is a refugee depends on whether the person meets the definition of refugee set out in the Refugee Convention, which is incorporated in Australian law. This is not a matter on which the Minister should be able to issue policy directions...*
>
> *Deciding a refugee application is not properly an immigration matter at all. Refugee determinations should therefore be transferred to the Attorney-General's Department which is better placed to manage a legal process, which should not be constrained by immigration policy*[18].

Recommendation 4

The Human Rights Council of Australia recommends that

4.1 administrative responsibility for the system of determination of refugee and humanitarian status be transferred from the Minister and Department of Immigration and Citizenship to the Attorney General

4.2 administrative responsibility for the management and operation of immigration detention centres be transferred from the Minister and Department of Immigration and Citizenship to the Minister for Justice.

A functional arrangement for the implementation of this revised administrative model is in appendix 2.

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[17] Recommendation 16.1.

[18] 1998 HREOC Report *Those who've come across the seas: Detention of unauthorised arrivals,* p 234.

APPENDIX 1
MEMBERS OF THE HUMAN RIGHTS COUNCL OF AUSTRALIA

Mr Andrew Naylor, Chair
Andrew Naylor is a Barrister in Maurice Byers Chambers. He was formerly the Commission Solicitor to the NSW Police Integrity Commission.

Mr Michael Curtotti, Vice-chair
Michael Curtotti is the founder of Synergy Legal and is a Legal Counsel for the Australian National University.

Ms Andrea Durbach, Secretary
Andrea Durbach is a former Director of the NSW Public Interest Advocacy Centre. She is currently the Director of the Australian Human Rights Centre at the University of NSW.

Ms Kathy Montgomery, Treasurer
Kathy Montgomery is a Principal Accountant with Yellow Brick Road, a financial services advisory company.

Professor Meaghan Morris, International Policy Adviser
Dr Meaghan Morris is Chair-Professor in the Department of Cultural Studies at Lingnan University in Hong Kong and Research Professor at the University of Western Sydney.

Mr André Frankovits, International Project Director
André Frankovits is a former Executive Director of HRCA and former Campaign Director for Amnesty International Australia.

Mr Patrick Earle, Executive Director
Patrick Earle is the Executive Director of the Diplomacy Training Program at the Law Faculty at the University of NSW.

Mr James Dunn, Convenor
James Dunn, AO, founder of HRCA, is a former diplomat and former senior Australian Federal Parliamentary Researcher.

Dr Mary Edmunds
Dr Mary Edmunds, an anthropologist, is a member of the Australian National Native Title Tribunal.

Ms Robin Gurr
Robin Gurr is a barrister and former Registrar in the Family Court of Australia, President of the NSW Community Services Appeals Tribunal and Senior Member of the Fair Trading Tribunal.

Dr Roger Gurr
Dr Roger Gurr is a former President of Amnesty International Australia and currently Director of Mental Health in the Sydney West Area Health Service

Dr Jeff Kildea
Dr Jeff Kildea is a Barrister and historian at the University of NSW. He is a former Chairman of the Catholic Commission for Justice and Peace.

Dr David Kinley
Dr David Kinley holds the inaugural Chair in Human Rights Law at Sydney University. He was formerly Director of the Castan Centre for Human Rights Law at Monash University in Melbourne.

Ms Sanushka Mudaliar
Sanuhka Mudaliar is a lawyer and Program Coordinator for Young Feminist Activism for the Association for Women's Rights in Development, based in Shanghai, China.

Sister Patricia Pak Poy
Pat Pak Poy, AO, is a Mercy Sister and the national coordinator of the Australian Network of the International Campaign to Ban Landmines.

Mr Chris Sidoti
Professor Chris Sidoti is an international human rights consultant. He was formerly Australian Human Rights Commissioner, Australian Law Reform Commissioner and Director of the International Service for Human Rights, Geneva, Switzerland.

Mr Harris van Beek
Harris van Beek is a former Director of Amnesty International Australia, former CEO of Enterprise Career Education Foundation, and is now a Senior Consultant with the Nous Group.

Mr Pat Walsh
Pat Walsh is a former Human Rights Officer for the Australian Council for Overseas Aid and currently senior advisor to the East Timorese Government's Reception, Truth and Reconciliation Commission Secretariat.

Appendix 2
Functional arrangement for revised administrative model

Function	Change	The case for change
Identity and security checking, health screening of unauthorised arrivals	Immigration and health department officials Officials to be given training in human rights and refugee law and government obligations	No substantive change.
Administration of Asylum-Seeker Detention Facilities	Move to Federal Justice Department, within Attorney General's.	Courts, police, prisons and all other detention facilities fall within scope of Commonwealth justice portfolios. Detention is not the core business of immigration, population or multicultural department.
On-shore assessment of asylum-seeker claims	An independent tribunal should make first determination of asylum claims within 30 days. The tribunal should have three members, including at lease one with human rights/legal expertise. Move responsibility for tribunal from DIAC to Attorney-General's Department.	Refugee and asylum seekers are not migrants. Australia has clearly defined legal responsibilities to refugees and asylum seekers, while issues of migration are discretionary.
Issue bridging visas with appropriate restrictions on movement to those not a health or security risk within 30 days.	Independent Tribunal should consider all application and make determination. AGs to make government case for or against visa to Tribunal	Puts humanitarian issues first.
Ensure that each asylum seeker in detention receives individual assessment on need to continue detention.	Move from DIAC to case management officers in Attorney General's department. Decision to be made by Tribunal. Cases of children to be assessed by panel including child health specialists and best interest of child acknowledged as primary consideration.	See above. Detention is fundamentally connected with the law, individual rights and consideration of Australia's human rights obligations.

Ensure prompt access to independent review of any independent orders for continued detention/First review of rejected asylum claims	Tribunal with appellate panel for review applications dealing with detention issues and substantive issues of refugee recognition. Appellate panel dealing with detention issues should include medical expertise. Tribunal appointments to be made either by AG or independent appointments commission. Access to judicial review.	The RRT is not functioning adequately, has limited scope & decisions have become highly contested. It is not sufficiently independent as the Minister has the power to hire and fire, tenure of members is short and single-member panels are open to influence. Increasing numbers of RRT decisions are being successfully challenged in the courts.
Ministerial discretion on refugee issues	Relieve Minister from responsibility for, and discretion on, adjudicating on individual refugee issues. Delegate discretionary power to refugee determination tribunal.	Has been a huge increase in the number of discretionary decisions as the rest of the system has tightened.

APPENDIX 3
STATEMENT BY THE AUSTRALIAN NATIONAL CONTACT POINT 'GSL AUSTRALIA SPECIFIC INSTANCE'

Introduction

1. In June 2005, the Australian National Contact Point (ANCP) for the OECD Guidelines for Multinational Enterprises ("the Guidelines": Attachment A) received a submission from several Australian and overseas non-government organisations ("the complainants")[19] alleging that a UK-controlled multinational, Global Solutions Limited, in providing immigration detention services to the Australian Government through its Australian incorporated wholly-owned subsidiary GSL (Australia) Pty Ltd ("GSL Australia")[20], had breached the Human Rights and Consumer Interests provisions[21] of the Guidelines.

2. The submission alleged that GSL Australia:

- in detaining children was complicit in violations of the 1989 Convention on the Rights of the Child particularly where there is no legal limit on the length of the detention;
- was acquiescing in the mandatory detention of asylum seekers and was therefore complicit in subjecting detainees to a regime of indefinite and arbitrary detention in contravention of Article 9 of the 1996 International Covenant on Civil and Political Rights and Article 9 of the 1948 Universal Declaration of Human Rights. Furthermore, this regime is allegedly punitive in nature and is thus in contravention of Article 31 of the 1951 Convention relating to the Status of Refugees;
- did not adequately respect the human rights of those detained in its operation of Australian immigration detention facilities; and
- was misstating its operations in a way that was 'deceptive, misleading, fraudulent, or unfair' by claiming to be 'committed to promoting best practice in human rights in its policies, procedures and practices'.

ANCP Processes

3. In accordance with the ANCP's published procedures for handling specific instances, the ANCP commenced an initial assessment as to whether the issues raised warranted further consideration as a specific instance under the Guidelines. The ANCP's fact finding included meeting separately with representatives of the complainants and GSL

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[19] The complainants are the Brotherhood of St Laurence, Children Out of Detention (ChilOut), the Human Rights Council of Australia, the International Commission of Jurists (ICJ – Switzerland) and Rights & Accountability in Development (RAID – UK).

[20] Although GSL Australia operates some State Government prisons and prisoner transportation services, the complaint concerned its activities as the provider of immigration detention services to the Australian Government.

[21] See § 2 of Chapter II and § 4 of Chapter VII respectively ('The OECD Guidelines for Multinational Enterprises – Revision 2000', OECD, Paris, 2000).

Australia on 4 July 2005 in Melbourne, and a follow-up meeting with the complainants and their nominated experts on 11 July 2005 in Sydney. Following the Sydney meeting, the complainants lodged a supplementary submission that focussed on GSL Australia's operations. The issues raised in both submissions were complex and sensitive.

4. On 1 August 2005, the ANCP determined that it would be appropriate to accept as a specific instance those matters raised by the complainants that could be shown to relate directly to the conduct of GSL Australia and were within its control. Those matters included arrangements in respect of children and the general detainee population, staff training, implementation and monitoring of operational procedures, information provision to detainees, psychiatric and mental health services, and the utilisation of the Management Support Units and Red One Compound. The ANCP proposed that the specific instance should not focus on isolated cases or where the risk of re-occurrence in the future has been or is being addressed through other means.[22] The ANCP reasoned that this would allow the parties to concentrate on those GSL Australia activities that have the greatest likelihood of being resolved through mediation.

5. The ANCP also determined that it would be inappropriate to accept those parts of the complainants' submission that sought to address the Australian Government's mandatory detention policy because the Guidelines do not provide an appropriate avenue to review a host government's domestic policy settings. The complainants disputed this determination, reiterating that the Guidelines state that the right of governments to 'prescribe conditions under which multinational enterprises operate within their jurisdictions is subject to international law'. The ANCP also ruled out portions of the supplementary submission that related to the activities of a previous detention centre operator.

6. On 10 August 2005 and 19 August 2005, the complainants and GSL Australia respectively agreed to participate in the specific instance. To facilitate a shared understanding of the issues under consideration, on 24 August 2005, the ANCP proposed an approach to progress the specific instance and circulated a 'Preliminary list of issues within GSL Australia's control' to the parties.

7. On 21 October 2005, the ANCP circulated an updated list of issues within GSL Australia's control in conjunction with the parties' respective views. This was followed by an exchange of information to enable the parties to be able to understand the

[22] In the lead up to the complaint and during the specific instance, there were a number of official inquiries (that is, parallel processes) related to immigration administration and GSL Australia's administration of immigration detention facilities in Australia. Prominent examples include the Palmer and Hamburger inquiries commissioned by the Australian Government and an own-motion study by the Australian National Audit Office. The Commonwealth Ombudsman was also asked by the Government to review particular immigration cases including the Vivian Alvarez (Solon) case, other immigration detention cases identified where the persons detained had been released from detention with their files marked 'not unlawful' and the cases of detainees who have been in detention for two years or more. Consequent changes to the administration of immigration detention policy (say, in relation to families and children) and procedures have had a bearing on the issues considered by this specific instance.

procedures and practices associated with managing immigration detention facilities and to appreciate the concerns and sensitivities of the complaint.[23]

8. The ANCP convened a face-to-face mediation session on 28 February 2006, in Canberra. GSL Australia was represented at the mediation session by its Managing Director, Mr Peter Olszak and its Public Affairs Director, Mr Tim Hall. The complainants were represented by the Manager of Ethical Business at the Brotherhood of St Laurence, Ms Serena Lillywhite, the Executive Director of the Human Rights Council of Australia, Mr Patrick Earle and a member of the International Commission of Jurists, Dr Elizabeth Evatt. The ANCP was assisted by Ms Angela McGrath, Mr Andrew Callaway and Ms Debra Chesters.

Outcomes of the Specific Instance

9. The mediation session was conducted in a spirit that promoted the wellbeing of the detainee population whose care is currently entrusted to GSL Australia. A significant outcome was the value both parties gained in engaging openly on the human rights aspects of GSL Australia's operations. The discussion was frank and robust and enabled consideration of potential solutions.

10. GSL Australia committed to upholding the human rights of those in its care. GSL Australia's Managing Director, Mr Olszak, summed up the company's position by pledging to always consider the question of 'Is it right?' within the framework of human rights and embedding this approach within the company's policy and procedures, including training of its officers. The complainants acknowledged the difficult and changing environment of immigration detention services and offered practical suggestions to assist GSL Australia in utilizing human rights experts to interpret human rights standards and in training staff. The mediation session's agreed outcomes are at Attachment B.

Summary

The ANCP congratulates GSL Australia and the complainants for engaging constructively in a manner that will contribute to resolving many of the issues considered in this specific instance. Throughout this process, the parties engaged with goodwill and commonsense. The agreed outcomes provide a basis for GSL Australia to continue to improve its administration of immigration detention services. This is the first specific instance lodged with the ANCP since the Guidelines were revised in 2000. The ANCP intends to evaluate its processes for handling specific instances in the light of any suggestions that the parties may wish to offer.

Gerry Antioch
Australian National Contact Point
6 April 2006

[23] Among the key pieces of information exchanged were operational procedures applicable to the issues raised and references to the findings of parallel processes and international standards.

Attachment A to the ANCP statement: GSL Australia specific instance

The OECD Guidelines for Multinational Enterprises (the Guidelines)

The Organisation for Economic Co-operation and Development (OECD) published guidelines for responsible business conduct in 1976 and a revised version was issued in 2000. The Guidelines establish voluntary principles for the activities of multinational enterprises and cover issues including information disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition and taxation. They represent standards of behaviour supplemental to the laws of the countries where the multinational enterprises are based or their activities undertaken.

Thirty nine Governments (30 OECD members and 9 non-members) have agreed to the OECD Guidelines as part of a broader balanced package of rights and commitments called the 'OECD Declaration on International Investment'. Adhering countries have a National Contact Point whose role is to promote and ensure the effective implementation of the OECD Guidelines, including providing good offices for the handling of specific instances. The ANCP maintains a website at http://www.ausncp.gov.au.

Attachment B to the ANCP statement: GSL Australia specific instance

OECD Guidelines for Multinational Enterprises
Specific instance involving GSL (Australia) Pty Ltd and the complainants
Agreed outcomes of mediation meeting
April 2006

INTRODUCTION

This document is a record of the agreed outcomes reached between GSL (Australia) Pty Ltd ("GSL") and the complainants during the mediation meeting held on Tuesday 28 February, 2006, at the Department of Treasury, Canberra. Present at the mediation were:

Mr. Gerry Antioch – Australian National Contact Point (ANCP)
Ms. Angela McGrath – office of the ANCP
Ms. Debra Chesters – office of the ANCP
Mr. Andrew Callaway – office of the ANCP
M. Peter Olszak – Managing Director, GSL
Mr. Tim Hall – Director, Public Affairs, GSL
Dr. Elizabeth Evatt – International Commission of Jurists
Mr. Patrick Earle – Human Rights Council of Australia
Ms. Serena Lillywhite – Brotherhood of St Laurence.

Additional recommendations were tabled by the complainants during the meeting. An opening statement and relevant documents relating to human rights standards adopted by the United Nations General Assembly were also tabled.

The discussion was open and frank, and based on a shared commitment by all to promote adherence to universally recognised standards of human rights. It was acknowledged that there had been many positive changes since the complaint was lodged, not least that children were no longer being detained in detention centres. In this time there have been a number of reports such as the Palmer Report, and court cases that have highlighted many of the issues at the heart of the complaint.

The protracted tender and negotiation period for the contract, and the constantly changing nature of the demands being placed on the detention services provider, and its own learning from the experience highlighted for the complainants the considerable scope for the company in deciding what services it will offer and how. For all involved there seemed to be a shared understanding at the conclusion of the meeting of the value of international human rights standards in determining the companies own decision making processes.

The meeting took place between 10.00 am and 2.45 pm. Discussion of some issues of concern will require further time and consideration. There was willingness from all involved to canvass the range of issues involved in the original complaint – from the

contractual issues through to operating protocols and the changing patterns of immigration detention. It was agreed that an atmosphere of direct dialogue between the complainants (and others concerned) and the company on these issues was engendered by the meeting and should be fostered to address continuing concerns. This provides scope for GSL to engage more closely with the complainants, or other appropriate external groups, in the future to ensure outcomes reached are implemented and a culture of transparency and accountability fostered.

At the conclusion of the meeting it was agreed by all parties that there would be value in the NCP forwarding a copy of his statement to the Department of Immigration and Multicultural Affairs, the Commonwealth Ombudsman, IDAG and HREOC.

General agreement

1. GSL acknowledged the value of using a human rights framework as the appropriate standard to guide operations and assist the company 'do the right thing' in all aspects of operation and service delivery.

2. GSL acknowledged that as a corporation it had its own responsibilities and should be accountable for these responsibilities. How it understood and implemented its responsibilities was a key factor in its corporate reputation, which is central to its business success.

3. GSL agreed to ensure the contract renegotiation, and the final contract with DIMA (should GSL successfully tender) make reference to human rights standards and appropriate international conventions as the appropriate framework for a service delivery model in all areas of detention and deportation.

4. GSL agreed to ensure that the contract renegotiation process with DIMA (should GSL successfully tender) include the experiences and learning's that GSL has had with regards to the management of detention centres and their use of isolation facilities, and concerns raised regarding compliance with human rights standards.

5. GSL agreed that some of the issues discussed at the meeting needed further consideration and the input of external advice. GSL expressed the willingness to have a more ongoing dialogue on the issues discussed with those with relevant expertise and knowledge.

Training

6. GSL acknowledged the value of deepening the knowledge of understanding of human rights standards of all GSL staff, from senior management down given the nature of the industry that GSL was involved in.

7. GSL agreed to enhance the training curriculum it provides to its staff through the inclusion of appropriate human rights materials and references.

8. GSL agreed to liaise with DIMA to ensure that training delivered via the DIMA Training Initiative recognises the increasingly diverse detainee population, includes human rights standards, and utilises a human rights framework in training.

9. GSL agreed to make their training curriculum, manuals and materials available to external human rights trainers for review and comment.

10. GSL agreed to seek input from human rights experts to deliver human rights training as appropriate (the complainants offered to recommend appropriate trainers).

11. GSL agreed that staff with particular duties in relation to detainees may have a need for more specialised and in-depth human rights trainings.

12. GSL acknowledged that human rights training delivered to all GSL staff would assist in 'embedding' a corporate culture that values a human rights framework in service delivery and operations.

13. GSL agreed to develop systems to monitor and evaluate the effectiveness of its training in meeting desired organisational and individual behavioural and attitudinal changes.

Monitoring the implementation of GSL procedures

14. GSL agreed to seek external advice to determine if the operations of the GSL Compliance and Audit Unit adequately encompass a human rights framework for monitoring and auditing purposes.

15. GSL indicated it was willing to make its own 'random audits' available for external scrutiny.

16. GSL indicated it was changing its complaints monitoring system so that it could monitor the number and nature of complaints and responses to complaints more effectively and would be establishing targets for reduction in complaints.

17. GSL agreed to review the terms of reference and composition of its Community Advisory Committee to enhance external engagement (the complainants offered to suggest additional community representatives).

18. GSL agreed to expand their planned / forthcoming 'client survey' to include input and feedback from community visitors to the detention centres (the complainants offered to provide names of key community visitors).

19. GSL agreed that the existing 'infringement mechanisms' for identifying, reporting and responding to infringements needs to be made clearer to all GSL staff. International

human rights standards were the agreed framework for the management and disciplining of staff alleged to have engaged in the ill-treatment of detainees.

Adequacy of information provision and access to interpreters

20. GSL undertook to improve the 'induction handbook' for detainees, and to ensure it is available in the appropriate languages.

21. GSL undertook to evaluate detainees 'understanding' of the induction handbook to ensure the content, expectations and detainees rights and responsibilities were understood.

22. GSL agreed to give consideration to alternative mechanisms to deliver the induction handbook to address literacy issues. Audio presentation was one idea suggested.

23. GSL undertook to consider expansion of the current complaints system to encompass a way to register and respond to the concerns of visitors to the detention centre. GSL would consider ways to convey its commitment that there would be no negative repercussions, such as visiting limitations, placed on visitors who register complaints. A "hotline" was suggested.

Management Support Unit and Red One Compound

24. It should be noted that GSL and the complainants were unable to reach agreement about the use of isolation facilities for punitive purposes. GSL reiterated its position that isolation facilities are never used for punitive purposes. The complainants reiterated that feedback from reputable and regular visitors to the centres suggested that facilities were being used for such purposes. It was acknowledged that the use of Red One Compound in particular had been and continues to be a source of particular concern in relation to the human rights of detainees. Agreement was reached on the need for a further review of the GSL protocols governing the use and operations of these facilities.

25. GSL agreed to accept advice from external stakeholders as to how the existing protocols can be improved and streamlined. For example, it was recommended by the complainants that the MSU Transfer and accommodation Guidelines be amended to ensure that women and minors are never placed in the MSU. It was agreed that the definition of "good order of the institution" would be reviewed against relevant human rights standards.

26. GSL agreed to give consideration to identifying and disclosing the nature of the 'structured programs' that are available to detainees in MSU and Red One.

27. GSL agreed to refer to relevant international human rights standards in drafting protocols for the management and disciplining of staff alleged to have engaged in illtreatment of detainees.

28. GSL agreed to consider the desirability of reviewing (against relevant human rights standards) the timeframes for the transfer, detention and assessment of detainees in MSU. In particular, endorsement of transfer (recommended change from 48 to 24 hours), final determination (recommended within 24 not 72 hours) and emergency mental health assessments and checks (recommended within 12 not 24 hours).

Removal and deportation

29. It was agreed that removal and deportations in particular raised sensitive and important human rights issues that need to be considered on a case-by-case basis. GSL agreed to consult with DIMA to ensure an appropriate human rights framework is used in developing guidelines and processes for removals and deportations, particularly as they relate to the use of GSL staff as escorts.

30. GSL agreed to ensure that all GSL removal and deportation escorts have received appropriate training and understand the international protocols and human rights standards.

31. GSL undertook to provide a report to DIMA as a matter of course on all deportations and removals in which its officers are involved, and to the extent reasonably possible, in compliance with removal / deportation protocols, and also an assessment of the arrival situation and well being of the person being removed.

General conditions and services to detainees

32. GSL undertook to give consideration to establishing a 'visitors scheme' that is more open and could provide feedback and advice to GSL in enhance their risk management process and improve conditions for detainees (the complainants suggested the Victorian Community Visitors Scheme operated by the Office of the Public Advocate as a possible model).

33. GSL indicated a major announcement would be forthcoming with regard to the provision of food in detention centres. Both GSL and the complainants agreed this is a significant issue of detainee dissatisfaction. It was acknowledged that in part this was an issue of infrastructure operated by GSL, but provided by DIMA.

34. GSL undertook to ensure all detainees have regular access to phones and phone cards to enable communication, support and advocacy.