

Immigration Detention in Australia: the loss of decency and humanity

Submission to the People's Inquiry Into Immigration Detention

20 July 2006

“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.”

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit legal and policy centre. PIAC provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged and marginalised people and enhance accountability, fairness and transparency in government decision-making.

PIAC was established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission. It 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 generates approximately 40% of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work extends beyond the interests and rights of individuals; it specialises in working on issues that have systemic impact at both state and national levels. PIAC's clients and constituencies are primarily those with the least access to economic, social and legal resources and opportunities. PIAC provides its services on a *pro bono* or reduced fee basis.

PIAC's key goal is to undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities. Wherever possible, PIAC works co-operatively with other public interest groups, community and consumer organisations, community legal centres, private law firms, professional associations, academics, experts, industry and unions to achieve its goals.

1.2 PIAC's work in the area of Immigration Detention

PIAC has a long history in advising, representing and advocating for immigration detainees. PIAC has been particularly active in challenging the process of indefinite immigration detention and has provided legal advice and representation to a number of long-term detainees, including Mr Peter Qasim. 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 detention regime that resulted in all of PIAC's clients who were still being held in indefinite detention being released.

In addition, PIAC has represented a number of unaccompanied minors seeking asylum, and is currently a partner in a research project being conducted by Associate Professor Mary Crock at the University of Sydney concerning the effectiveness of the legal process for unaccompanied minors.

In *Minister for Immigration 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').

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*.

1.3 Scope of this Submission

PIAC welcomes the opportunity to make this submission to the People's Inquiry into Immigration Detention (**the People's Inquiry**). PIAC applauds the initiative of the Australian Council of Heads of Schools of Social Work (**ACHSSW**) in setting up this Inquiry to examine in detail the mandatory detention regime and its operations. PIAC also appreciates the extension of time provided by the People's Inquiry in relation to PIAC's submission.

PIAC notes that the People's Inquiry is an open inquiry into the practices and procedures related to the observance of human rights of those detained in immigration detention facilities whatever their ethnic background. PIAC's submission will focus on issues relating to the privatisation of the operations of detention, specifically detention centres.

2. Summary of Recommendations

Recommendation 1

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.

That if the current practice of privatisation of immigration detention services is retained:

Recommendation 2

The Commonwealth Government should not extend its current contract with GSL and should instead enter a fresh contract with another operator.

Recommendation 3

Any contract between the Commonwealth Government and a private operator of Australian immigration detention centres clearly specify certain minimum requirements, including the following:

- minimum staffing levels;
- minimum training periods for staff; and
- minimum working conditions of staff.

Recommendation 4

That all staff who work in immigration detention centres should be required to undergo cultural awareness training on a regular basis.

Recommendation 5

That there should be initial and ongoing assessment of the suitability of staff for working in a detention centre environment.

Recommendation 6

That DIMA should ensure that any renegotiated Detention Services Contract with GSL (or any fresh contract with an alternative provider) makes reference to human rights standards and relevant international conventions as the appropriate framework for a service delivery model in all areas of detention.

Recommendation 7

That GSL (and any alternative private operator of immigration detention services):

- ensure that all staff are provided with human rights training;
- consult with human rights experts as to the content and delivery of such training;
- make training materials and manuals available to external human rights trainers for review and comment.

Recommendation 8

That a statement of detainee's rights and conditions should be enshrined in regulations to the Migration Act, or in a Charter of Rights.

Recommendation 9

That the performance linked fee not be retained in the Detention Services Contract.

Recommendation 10

If the current system of privatisation of immigration detention services is retained, there should be a statute-based, independent regulator with ongoing responsibility for monitoring the operation and management of immigration detention centres.

Recommendation 11

That any such independent third party should be given the capacity to make binding orders requiring that the rights of detainees be upheld.

Recommendation 12

That current restrictions by DIMA over media and public scrutiny of immigration detention centres be limited. That individual detainees should retain the right to refuse to be subject of media attention or public scrutiny on privacy grounds.

Recommendation 13

That the *Migration Act* be amended to allow for judicial review of any decisions made by employees of private detention centre operators in circumstances where such employees have been designated as officers under the Act.

Recommendation 14

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

Alternatively, that DIMA 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 15

That the OECD Guidelines should be legally binding with enforceable outcomes for complainants.

3. Privatisation of immigration detention

3.1 The privatisation of the operations of immigration detention

The Commonwealth Government announced its intention to privatisate the operations of Australia's immigration detention centres as part of its Budget discussion in August 1996.¹ Previously, 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 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 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 failed 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.

In August 2003, 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**). ACM continued to manage the detention centres over a transitional period until February 2004. GSL's contract is for four years, with an option to renew for a further three years.

3.2 The Detention Services Contract

The Detention Services Contract sets out in detail the services to be delivered by GSL in the operation of immigration detention centres. It sits within the framework of an overarching General Agreement, which sets the scene for DIMA's relationship with GSL, and an Occupation Licence Agreement, which provides GSL with the authority to use immigration detention facilities.

The Detention Services Contract has a number of schedules, including the Immigration Detention Standards and performance measures.² Essentially, it requires that GSL provide a custodial service for people held in immigration detention and take responsibility for the security, custody, health and welfare of detainees delivered into its custody by DIMA. GSL has no role in, or responsibility for, establishing identity or providing any service or function that relates to the application of the *Migration Act 1958* (Cth) (**the Migration Act**).

¹ 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 & Human Rights* (2003) 129.

² DIMA, *Detention Agreements between the Commonwealth of Australia and Group 4 Falck Global Solutions Pty Ltd* (27 August 2003).

4. General concerns about privatisation of immigration detention services

In the years since privatisation of immigration detention services, disturbing evidence has emerged of a wide range of problems in immigration detention centres. 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.³

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 ACM officers at Woomera had used excessive force when dealing with detainees and that they had racially abused detainees.

Since GSL took over the contract in 2003, evidence has continued to emerge of defective practices and abuses of human rights in immigration detention centres.⁴ 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 been highly critical of the operations of immigration detention centres and the contracts underpinning those operations.⁵

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 pre-tendering processes, tender evaluation, contract negotiation and termination payments.⁶

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. These issues are considered in further detail below.

Recommendation 1

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.

³ Commonwealth Ombudsman, *Report of Own Motion Investigation into the Department of Immigration and Multicultural Affairs Immigration Detention Centres* (2001) 17.

⁴ See, 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).

⁵ 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*; M Palmer Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005).

⁶ Australian National Audit Office, above n 5.

5. Appropriateness of GSL as the provider of private immigration detention services

GSL is a subsidiary of a British company, Global Solutions Limited UK Ltd (**GSL UK**). Until 2004, GSL was known as ‘Group 4 Falck Global Solutions’, and was a part of Group 4 Falck, a multinational security conglomerate with 340,000 employees in 108 countries.⁷ In July 2004, GSL and GSL UK were separated from Group 4 and sold to two European private equity firms, Englefield Capital and Electra Partners Europe, for more than \$500 million.⁸

Prior to becoming the operator of Australia’s immigration detention centres, GSL’s business primarily involved running prisons and prisoner transportation services. GSL operates the Mount Gambier Prison and the maximum-security Port Phillip Prison. GSL has four major subcontractors operating in Australia’s Immigration Detention Centres:

- Tempo Facilities Management;
- Delaware North Australia: catering;
- IHMS: health services; and
- PSS: psychological counselling services.⁹

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, the track records of GSL UK and its predecessor, Group 4, do not inspire confidence. In March 1997, riots occurred at Group 4’s 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 Group 4 security officers had fabricated the evidence given against the detainees, and were in fact responsible for some of the property damage that occurred during the riot.¹⁰

In 2002, a riot at another Group 4 detention centre in the UK, Yarl’s 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.¹¹

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 and condoning violence towards detainees, using racist language and describing how men of certain ethnicities were arbitrarily held in high security units.¹² A British MP has attributed

⁷ GSL (Australia) Pty Ltd, *About GSL (Australia) Pty Ltd* (2006) <http://www.gslpl.com.au/gsl/about_us.asp> at 10 July 2006.

⁸ Ibid.

⁹ GSL (Australia) Pty Ltd, *GSL (Australia) Pty Ltd Contracts & Services* (2006) <<http://www.gslpl.com.au/gsl/contracts/contracts.asp>> at 10 July 2006.

¹⁰ *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.

¹¹ Stephen Shaw, *Report of the inquiry into the disturbance and fire at Yarl’s Wood Removal Centre* (2004) 115-119 <<http://www.ppo.gov.uk/othereps.htm>> at 10 July 2006.

¹² Simon Jenkins, ‘The Shameful Face of Going Private’ *Evening Standard* (London) 3 March 2005, <http://0-global.factiva.com.opac.library.usyd.edu.au:80/en/arch/print_results.asp>; Yvonne Roberts, *New Anti-terror Laws Spark More Prejudice* (2005) *Community Care* (2005) <<http://www.communitycare.co.uk/Articles/2005/03/10/48491/New+Anti-terror+laws+spark+more+prejudice.html?key=ANTI-TERROR%20LAWS>> at 10 July 2006.

this to ‘an endemic failure by GSL to properly recruit, train and supervise its staff’.¹³ The British Prisons and Probations Ombudsman conducted an investigation pursuant to the BBC episode, which found abuse and inappropriate use of physical force by GSL staff.¹⁴

It would appear that part of the reason for these problems 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 immigrant detention centres, 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.¹⁵

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. For example, in July 2005, the (then) Department of Immigration Multicultural and Indigenous Affairs (**DIMIA**) released a report following an investigation 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 report found that the detainees were humiliated and treated in an ‘inhumane and undignified manner’ including being manhandled, 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.¹⁶

It is inappropriate for the Commonwealth to contract out of 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 have committed no crimes and may be suffering the effects of trauma and torture. (That said, PIAC has ongoing concerns about the privatisation of prisons and the impact this has on the quality of services and the accountability of those managing such facilities.)

PIAC is particularly concerned that the Government saw fit to award the current contract to provide immigration detention services to GSL, given its background in operating high-security prisons and its track record of gross failures to maintain human rights standards in British Asylum Detention Centres. The performance of GSL in Australia since taking over the contract has done little to inspire confidence in its ability to carry out immigration detention services in a manner that upholds the dignity of detainees.

¹³ *Asylum deal rethink call* (2005) thisisoxfordshire.co.uk <<http://archive.thisisoxfordshire.co.uk/2005/3/7/4794.html>> at 10 July 2006..

¹⁴ 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

¹⁵ <http://www.ind.homeoffice.gov.uk/aboutus/reports/allegation_of_racism> at 10 July 2006.

GSL (Australia) Pty Ltd, *GSL (Australia) Pty Ltd Contracts & Services* (2006)

<<http://www.gslpl.com.au/gsl/contracts/contracts.asp>> at 10 July 2006.

¹⁶ 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).

In PIAC's view, GSL is entirely inappropriate as the private operator of immigration detention centres in Australia. If the current practice of privatisation of immigration of detention services 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 2

That, if the current practice of privatisation of immigration detention services is retained, the Commonwealth Government should not extend its current contract with GSL and should instead enter a fresh contract with another operator with relevant expertise in the provision of community and health care, rather than corrective services.

6. Privatisation: staffing and training issues

Problems of understaffing and inadequately trained staff are common in the private detention services industry and are a consequence of the economics of privatisation. Private providers have an economic incentive to minimise their expenditures on staff. This equates to an incentive to minimise staff numbers, remuneration and training. Poor pay and working conditions, coupled with the isolated location of detention centres, leads to problems retaining staff. If the detention centres were to be operated by the Government, there would not be the same profit motive to cut corners on staff numbers, pay conditions and training. The move to privatisation carries the danger that fundamental choices about public safety, employee training and the denial of personal freedoms will increasingly be made with a view to the bottom line.

The track records of GSL and ACM in the UK and Australia demonstrate a persistent failure to address issues of inadequate staffing levels and inappropriate staff training. The Detention Services Contract (discussed below) contains provisions relating to staff numbers and training. These are expressed in general language. For example the contract requires that 'staff are of good character and conduct'¹⁷, that they 'behave in a tolerant, respectful and culturally sensitive manner'¹⁸ and that they have 'communication, counseling, negotiation and conflict resolution skills'.¹⁹

However, neither the contract nor the Immigration Detention Standards set specific minimum staff numbers or minimum training hours. Nor do they address type or content of training. Staff shortages and high staff turnover were a problem for ACM, particularly at Woomera. Many staff were on six-week work contracts and the ability of ACM to retain staff was no doubt exacerbated by the centre's remote location.

According to the Palmer Inquiry, GSL staff often had to be provided at short notice, and tended to be drawn from ACM's private prisons. Their background and training were therefore unlikely to equip them to work in a detention centre.

ACM staff receive only a five-week pre-service training and forty hours of refresher training annually.²⁰ ACM staff were found to lack cultural awareness, or failed to appreciate that the conditions of detention should not be punitive.²¹ According to the Commonwealth Ombudsman:

¹⁷ Detention Services Contract, Schedule 3: Immigration Detention Standards, Performance Measures and the Performance Linked Fee Matrix, s 7.1.4.

¹⁸ Ibid, s 7.1.2.

¹⁹ Ibid, s 7.1.5.

²⁰ Prison Reform Trust, *Australia: ACM contract under scrutiny* (2001) Prison Privatisation Report International No 39 <<http://www.psiru.org/justice/ppriarchive/ppri39-03-01.asp>> at 10 July 2006.

²¹ Flood, above n 1; Commonwealth Ombudsman, above n 3.

Information of racial abuse, insensitivity and inappropriate comments, as well as a heavy-handed approach have been brought to my attention in relation to all IDCs... Examples of this, provided by witnesses, were a poem and drawings purportedly by ACM officers, which I was advised, were widely available within the Woomera IDC.²²

The UK Prison Inspector's report into the Campsfield House riot noted considerable staffing problems at Campsfield. Annual staff turnover was at 57% in 1996. This was attributed to the meager salaries and poor working conditions of staff. There were inadequate staff numbers on shifts; staff were required to work seven consecutive 12-hour shifts with no lunch break; and many did not receive their correct leave entitlements. The Prisons Inspector also found that staff were inadequately trained, sometimes made racist remarks to detainees and that there were inadequate grievance procedures.²³

Recommendation 3

That, if the current practice of privatisation of immigration detention services is retained, any contract between the Commonwealth and the private operator of Australian detention centres should clearly specify the following:

- minimum staffing levels;
- minimum training periods for staff; and
- minimum working conditions for staff.

Recommendation 4

That all staff who work in immigration detention centres should be required to undergo cultural awareness training on a regular basis.

Recommendation 5

That there should be initial and ongoing assessment of the suitability of staff for working in a detention centre environment.

7. Corporate responsibility - GSL's human rights policy

GSL UK's website states that:

Our policies are guided by respect for the human rights and individual freedoms laid out in the Universal Declaration of Human Rights.²⁴

GSL UK's Human Rights Policy states that:

Put simply, [human rights] are about how we would want our family, friends and ourselves to be treated... Training in human rights will form an integral part of our induction training and job development training program for all employees.²⁵

²² Commonwealth Ombudsman, above n 3, 26

²³ Sir David Ramsbotham, *Campsfield House Detention Centre: a report by Her Majesty's Chief Inspector of Prisons following an unannounced short inspection* (1998).

²⁴ *Welcome to GSL: Human Rights* (2006) <http://www.gslglobal.com/corporate/human_rights.asp> at 10 July 2006.

Unfortunately, GSL's Human Rights Policy is not consistent with its involvement with the mandatory detention of asylum seekers, and has not translated into appropriately trained staff or open and transparent practices.

Firstly, GSL's stated commitment to human rights must be seen in the context of the fact that it provides a service to the Australian Government that, by its very nature, offends basic human rights standards. Australia's system of compulsory detention of all asylum seekers, regardless of the threat they pose to Australian society, was found, by the UN Human Rights Committee, to be a violation of the prohibition against arbitrary detention²⁶ in Article 9 of the *International Covenant on Civil and Political Rights (ICCPR)*.²⁷

Moreover, as outlined above, GSL's record in Australia and the United Kingdom demonstrates that its policies have failed to ensure respect for detainee's other rights under articles of the ICCPR, such as the right to security of the person (Article 9), and the right to be free from racial discrimination (Article 2).

In June 2005, the Brotherhood of St Lawrence, Children Out of Detention (**ChilOut**), the Human Rights Council of Australia (**HRCA**), Rights and Accountability in Development (**RAID**) and the International Commission of Jurists (**ICJ**) made a complaint against GSL under the revised Organisation for Economic Co-operation and Development (**OECD**) Voluntary Guidelines on Multinational Enterprises (**the OECD Guidelines**). The OECD Guidelines establish voluntary principles for the activities of multinational enterprises and standards of behaviour supplemental to the laws of the countries where the multinational enterprises are based, or their activities are undertaken. Essentially, they are a means of encouraging corporate social responsibility. The OECD Guidelines include a clause that states that 'enterprises should ... respect the human rights of those affected by their activities'.

The complaint alleged that GSL, in its operation of Australian detention centres, had breached the Human Rights and Consumer Interests provisions of the Guidelines. In particular it was alleged that GSL 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'.

Following mediation, GSL agreed to a number of undertakings, including that it would ask DIMA to include in its next contract reference to human rights standards, that human rights training would be included in its training program and that it would improve the information provided to detainees about their rights and how to complain.²⁸

PIAC supports the undertakings as a significant step forward in promoting a better understanding and appreciation by GSL of its human rights obligations towards detainees. Given that the Australian Government claims to promote and implement the OECD Guidelines, the Government should, through DIMA, ensure that any future contract with GSL (or any alternative private

²⁵ Ibid.

²⁶ *A v Australia* (1997) UN Doc CCPR/C/59/D/560/1993 (30 April 1997). See also, *C v Australia* (2002) UN Doc CCPR/C/76/D/900/1999 (13 November 2002); *Baban v Australia* (2003) UN Doc CCPR/C/78/D/1014/2001 (12 August 2003); *Bakhtiyari v Australia* (2003) UN Doc CCPR/C/79/D/1069/2002 (29 October 2003).

²⁷ *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 999 United Nations Treaty Series 171. Entered into force for Australia on 13 November 1980.

²⁸ 'Australian National Contact Point, 'GSL Australia Specific Instance' (2006) at <<http://www.ausncp.gov.au>> at 10 July 2006.

operator of immigration detention services) includes provisions that give effect to these undertakings.

Unfortunately, the undertakings are voluntary, and there is no timeline for their implementation. PIAC supports a process that would see OECD Guidelines become legally binding with enforceable outcomes for complaints. This is discussed in more detail in Part 11.5 below.

Recommendation 6

That the Commonwealth Government should ensure that any renegotiated Detention Services Contract with GSL (or any fresh contract with an alternative provider) makes reference to human rights standards and relevant international treaties and standards as the appropriate framework for a service delivery model in all areas of detention.

Recommendation 7

That GSL (and any alternative private operator of immigration detention services):

- ensure that all staff are provided with human rights training;
- consult with human rights experts as to the content and delivery of such training;
- make training materials and manuals available to external human rights trainers for review and comment.

8. Immigration Detention Standards

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 the Human Rights and Equal Opportunity Commission (**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.

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, under the doctrine of privity only the parties to a contact 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.²⁹ 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.³⁰ 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. In PIAC’s view, it would be preferable that the rights and conditions of detainees 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. PIAC notes that convicted criminals have the benefit of minimum standards in relation to imprisonment, which are guaranteed by regulations. PIAC is unable to understand why asylum seekers and other immigration detainees are denied such guarantees.

²⁹ *Trident General Insurance v McNiece Bros* (1988) 165 CLR 107.

³⁰ *Ibid.*

Recommendation 8

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 mechanisms should ensure that the rights and conditions give rise to an enforceable remedy.

9. The performance-linked fee

The Detention Services Contract provides for a 'performance-linked fee component'. This is really a liquidated damages clause, because it provides for a deduction from GSL's fee if it fails to meet the IDS, rather than a bonus for performance that exceeds the minimum requirements. The method of calculating the financial penalty is quite complicated. GSL is awarded negative points for failures to meet the performance measures in the IDS. The number of negative points allocated to each performance measure is unknown, as the contract makes this information confidential to GSL. The Commonwealth can also award GSL positive points for achievement of the Business Plan that the contract requires GSL to formulate. Because the quantum of points awarded in different circumstances is unknown, it is impossible to compare the relative incentives that the points system provides for GSL to adhere to the IDS, compared to achieving its Business Plan. If these goals are in conflict it may be in GSL's economic interest to achieve its Business Plan at the expense of achieving some of the performance measures in the IDS.

The points system has an 'escalation multiplier'. The effect of the multiplier system is that as more negative points are accumulated, any extra negative points received as a result of a failure to achieve the performance measures become more crucial, because they are multiplied before being added to the total. For example, if more than 200 negative points have been accumulated, any additional points are given an escalated value of 1.25. If more than 351 points have been accumulated, each additional point is given a value of 2.

At the end of each quarter, if the total points value is positive, GSL pays no penalty. If the total points value is negative, GSL pays a fine of \$1,000 for every negative point accumulated, up to a limit of 5% of the contract fee. Because the amount of the contract fee is confidential to GSL, there is no way to calculate the maximum financial penalty GSL can suffer as a result of failures to adhere to the IDS. GSL is not a public company, and does not publish annual profit data. Thus it is not possible to assess the impact that a loss of 5% of the contract price would have on the contract's overall profitability for GSL.

In making its quarterly assessment of GSL's performance in relation to IDS, DIMA can make use of information obtained during its own monitoring, and information brought to its attention by HREOC, the Commonwealth Ombudsman or the Immigration Detention Advisory Group (**IDAG**). Arguably, however, the most important source of information is GSL's own incident reports. PIAC is concerned that the performance-linked fee may act as a disincentive for the accurate reporting of incidents at GSL's detention centres, including incidences of failure to comply with the IDS. Experience demonstrates that this is more than a mere theoretical concern. In 2000, a duty nurse at Woomera reported to the centre's manager (an ACM employee) that she suspected that a 12-year old boy had been sexually assaulted, but the manager and other officials failed to report the incident to DIMA, ignoring established reporting procedures.³¹

GSL already has a long-term financial disincentive to report failures to conform to the performance measures to DIMA, because if DIMA is generally unsatisfied with GSL's performance it might

³¹ Flood, above n1, at chapter 6

award the next contract to a competitor. The performance-linked fee constitutes a more immediate and escalating financial disincentive. If GSL responds to this financial disincentive by under-reporting incidents, the performance-linked fee may sacrifice accountability without achieving its aim of ensuring GSL's adherence to the IDS.

In PIAC's view, the performance-linked fee acts as a disincentive for the accurate reporting of incidents at GSL's detention centres, while failing to achieve its purpose of ensuring adherence to the IDS.

Recommendation 9

That the Commonwealth Government remove the performance-linked fee from the Detention Services Contract.

10. Regulation and capture

When services previously provided by government are privatised, creating a new private industry, one problem that needs to be addressed is how the new private industry will be regulated. Either existing regulatory structures need to expand their jurisdiction to cover the new industry, or a new system of regulation must be created. The Detention Services Contract states that:

The Department remains responsible and accountable to the Minister and to Parliament for the management of detention facilities. While the Services Provider should monitor its own operations, the Department and, particularly departmental staff in the facilities, also have an ongoing role in monitoring the provision of services.³²

In effect, DIMA is both the sole customer and the regulator of the private detention industry. It is DIMA's responsibility to ensure, on behalf of the public that funds the detention services contract, that GSL adequately performs the contract, and conforms to the law and standards of conduct that the public would find acceptable.

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 serve the interests of the industry with which they are in regular contact than the more remote and abstract public interest'.³³ 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:

1. a contractual rather than statutory basis for regulation;
2. situations in which the regulatory agency regulates a small number of companies; and
3. situations where there is frequent contact between the regulatory agency and the private company, such as when the regulators are based at the same site as the company.³⁴

All three of these factors are present in the relationship between DIMA and GSL.

First, there is no true statutory basis for the regulation of GSL's conduct. The *Migration Act* only regulates the powers that the Minister can give GSL employees to act in ways that would otherwise be unlawful, such as by strip-searching detainees. It does not provide a framework or rules for the

³² Detention Services Contract, Schedule 2: Detention Services, s 17.1.7

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

³⁴ *Ibid*, 37.

general regulation of the private detention industry, so DIMA must conduct regulation as a matter of contract enforcement.

Secondly, DIMA regulates only one company in the private detention industry: GSL.

Thirdly, as the above extract from the Detention Services Contract indicates, DIMA 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.

These risk factors would suggest that the relationship between DIMA and GSL is one that is highly susceptible to capture. However, in assessing the risk of capture in the regulation of the private prison industry, Harding identified an even more serious problem. He states that:

[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.³⁵

This accurately describes the relationship between DIMA and GSL. The Government's policy of mandatory detention and DIMA's treatment of detainees are constantly under attack, by interest groups, the media, and even politicians within the liberal party. In this environment, DIMA's vested interest is 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 within DIMA there is an institutionalised siege mentality, and that anyone seeking to criticise practices at detention centres is 'the enemy'. This mentality is evidenced by the importance placed on keeping the media away from detention centres.

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

Recommendation 10

If the current system of privatisation of immigration detention services is retained, there should be a statute-based, independent regulator with ongoing responsibility for monitoring the operation and management of immigration detention centres.

Recommendation 11

That any such independent third party should be given the capacity to make binding orders requiring that the rights of detainees be upheld.

11. Transparency and Accountability

The right to liberty is a fundamental human right. According to Article 9 of the *International Covenant on Civil and Political Rights* everyone has the right to liberty and security of the person and no one is to be subjected to arbitrary arrest and detention. Because immigration detention involves such a significant trespass onto this right, it is crucial that the operation of immigration

³⁵ Ibid, 48.

detention centres and services should be open to public scrutiny. However, the effect of privatisation of the operations of immigration detention has been to render the operations of immigration detention less transparent and less accountable than ever before.

11.1 Public and media scrutiny

DIMA exerts a high degree of control over scrutiny of detention centres by members of the public and the media. This impedes the process of public accountability. For example, GSL is contractually obliged not to communicate with the media or members of the public about any aspect of its operation of Australia's detention centres without DIMA's written consent.³⁶ GSL must report the presence of members of the media or protestors at a detention centre to DIMA within one hour.³⁷ The Immigration Detention Standards designate certain incidents as 'minor', 'major' or 'critical'.³⁸ The rating given to a particular type of incident determines the timeframe within which GSL must report the incident to DIMA in order to comply with the Immigration Detention Standards. According to the standards, the presence of media, state welfare authorities or protestors at a detention centre, or a high-profile visitor being refused access, are all 'critical incidents'. Extraordinarily, these incidents are in the same category as: a detainee's death or self-harm; a mass breakout, riot or hostage situation; a bomb, or biological or chemical weapon threat; or a fire, flood, cyclone or earthquake. They must be reported to DIMA with higher priority than an actual or suspected case of unlawful detention, or the voluntary starvation by a minor, which are both classified as 'major' incidents.

DIMA's practice in this area appears to be at odds with its practice of permitting journalists to accompany DIMA officers on 'raids' involving the arrest of prohibited non-citizens.³⁹ PIAC is currently acting for a detainee who was photographed by the media on one of these raids and effectively identified in an article that was subsequently published about the raid. PIAC's client has alleged breaches of several of the Information Privacy Principles (IPPs) under the *Privacy Act 1988* (Cth).

The Detention Services Contract and the IDS have been made available to the public, thereby allowing the media and members of the public to scrutinise the private administration of Australia's detention centres to some extent. However, other important information, including incident reports, is not available. Furthermore, the length and complexity of the documents regulating the relationship between DIMA and GSL makes it difficult for members of the public to scrutinise them effectively unless they have a lot of time and legal expertise available for the task.

Recommendation 12

That current restrictions by DIMA over media and public scrutiny of immigration detention centres be removed. That individual detainees should retain the right to refuse to be the subject of media attention or public scrutiny on privacy grounds.

11.2 Administrative Law

Administrative law allows individuals to challenge the lawfulness of actions and decisions of the executive government. It is an important accountability mechanism. Judicial review of

³⁶ Detention Services Contract, s 11.9.1.

³⁷ Detention Services Contract, Schedule 3: Immigration Detention Standards, Performance Measures and the Performance Linked Fee Matrix, Attachment A: Incidents.

³⁸ Detention Services Contract, Schedule 3: Immigration Detention Standards, Performance Measures and the Performance Linked Fee Matrix, Attachment A: Incidents.

³⁹ Martin Wallace, 'Exposing Sydney's Sex Slave Traders', *Daily Telegraph* (Sydney) 15 May 2004, page 31

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. The ultimate authority to detain asylum seekers rests with DIMA, and DIMA retains 'ultimate responsibility for immigration detainees'.⁴⁰ However, GSL has considerable power over the daily lives of detainees. Most of the decisions that GSL makes in relation to detainees are not made pursuant to any statutory power and are governed only by the Immigration Detention Standards. This includes decisions about detainees' food, education, recreation, opportunities for religious observance, and basic care needs such as clothing, toiletries and blankets. As noted above, the Immigration Detention Standards bind GSL only as a matter of contract law. Detainees are not able to seek judicial review of these decisions under administrative law. In *Neat Domestic Trading v AWB*⁴¹ 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.

Some of the powers that GSL employees exercise over detainees, such as the power to strip search them⁴², are powers under the *Migration Act*. The Minister for Immigration (**the Minister**) can confer these powers upon GSL employees by designating them officers under the Act.⁴³ GSL employees who perform functions under the *Migration Act* are usually made officers under the Act.⁴⁴ The ADJR Act allows judicial review of decisions 'of an administrative character ... made under an enactment'.⁴⁵ 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.⁴⁶ 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, not on 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 as such would be immune from review under the ADJR Act.

Recommendation 13

That the *Migration Act* be amended to provide for judicial review of any decisions made by employees of private detention centre operators in circumstances where such employees have been designated as officers under the Act.

11.3 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. At the

⁴⁰ Detention Services Contract, Schedule 3: Immigration Detention Standards, Performance Measures and the Performance Linked Fee Matrix, Principles Underlying Care and Security.

⁴¹ [2003] HCA 35.

⁴² *Migration Act 1958*, s 252A.

⁴³ *Ibid*, s 5.

⁴⁴ Detention Services Contract, Schedule 2: Detention Services, Lawfulness of Detention, 2.1.9.

⁴⁵ *Administrative Decisions (Judicial Review) Act 1977*, s 3.

⁴⁶ *Neat Domestic Trading v AWB* [2003] HCA 35, [64], McHugh, Hayne and Callinan JJ.

Commonwealth level access to information held by Government is regulated by the *Freedom of Information Act 1982 (FOI Act)*. The FOI Act does not allow members of the public to access information from private companies, such as GSL, but it does allow access to documents held by government departments and agencies, including DIMA. This would include information that DIMA holds about GSL's operation 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 affairs⁴⁷ and information that a government department has obtained in confidence.⁴⁸ The Detention Services Contract makes many of the monetary amounts in the contract confidential to GSL.⁴⁹ 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 it provides under the contract, and to assess the government's economic justification for privatisation of detention centres.

Also confidential to GSL is 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 awarded if GSL meets its business plan. This means that the public cannot assess the relative importance that DIMA and GSL have contractually assigned to protecting the detainees' rights and living standards, as opposed to running the centres as efficient businesses.

Recommendation 14

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

Alternatively, that DIMA 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.

11.4 Government review 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. Of these, only IDAG has a mandate relating specifically to detention centres. IDAG is particularly important because it is the only group that can visit detention centres without notice. The members of IDAG are appointed by the Minister. They come from diverse backgrounds; some are members of organisations that oppose the government's policy of mandatory detention, while others are former Liberal politicians. IDAG's function is to privately advise the Minister. However, IDAG's mandate does not include commenting publicly on its work, and to do so would probably undermine any influence it may have with the Minister. It is therefore 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

⁴⁷ *Freedom of Information Act 1982*, s 43.

⁴⁸ *Ibid*, s 45.

⁴⁹ Detention Services Contract, Schedule 11: Commonwealth's and Service Provider's Confidential Information.

public accountability mechanism; it does not allow the public to scrutinise GSL or DIMA's behaviour.

HREOC and the Commonwealth Ombudsman are more independent than IDAG because they are not appointed by the Minister for Immigration. While these bodies 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 compiled reports about conditions in Australia's migration detention centres, and these reports have included many adverse findings.⁵⁰ Their existence and their capacity to scrutinise GSL and DIMA 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 also have very broad, general 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.

PIAC reiterates Recommendation 10 above, that if the current system of privatisation of immigration detention services is retained, there should be a statute-based, independent regulator with ongoing responsibility for monitoring the operation and management of immigration detention centres.

11.5 OECD Voluntary Guidelines on Multinational Enterprises

As outlined above, the OECD Guidelines have recently been shown to be an effective forum for raising concerns about private immigration detention centre operators. The complaint against GSL by ICJ, ChilOut and others, led to GSL participating in a voluntary mediation process and making significant undertakings to improve its practices. However, the effectiveness of this process is limited, given that the undertakings are not binding, and rely, in part on the co-operation of DIMA in order to take effect.

Recommendation 15

That the OECD Guidelines should be legally binding with enforceable outcomes for complainants.

⁵⁰ For example: *HREOC Report No. 28*: above note 14; Commonwealth Ombudsman, above note 9.