



## **OECD Guidelines for MNE's – GSL and Complainants**

### ***COMPLAINANTS OPENING STATEMENT***

**27 February, 2006, The Treasury, Canberra**

1. On behalf of the complainants I would like to express appreciation to the Australian National Contact Point, Mr Gerry Antioch and his colleagues, for accepting this complaint under the OECD Guidelines and for their guidance of the complaint process to this stage.
2. This complaint is based on accepted international human rights standards, and shared concerns between the complainant organisations based in Geneva, the United Kingdom and Australia that these standards be upheld,
3. On behalf of the complainants I would like to express our appreciation to GSL Australia (Pty Ltd) for their willingness to engage in this dialogue with us through the Australian National Contact Point for the OECD Guidelines for Multi-National Enterprises.
4. The complainants themselves entered this process from a strong belief that the promotion of, and respect for, international human rights standards is a shared responsibility for all – and that these standards provide common ground for all the parties involved in this complaints process.
5. The focus of today's meeting, at the Australian National Contact Point's request, is the operational issues associated with GSL's management of the detention centres as they are relevant to this complaint.
6. It is the view of the complainants that operational issues (policies, procedures and their implementation) require an understanding, by all levels of the company, of accepted

international human rights standards. The complainants represented here look forward to dialogue on these issues today and have developed practical recommendations for the company based on the complainants understanding of international law. The complainants hope that there will be an opportunity to discuss these recommendations and others that might arise in the course of the discussion.

7. We believe that some general introductory remarks that explain how we have come to this point will be helpful.
8. The complaint itself is a reflection of a growing global movement that is committed to ensuring that corporations, including multinational corporations, understand their responsibilities in relation to human rights, accept these responsibilities and apply them to their practice. This movement is reflected in developments such as the UN Global Compact, the UN Draft Norms on Business and Human Rights and the OECD Guidelines on Multi-National Enterprises as well as in industry codes and in litigation.
9. The OECD Guidelines on Multi-National Enterprises call on enterprises to respect the human rights of those affected and explicitly include reference to international human rights standards. The OECD Guidelines were developed on the perception that some oversight of companies was necessary to avoid violation of these standards. They grew out of the regrettable fact that at various times and in different parts of the world, companies have engaged in practices that violate universally recognised standards of human rights.
10. The movement calling for companies to accept their human rights responsibilities has gathered pace and urgency as more governments have contracted out services and responsibilities long regarded as the preserve of the state. The contracting out of prison and detention centre administration is perhaps one of the most sensitive areas of such contracting-out.
11. In this context, if it is claimed that a government has violated human rights, it is not a sufficient defence for it to answer that it has complied with its own domestic laws. Enterprises need to be aware of this principle, since it is equally applicable to them. An allegation that an enterprise has acted in violation of human rights standards cannot simply be answered by stating that domestic law was complied with. This principle means that enterprises need to be fully aware of where their own actions may impinge on the enjoyment of human rights.

12. It is the contention of the complainants that when the detention of individuals often for long periods of time, is contracted out by the state for whatever reasons, then the guidelines require that the company should have an awareness and understanding of the human rights standards that the international community has adopted, and that bind the states that contract out the function of detention.
13. In particular, they should at least be aware of the meaning of concepts such as arbitrary detention and unlawful detention, of the rights of recourse of detainees and the minimum standards of treatment of detainees, and how their own activities relate to these issues.
14. It follows from this, that the company concerned needs to have suitable processes for assessing the compatibility of its policies and operations with international human rights standards, for determining itself when infringements might be likely to occur and when these have occurred for addressing them and offering redress to individuals for these infringements.
15. The complainants in this case do not suggest that this is always an easy undertaking for companies, but it is clearly what is called for under the OECD Guidelines. The complainants value the current process under the guidance of the ANCP. This has provided an opportunity to identify recommendations and processes that will assist GSL Pty Ltd understand and apply their human rights obligations, in relation to both the past and the future.
16. This complaint is not concerned with government policy and practice, except inasmuch as it concerns the responsibility of the government to properly investigate complaints under the OECD Guidelines.
17. In many contractual situations a corporation has a choice, some option as to how to fulfil its obligations. Where there is such leeway, the question that the corporation needs to ask is whether there is a way to fulfil its contractual obligations and at the same time respect international human rights standards. This applies whether it is contracting with government or with any other person. If, on the other hand, there is no leeway, no options for the corporation in fulfilling its contract, it may have to face squarely a conflict between its contractual obligations and the recommendation that it respect human rights. There seems nothing in the Guidelines to prevent the corporation from raising such an issue with the NCP
18. This case could be characterised as having two parts.

- The first focuses on GSL's willingness to detain children in breach of a number of international human rights standards, and its willingness to detain individuals arbitrarily in breach of Article 9 of the International Covenant on Civil and Political Rights.
- The second focuses on the way in which it has detained people and what has happened to the individuals it has detained.

19. The common thread that runs through both parts of the complaint is the issue of GSL's understanding of human rights standards and how it might apply these standards to its operations – from the negotiation of contracts through to the delivery of its services to the detainees in its care. It is the contention of the complainants that GSL has not adequately understood these standards, nor applied them and that this lack of understanding still needs to be addressed. The complainants have approached this issue in putting forward a number of positive recommendations.

20. At the time of negotiating the contract to administer the detention centres, many of the human rights issues were already very well documented. These human rights issues included the arbitrariness of the detention of some individuals, the mandatory nature of children's detention and the way in which these children were detained. These were issues that could and should have been taken up in the contract negotiations as well as in subsequent operations. These remain as issues that this company is obliged to address when the contract again comes up for tender.

21. The complainants are encouraged that it has been possible for GSL to change its protocols, procedures and practices following the findings of the Palmer Enquiry and other recent reports. This indicates a welcome willingness and flexibility to make changes in the light of findings by relevant bodies.

22. Since the complaint was lodged children have been released from the detention camps. This is a very welcome step. At the same time it should be acknowledged that there was no legal requirement, even under Australian law, for them ever to have been held in detention camps in the circumstances that are now widely recognised as damaging to their health and development. The relevant legislation has for example enabled children and their families to be held in "designated places of detention" that can be an individual's home. It is not clear that if GSL is again requested to detain children in circumstances that breach international human rights standards that it will refuse to do so in accordance with its obligations under the Guidelines.

23. Since the complaint was lodged a number of the long term detainees have also been released, and it is understood that there are now less than ten individuals that have been in detention for over five years and that these cases are being investigated by the Ombudsman.
24. The causal relationship between arbitrary detention, particularly for long periods, and psychiatric problems is well documented internationally. An understanding of this may have enabled the company to have developed its own processes for bringing cases of concern to the attention of the government much earlier than in fact occurred in many cases. GSL needs to draw its line in the sand and be clear that there are circumstances in which it will not detain people, that these circumstances are guided by international standards and that the Company will not be contractually obliged violate human rights.
25. These are issues that are integral to negotiation of the contract, and will be to its renegotiation.
26. It should also be noted here that since the complaint was lodged it has emerged that a number of individuals – over 50 and perhaps over 100 – have been detained and in some cases deported unlawfully.
27. Moving on to second part of the complaint, which is the focus of today's meeting, the complainants are anxious to explore the processes that GSL has for applying an understanding of human rights standards to its operational practice, both in general terms and in the specific agenda items that have been listed.
28. The complainants are engaged in this process in good faith, from a commitment to seek both acknowledgement of problems, but also solutions based on international standards that are practical.
29. The complainants recognise that is unlikely that we will arrive at all of these solutions through today's dialogue but we are hopeful that this is a step in the right direction and that the ANCP can encourage further steps to be taken.
30. The Complainants would like to table a number of the relevant documents adopted by the United Nations General Assembly such as the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the United Nations Principles for the Protection of Persons with mental Illnesses and the Improvement of Mental Health Care, and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

31. I conclude these opening remarks by reiterating our thanks to the ANCP for facilitating this process, and to GSL for its willingness to engage in dialogue on these important issues. We look forward to a fruitful day of discussions based on a shared commitment to human rights.

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