

Submission to the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises concerning Global Solutions Ltd (Australia) Pty Ltd

The complainants - Rights & Accountability in Development (RAID), the Human Rights Council of Australia, Chil-Out, the Brotherhood of St Laurence and the International Commission of Jurists (ICJ) are non-governmental organisations based in the United Kingdom, Australia and Switzerland.

The submission concerns the detention facilities managed by the Global Solutions Ltd ('GSL') wholly owned subsidiary in Australia, namely Global Solutions Limited (Australia) Pty Ltd, pursuant to a contract signed between the Australian Department of Immigration and Multicultural and Indigenous Affairs and Group 4 Falck Global Solutions Pty Ltd on 27 August 2003.¹ We note that in February 2004 Group 4 Falck Global Solutions changed its name to Global Solutions Limited (Australia) Pty Ltd.² On 26 May 2004 it was announced that Global Solutions Limited had been sold by Group 4 Falck to private equity firms Englefield Capital and Electra Partners Europe.³ Global Solutions Ltd (Australia) has its head office at the Fawkner Centre, level 16, 499 St Kilda Rd, Melbourne, Victoria 3004. The activities of GSL (Australia), a subsidiary of the British multinational, falls under the jurisdiction of the Australian National Contact Point (NCP).

Background

GSL's subsidiary, Global Solutions Limited (Australia) Pty Ltd, operates the following immigration facilities for the Australian Government through a contract with the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA):

1. Maribyrnong IDC (as of 1 December 2003)
2. Perth IDC (as of 8 December 2003)
3. Port Hedland IDC (as of 15 December 2003)
4. Christmas Island IRPC (as of 17 December 2003)
5. Baxter Immigration Centre, Port Augusta, SA (as of January 2004)
6. Villawood IDC, Sydney (as of February 2004)⁴

GSL is committed to the Private Finance Initiative and Public Private Partnership (PPP) market. In 2002 47% of GSL's revenue came from PPP contracts.⁵

GSL has a human rights policy⁶ which provides that the company's policies "*are guided by respect for the human rights and individual freedoms as laid out in the Universal Declaration of Human Rights.*"⁷ The company maintains that "*We shall adapt our decision making processes to ensure that human rights considerations are always considered prior to taking action. Where justifiable infringements are necessary we shall take measures*

¹ <http://www.immi.gov.au/detention/group4/>

² Company News section from <http://www.g4f.com.au/>

³ <http://www.group4falck.com/251000c/base/4a60068>

⁴ List taken from the company's website <http://www.gslglobal.com>

⁵ Group 4 Falck Global Solutions Limited, Annual Report 2002

⁶ <http://www.gslglobal.com/downloads/human.pdf>

⁷ Id page 4

which have the least adverse impact on individual rights and shall record our justification for taking such action.”⁸

The Facts

The complainants allege that GSL (Australia) is in breach of the human rights provision of the OECD Guidelines for Multinational Enterprises which states, *“Enterprises should ... respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments”* [Chapter II, § 2], for the reasons explained below.

1. GSL (Australia) is in breach of the Guidelines by acquiescing in the detention of children in its immigration detention centres. GSL (Australia) is complicit in violations of the Convention on the Rights of the Child (CROC) for which the Australian Government has been censured [see below]. As of 8 June 2005, the total official number of detainees in immigration detention was 884, of which 52 are children.⁹ Amnesty calculates that as of 24 May 2005 there were 129 long term (i.e. 18 months or more) or indefinite detainees held in GSL facilities. The latest detainee, baby Michael Andrew Tran, was born on Christmas Island on Monday 23 May 2005. Detaining children is strongly discouraged under the CROC. It provides that children should only be detained as a last resort and then only for the shortest appropriate period of time. Any detention must be subject to periodic judicial review.
2. GSL (Australia) is complicit in violations of the CROC by detaining children when there is no legal limit on the length of their detention. Some children have spent years in detention. Children living in detention centres run by GSL do not enjoy the full range of rights they are entitled to, including access to full time education, adequate play and leisure areas. Almost one year after a report by the Human Rights and Equal Opportunity Commission (HREOC) called on the Australian Government to release children from detention, children continue to be held in GSL run centres in a situation which has been shown to be damaging to both their physical and mental wellbeing.
3. GSL (Australia), by acquiescing in the mandatory detention of asylum seekers without charge or judicial review, is complicit in subjecting them to a regime of indefinite and arbitrary detention in contravention of Article 9 of the International Covenant on Civil and Political Rights. By unjustly penalising asylum seekers the detention regime is punitive and in contravention of Article 31 of the 1951 Refugee Convention.
4. There are reliable recent reports that human rights abuses are taking place in GSL run immigration detention centres such as the placing of people in isolation as a punishment for alleged lapses of behaviour or for disobeying orders from detention centre staff.

In recent weeks serious cases have come to light: the wrongful detention of Cornelia Rau and up to 200 others, the wrongful deportation of Vivian Alvarez Solon and the eventual release of three-year old Naomi Leong after being detained for her entire life.

⁸ Id page 5.

⁹ <http://www.immi.gov.au/detention/facilities.htm>.

5. In view of the foregoing GSL's claim to be "committed to promoting best practice in human rights in its policies, procedures and practices" cannot be sustained and seriously misrepresents the company's operations.¹⁰

Compliance with International Human Rights Law

The detention of asylum seekers and refugees by the government of Australia has been held to be in breach of international human rights law by, amongst others, the following authorities:

1. The Australian Human Rights and Equal Opportunity Commission in its report "*The National Inquiry into Children in Immigration Detention Report – A Last Resort?*"¹¹ found that being held in detention has caused asylum seeker and refugee children serious mental health problems or exacerbated existing problems related to prior trauma. It found that insufficient precautions have been taken to promote the physical and psychological recovery of these children. The failure to remove children from immigration detention following recommendations by health care professionals amounts to cruel, inhuman and degrading treatment which is prohibited by international human rights law.¹²
2. The United Nations Working Group on Arbitrary Detention's Report¹³ raises several concerns about the mandatory detention of unauthorised arrivals in Australia including the automatic and indiscriminate character of detention, its potentially indefinite duration, the psychological impact of detention on asylum-seekers, who suffer "collective depression syndrome" and the denial of family unity. The Working Group found that Australia's system of mandatory detention does not comply with international law.¹⁴(Appendix B).
3. A report by P.N. Bhagwati,¹⁵ Regional Adviser for Asia and the Pacific of the United Nations High Commissioner for Human Rights and former Chief Justice of India, found that "*the human rights situation of persons in immigration detention in Australia is a matter of serious concern*". A more humane approach to illegal immigration "*would certainly be desirable*", and the situation of persons in immigration detention could, in many ways, be considered inhuman and degrading and therefore in violation of international human rights law. Of particular concern was the situation of children in detention, including unaccompanied minors; the unduly long periods spent in detention by some individuals; the lack of family unity and family life; the lack of adequate information to detainees about their rights; the situation of refugees kept in detention after their status had been determined and the situation of people who have had their applications rejected but cannot be returned home so are kept in detention indeterminately. (Appendix C).
4. In *Bakhtiyari et al v. Australia*¹⁶ the United Nations Human Rights Committee determined that to hold Mrs Bakhtiyari and her children in detention indefinitely,

¹⁰ GSL UK Limited Human Rights Policy, October 2003

¹¹ http://www.hreoc.gov.au/human_rights/children_detention/

¹² Article 7 International Covenant on Civil and Political Rights

¹³ <http://www.users.bigpond.com/burnside/UNreport.htm>

¹⁴ Id paragraph 63

¹⁵ <http://www.arts.uwa.edu.au/MotsPluriels/BhagwatiReport.pdf>

¹⁶ *Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, 6 November 2003.

without appropriate justification, was arbitrary and contrary to article 9, paragraph 1 of the International Covenant on Civil and Political Rights.¹⁷ The Committee further observed that the Bakhtiyari children suffered demonstrable, documented and on-going adverse effects of detention in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant and that as a result the treatment of the children had not been guided by their best interests and thus their right to such measures of protection as required by their status as minors from article 24, paragraph 1, of the Covenant had been violated.¹⁸

5. The United Nations High Commissioner for Refugees (UNHCR) “views the detention of asylum seekers as inherently undesirable” in its submission to the National Inquiry into Children in Immigration, and referred to the 1999 Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum seekers, based on the 1951 Convention relating to the Status of Refugees.

More specifically, the following aspects of Australia’s policy of detaining immigrants have been criticised and violate international human rights law:

According to Australian law on immigration, anyone who enters the country without a visa is automatically detained. The detention is mandatory by simple virtue of having no visa, and no other circumstances of the person (such as the age, health, disability, family situation or whether the person is an unaccompanied minor) are taken into account. There is ministerial discretion to release certain persons, but these decisions of the minister cannot be reviewed by courts. As the Working Group on Arbitrary Detention has noted: “*The system of mandatory detention sets up a presumption whereby each unlawful non-citizen, if not detained, represents a danger to the community, even in cases when the implementation of this system results in the detention of children, elderly or sick people and others in a vulnerable situation, the detention of whom is obviously not absolutely necessary to achieve the aims of the immigration policy. Since this presumption is irrefutable, even when the immigration agent is convinced that in a particular case detention is unnecessary, he or she may not disregard the mandatory character of detention.*”¹⁹

The detention is mandatory: Any immigrant in an unlawful situation (i.e. without a regular visa) is taken into detention, regardless of his or her personal circumstances.

This legal provision violates the prohibition of arbitrary detention enshrined in Article 9 of the Universal Declaration of Human Rights (UDHR) and Article 9 paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR). As the UN Human Rights Committee has stated, detention of individuals requesting asylum is not per se arbitrary. However, “*every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification*”, i.e. detention that is proportionate to the personal situation of the detainee, such as the likelihood of absconding or lack of cooperation. But if no personal circumstances are taken into account, the detention is arbitrary within the meaning of Article 9 paragraph 1

¹⁷ Paragraphs 9.4 and 9.5.

¹⁸ Paragraph 9.7.

¹⁹ *Report of the Working Group on Arbitrary Detention on its visit to Australia*, E/CN.4/2003/8/Add.2, 24 October 2002, paragraph 13.

ICCPR.²⁰ Alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.²¹ In the case of a mother and two children detained over two years and ten months on the mere basis of their unlawful situation, the Committee found a violation of Article 9 of the ICCPR because “*the State party ha[d] not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances.*”²²

The detention is indefinite. If a person's application for a visa is rejected, that person can be removed from the territory. However, pending removal, the person remains in detention and this detention, in most cases, becomes indefinite for many of the detainees who come from countries to which the Government cannot or is unwilling to return them, either because the country of their nationality is unwilling to take them back or because they are stateless. These detainees are held indefinitely, not knowing if they will ever be released. The longest detention so far has been that of Peter Qasim who has been in detention for six and a half years, and is facing lifetime detention. Peter Qasim is currently being held in Baxter detention centre. Last month, government backbencher Petro Georgiou named Qasim when he spoke out in parliament about the mandatory detention policy. Georgiou said “*the bottom line is that you have a person who nobody argues is a threat to Australian society who nobody argues that they don't know who he is, and he has been detained for 6 _ years*” (Appendix E).

Indefinite detention is inherently arbitrary in character and violates Article 9 UDHR and Article 9 ICCPR.²³ Indeed, according to Article 9 ICCPR, any detention has to be necessary, proportionate and reasonable.²⁴ The Working Group on Arbitrary Detention has expressed particular concern about the practice of indefinite detention in Australia.²⁵ The Human Rights Committee has criticized administrative detention of foreign nationals without a residence permit in another country “*for three months while the decision on the right of temporary residence is being prepared, and for a further six months, and even one year with the agreement of the judicial authority, pending expulsion. The Committee note[d] that these time-limits are considerably in excess of what is necessary, particularly in the case of detention pending expulsion*”.²⁶ The Australian regulation leads to much longer detention for

²⁰ *A v. Australia*, 30 April 1997, CCPR/C/59/D/560/1993, paragraphs 9.3-9.4; *Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, 6 November 2003, para 9.2; *Madafferi v. Australia*, CCPR/C/81/D/1011/2001, 26 August 2004, para 9.2; *Baban v. Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, para 7.2; *C v. Australia*, 13/11/2002, CCPR/C/76/D/900/1999, para 8.2; *Concluding observations of the Human Rights Committee: Australia*, 24/07/2000, A/55/40, paras.498-528; see also *Report of the Working Group on Arbitrary Detention on its visit to the United Kingdom*, E/CN.4/1999/63/Add.3, 18 December 1998, Recommendation 34.

²¹ *Report of the Working Group on Arbitrary Detention on its visit to the United Kingdom*, E/CN.4/1999/63/Add.3, 18 December 1998, Recommendation 33.

²² *Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, 6 November 2003, para 9.3; see also *Baban v. Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, para 7.2; *C v. Australia*, 13/11/2002, CCPR/C/76/D/900/1999, para 8.2.

²³ *Report of the Working Group on Arbitrary Detention*, E/CN.4/1993/24, 12 January 1993, page 20.

²⁴ *A v. Australia*, 30 April 1997, CCPR/C/59/D/560/1993, paragraphs 9.3.

²⁵ *Report of the Working Group on Arbitrary Detention on its visit to Australia*, E/CN.4/2003/8/Add.2, 24 October 2002, paragraph 13.

²⁶ *Concluding Observations of the Human Rights Committee: Switzerland*, CCPR/C/79/Add.70, para. 15.

foreigners. In light of its experience in visiting many detention centres, including detention centres for foreigners, the Working Group on Arbitrary Detention has stated that, as a general rule, to prevent abuse in administrative detention, “[a] maximum period should be set by law and the custody may in no case be unlimited or of excessive length.”²⁷

In the case of Australia, the Working Group has recommended that: (i) A reasonable time limit for detention should be set, after which the person would be given a bridging visa and lodged with family or friends, or in a reception centre located in an urban area; (ii) Persons able to provide credible guarantees (relatives with Australian nationality, family residing legally and permanently in Australia, benevolent organizations providing sponsorship or acting as guarantors, etc.) should be released and received in the community while waiting for a decision. In the case of a negative decision, the person should be detained pending removal only if he/she refuses to leave voluntarily; (iii) every family one of whose members - particularly a father who has arrived first - has been granted a bridging visa should be reunited in the community while awaiting the final decision concerning the whole family.²⁸

There is no effective legal remedy against the detention: The remedy of *habeas corpus* is in theory available to detainees and the Australian government claims that this satisfies the requirements of Article 9 ICCPR, according to which everyone has a right to have the lawfulness of one’s detention reviewed by law. However, a judicial remedy is only meaningful if the person has the possibility to obtain relief. But Australian courts have no discretion to release: they can only rubber stamp the administration’s decision to detain, because, as explained, the detention is mandatory if a person is in an irregular situation. Such a merely formal remedy does not satisfy the right of judicial review of detention under international law, because it does not provide the detainee with any meaningful possibility to defend his or her right to liberty. As the Human Rights Committee has stated in the case of Australia:

“In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. [...]. As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration

²⁷ *Report of the Working Group on Arbitrary Detention, Annex II, Deliberation No. 5: Situation regarding immigrants and asylum-seekers*, E/CN.4/2000/4, 28 December 1999, Principle 7; see also *Report of the Working Group on Arbitrary Detention on its visit to the United Kingdom*, E/CN.4/1999/63/Add.3, 18 December 1998, Recommendations 26 and 35.

²⁸ *Report of the Working Group on Arbitrary Detention on its visit to Australia*, E/CN.4/2003/8/Add.2, 24 October 2002, Recommendation 2.

Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.”²⁹

Similarly, the Working Group on Arbitrary Detention has stated that “[a]ny asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.”³⁰ It has also held that “[n]otification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum-seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned.”³¹ Judicial review is also a fundamental safeguard against torture or other forms of ill-treatment.³²

Indefinite detention can amount to cruel, inhuman or degrading treatment: The prospect of spending an indefinitely long time in detention until a solution is found has detrimental effects on the physical health and mental integrity of the detainees concerned. The delegation of the Working Group on Arbitrary Detention who visited Australia “met a considerable number of detainees in such a situation who manifested the signs of deep mental depression, distress, and even various physical ailments. Many of them have caused serious harm to themselves or attempted to commit suicide. Some detainees succeeded.”³³

One of such cases has come before the Human Rights Committee, which considered that there was a violation of the applicant’s right not to be tortured or submitted to cruel, inhuman or degrading treatment, guaranteed in Article 7 ICCPR:

“As to the author's allegations that his first period of detention amounted to a breach of article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the author when the State party was aware of the

²⁹ *A v. Australia*, 30 April 1997, CCPR/C/59/D/560/1993, paragraphs 9.5; see also *Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, 6 November 2003, para 9.4; *Baban v. Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, para 7.2; *C v. Australia*, 13/11/2002, CCPR/C/76/D/900/1999, para 8.3.

³⁰ *Report of the Working Group on Arbitrary Detention, Annex II, Deliberation No. 5: Situation regarding immigrants and asylum-seekers*, E/CN.4/2000/4, 28 December 1999, Principle 3.

³¹ *Report of the Working Group on Arbitrary Detention, Annex II, Deliberation No. 5: Situation regarding immigrants and asylum-seekers*, E/CN.4/2000/4, 28 December 1999, Principle 8.

³² *Conclusions and recommendations: Israel*, A/57/44, paras.47-53.

³³ *Report of the Working Group on Arbitrary Detention on its visit to Australia*, E/CN.4/2003/8/Add.2, 24 October 2002, paragraph 18.

author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.”³⁴

Mandatory and indefinite detention of children: Many among the detainees are children, even if the government has reduced their number. Their detention not only violates the right to liberty but also their right to special protection as minors guaranteed in Article 24 of the ICCPR. If it is mandatory, it automatically violates Article 3 (1) of the CROC, which requires that in all actions concerning children, the best interest of the child shall be a primary consideration. This necessarily warrants an assessment of the personal circumstances of the child, which is not the case if the detention is mandatory. Mandatory and indefinite detention also violates the obligation of Article 37 (b) of the CROC, which stipulates that detention of children “shall be used only as a measure of last resort and for the shortest appropriate period of time”. In the case of *Bakhtiyari v. Australia*, the Human Rights Committee observed that

“in this case children have suffered demonstrable, documented and on-going adverse effects of detention [...], and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up that point in time.”³⁵

Conditions in immigration detention: Conditions in immigration detention centres are extremely difficult. In comparison, persons convicted of crimes have access of education in prison, to psychiatric monitoring, to career development advice, to recreational facilities, to engage in meaningful work, to adapted conditions for persons with disabilities. Immigration detainees benefit from none of these facilities. They are left without the possibility of education except very basic English language teaching, without adequately remunerated and meaningful work, and without adequate recreational facilities. The Working Group on Arbitrary Detention noted that “[s]everal detainees who had been in both situations told the delegation that their time in prison had been less stressful than the time spent in the centres.”³⁶ The consequences for the detainees, such as depression, “collective depression syndrome”, self-mutilation and numerous suicide attempts have been largely documented.³⁷ Such situations may amount to violations of Article 10 paragraph 1 of the ICCPR, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. For the Committee, this is a “fundamental and universally applicable rule [...] [that] must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national

³⁴ *C v. Australia*, 13/11/2002, CCPR/C/76/D/900/1999, para 8.4.

³⁵ *Bakhtiyari v. Australia*, CCPR/C/79/D/1069/2002, 6 November 2003, para 9.7.

³⁶ *Report of the Working Group on Arbitrary Detention on its visit to Australia*, E/CN.4/2003/8/Add.2, 24 October 2002, paragraph 60.

³⁷ *See the Report of the Working Group on Arbitrary Detention on its visit to Australia*, E/CN.4/2003/8/Add.2, 24 October 2002, paragraphs 36-42.

or social origin, property, birth or other status.”³⁸ It may also amount to cruel, inhuman or degrading treatment in violation of Article 7 ICCPR, Article 37 CROC and Article 5 UDHR.

Compliance with the OECD Guidelines

In the light of the foregoing it is reasonable to conclude that GSL as the manager of the immigration facilities has perpetrated and/or participated in these human rights violations. In April 2005, the complainants wrote to Peter Olszak the Chief Executive of Global Solutions Limited (Australia) Pty Ltd and to Stephen Brown, the Chief Executive of Global Solutions Ltd. [Appendix G].

The complainants reminded GSL of the provision in the OECD Guidelines that strongly recommends companies to respect the human rights of those affected by its activities consistent with the Australian government's international obligations and commitments.³⁹ It was pointed out that the activities of GSL directly affect the detainees in the immigration detention centres managed by GSL's Australian subsidiary as it was the company's policy to take on and fulfil an Australian government contract to provide services that have been widely criticised as breaching principles and specific provisions of international human rights law. GSL therefore had a duty to respect the detainees' rights, failure to so do being a contravention of the OECD Guidelines and its own human rights policy. The complainants invited the company to explain GSL's role in the violations of international human rights law that have taken place and continue to take place in Australian immigration detention facilities managed by GSL's Australian subsidiary, namely:

- The failure to remove children from immigration detention following recommendations by health care professionals, in contravention of article 7 of the International Covenant on Civil and Political Rights.
- The violations of the rights of child asylum seekers to such measures of protection as required by their status as minors, in contravention of article 24, paragraph 1, of the International Covenant on Civil and Political Rights.
- The automatic and indiscriminate character of detention of asylum seekers, in contravention of article 9 of the International Covenant on Civil and Political Rights.
- The indefinite nature of detention of asylum seekers including those who have failed in their applications for recognition as refugees, in contravention of article 9 of the International Covenant on Civil and Political Rights.
- The penalising of asylum seekers who enter Australia without valid documentation, in contravention of article 31 of the Refugee Convention.

³⁸ *General Comment No. 21: concerning humane treatment of persons deprived of liberty*, para. 4.

³⁹ The international obligations are found in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Covenant on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women and , the Convention on the Elimination of All Forms of Racial Discrimination. Australia is a State party to all six instruments and as such the provisions of the instruments are legally binding on Australia.

The complainants explicitly asked the company whether it considered the decision “to take on and fulfil the contract to manage facilities where ongoing violations are taking place⁴⁰ to be a ‘justifiable infringement’⁴¹ and if so, to provide a record of justification for taking this action and of measures with the least adverse impact on the rights of the detainees”.⁴²

Company’s Response

In its response to the complainants GSL made the following points:

1. The provision of detention services is governed by a set of Immigration Detention Standards “which were developed and are constantly reviewed, in consultation with the Commonwealth Ombudsman, the United Nations High Commissioner for Refugees, the Immigration Detention Advisory Group and our customer, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) amongst others”.
2. The legislation which enables government officials to detain individuals is transparent and open to close scrutiny and is a matter which may be challenged in the courts and has been.
3. The company is satisfied that the thorough monitoring of these high profile contracts ensures the laws governing such activities are observed and fully complied with.
4. GSL staff are committed to the welfare of the detainees and every effort is made to recruit, train, manage and motivate them to deliver the high standards of service required [Appendix H].

Conclusions

From the above it is clear that GSL (Australia) knowingly entered into a contract when the Government of Australia’s policy of mandatory detention of asylum seekers and the detention of children had already been the subject of international, public criticism by human rights bodies including the Human Rights and Equal Opportunity Commission (HREOC), the UN Human Rights Committee and the UN Working Group on Arbitrary Detention.

Failure to take measures to prevent adverse human rights impacts

Despite the findings and recommendations of these authoritative human rights bodies the contract of GSL (Australia) bound the company to detain “unlawful non-citizens” when required to do so by DIMIA. After examining the contract the complainants could not find any clause to protect the company from the risk of aiding and abetting the Government of Australia in breaches of international law. Below are examples of clauses that GSL (Australia) might have inserted into its agreement to avoid breaching the human rights provision of the OECD Guidelines.

⁴⁰ The second and third reports mentioned above, being the Working Group and the Bhagwati reports, had already been published prior to the signing of the contract on 27 August 2003. Amnesty International Australia released its comprehensive report on mandatory detention, “A Continuing Shame: The mandatory detention of asylum-seekers” in June 1998. GSL could and should therefore have made itself aware of the finding that the Australian system of mandatory detention breaches international human rights law.

⁴¹ GSL Human Rights Policy page 5

⁴² Id page 5

a) To avoid breaching Art 9 of the International Covenant on Civil and Political Rights, GSL (Australia) should have requested the insertion of, for example, the following clause in the Contract:

“GSL (Australia) will not be required to provide Detention Services where the unlawful non-citizen” has no reasonable prospects of being removed from detention.”

b) To avoid breaching Art 37(a) of the Convention on the Rights of the Child, GSL should have requested the insertion of, for example, the following clause in the Contract:

“GSL (Australia) will not be required to provide Detention Services where a health professional has recommended that a child “unlawful non-citizen” be removed from detention.”

The absence of such exemptions and caveats in the contract lead the complainants to conclude that GSL (Australia) failed to take any measures to ensure that its operations would have “the least adverse impact on the rights of the detainees”.

Conformity with international human rights obligations

Since assuming responsibility for the immigration detention centres GSL (Australia) has facilitated the Government of Australia’s violations of international human rights law by acquiescing in the continuing mandatory detention of asylum seekers without charge or judicial review. According to the DIMIA, there are currently 884 persons held in mandatory detention. GSL’s contention that “the legislation enabling government officials to detain individuals is transparent, and open to close scrutiny and may be challenged in the courts and has been” ignores the fact that international bodies, with the authority and competence to interpret international law, have repeatedly found Australia to be in violation of its human rights obligations. In its response, GSL refers to two High Court judgments:

“On 6 August 2004, the High Court delivered two separate judgements overturning previous Full Federal Court authority and confirmed in both that the provisions of the Migration Act providing for detention of unlawful non citizens are clear in their terms and are not subject to implied limitations. The Court confirmed that the language of the Migration Act is unambiguous and the detention remains lawful until either removal, deportation or granting of a visa to an unlawful non citizen.”⁴³

GSL’s response seems to assume that to state that GSL (Australia’s) operations are permitted by Australian law is a defence to a claim of unlawfulness under international law. But as RAID has pointed out elsewhere this is based on a partial reading of Guidelines:

It is sometimes supposed that an enterprise need only abide by national laws. However, such an interpretation ignores the supranational aspect of the *Guidelines*... It is recognised in the *Guidelines* that ‘Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions’; yet this right is qualified as ‘subject to international

⁴³ Letter from Tim Hall, Director Public Affairs, GSL to Patrick Earle Human Rights Council of Australia 2 May 2005.

law.⁴⁴ Hence explicit recognition is given to the application of overarching obligations. At the same time, '[t]he entities of a multinational enterprise located in various countries are subject to the laws applicable in these countries.'⁴⁵ However, the perception that companies need only comply with national laws is based on a partial interpretation of the *Guidelines*. While they are not viewed as a substitute for national law and practice, the recommendations within the *Guidelines* are perceived in *supplementary* terms and the expectation is that companies will adhere to them.⁴⁶ After all, their *raison d'être* is the need for standards applicable across national boundaries to mirror the organisation and operation of multinationals. The fact that there are explicit references in the text and commentary to international human rights and labour instruments itself strengthens a supranational interpretation of the *Guidelines*.⁴⁷

It is the Australian NCP that has jurisdiction to determine whether GSL has breached the OECD Guidelines, and the breach is to be determined by reference to the rules in those Guidelines, not simply by reference to other rules (e.g., domestic law). While the Guidelines permit States to determine the content of domestic laws, governing the operation of corporations such as GSL, that right is explicitly made subject to international law⁴⁸. The human rights provision of the OECD Guidelines⁴⁹ requires conformity with *international* obligations, not merely with domestic laws. The Guidelines do not on their face permit a defence of 'domestic compliance' to a charge of international breach. Finally, it is well settled that a state cannot rely on its domestic law as a defence to a claim of breach of international law⁵⁰. Thus, a defence of 'domestic compliance' cannot be implied into the OECD Guidelines.

Monitoring by domestic bodies insufficient to assure conformity with international human rights

The fact that GSL (Australia's) operations are monitored by government bodies is irrelevant. Furthermore, GSL's response suggests that it is unaware that complicity in a state's human rights violations is not removed through domestic court decisions. Complicity is assessed according to international law. GSL makes no mention of the fact that Australia's national independent human rights institution (which satisfies the Paris Principles) is able to make findings as to breaches of international law and has done so on several occasions.⁵¹

⁴⁴ Ibid., I. Concepts and Principles, paragraph 7.

⁴⁵ Idem.

⁴⁶ *Commentary on the Guidelines*, op. cit., Commentary on General Policies, paragraph 2.

⁴⁷ RAID, *Unanswered Question: Companies, conflict and the Democratic Republic of Congo June 2004 p*

⁴⁸ The Guidelines, paragraph 7 of Part I 'Concepts and Principles': "Governments have the right to prescribe the conditions under which multinational enterprises operate within their jurisdictions, *subject to international law*" (emphasis added).

⁴⁹ "Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."

⁵⁰ *Alabama Claims Arbitration (US v GB)*, Moore (1872) 1 Int Arb 495, 656; *Exchange of Greek and Turkish Populations Case (Advisory Opinion)* (1925) PCIJ Reports, Ser B, No 10, 20; *Applicability of the Obligation to Arbitrate* (1988) ICJ Reports 12, 34 [57].

⁵¹ See for example: http://www.humanrights.gov.au/human_rights/asylum_seekers/index.html#seas
http://www.humanrights.gov.au/human_rights/children_detention_report/report/chap17.htm;
http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_25.html
http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_report_27.htm

Allegations of human rights violations at GSL run detention centres

GSL's assertion that the company's staff are committed to the welfare of the detainees and that every effort is made to recruit, train and manage them to deliver high standards of service fails to address the serious allegations of continuing human rights abuses at the detention centres it runs. Almost one year after a report by HREOC calling on the Government of Australia to release children from detention, at least 52 children are still in detention. It would be appropriate for the Australian NCP to inquire what steps GSL is taking to ensure that through its operations it is no longer facilitating the detention of children. It would also be relevant for the NCP to inquire what action GSL has taken to ensure that the physical and mental wellbeing of children held in detention is being addressed. The Australian NCP should ask GSL (Australia) about Amnesty International Australia's recent report⁵² alleging that there is inadequate health care in the Christmas Island detention centre where a number of detainees experience mental health problems. The NCP should request GSL (Australia) to respond to the concerns that have been recently expressed about the treatment of detainees at Baxter, where several detainees were injured as fights broke out at the centre, during which the guards allegedly failed to intervene. There are also reports that detainees were denied food and access to toilets during a 7-hour journey from Maribynong in Victoria to Baxter in South Australia. Further, the NCP should inquire into GSL's placing of uncooperative detainees in various states of solitary confinement, effectively as "punishment" when it is only the judicial arm of government that has the power "to punish".

GSL (Australia) as a specific instance—GSL investing in Australia

GSL Australia has established an extensive network of investments and businesses in Australia. These include the management of detention centres as identified in this submission, as well as:

- Prisons (maximum security Port Phillip Prison in Melbourne for the Victorian Government, and low/medium security Mount Gambier Prison for the South Australian Government);
- Security at the Thomas Embling Hospital (a Forensic care facility for the treatment of mental disorders associated with criminal behaviour);
- Prisoner Movement and In-Court Management for the South Australian Government;
- Prisoner Transportation Services for the Victorian Government;
- Medical Transport Services in Victoria: non-emergency ambulance services.

Collectively, the entire operations employ 1064 employees in Australia⁵³ as broad-based support services businesses. Whilst the OECD Guidelines for Multinational Enterprises do not give a precise definition of multinational enterprises, ***“they describe some general criteria covering a broad range of multinational activities and arrangements. These arrangements can include traditional international direct investment based on equity***

⁵² Amnesty International Australia, Refugee Bulletin Issue 11 April 2005

⁵³ http://www.gslpl.com.au/gsl/about_us.asp

*participation, or other means which do not include an equity capital element*⁵⁴. GSL Australia invests and manages its equity through both Public-Private partnerships (PPP) and Private Finance Initiatives (PFI)⁵⁵. This is a clear demonstration of an investment nexus, and as such, requires the Australian NCP to investigate— as a ‘specific instance’, their activities under the OECD Guidelines.

In addition, the OECD Guidelines make reference to the *“activities of multinational enterprises, through international trade and investment... bring substantial benefits to home and host countries. These benefits accrue when enterprises supply the goods and services (emphasis added) that consumers want to buy at competitive prices and when they provide fair returns to the suppliers of capital. Their trade and investment activities contribute to the efficient use of capital, technology and human and natural resources.”*⁵⁶ GSL Australia is clearly supplying a service to DIMA as a result of the companies’ investment. Further, they are contributing to the development of, and investing in human capital through the provision of *“extensive training prior to starting their employment and then throughout their careers ensures that management and staff fully understand their responsibilities under the contract and the unique nature of administrative detention.”*⁵⁷

Misrepresentation

Finally, GSL is proud of the fact that it has been a pioneer of Public Private Partnerships (PPP) “enabling governments to share investment risk and *responsibility* amongst their partners” (emphasis added).⁵⁸ In view of the overwhelming body of expert legal opinion that the Government of Australia’s policy of mandatory detention without charge or judicial review amounts to arbitrary indefinite detention and the well-substantiated concerns about on going human rights violations in the immigration detention centres managed by GSL, the complainants believe that the company’s claim to be “committed to promoting best practice in human rights in its policies, procedures and practices”⁵⁹ cannot be sustained. GSL (Australia) is therefore also in breach of the Consumer Interests provision, paragraph 4, Chapter VII of the OECD Guidelines which calls on enterprises *“Not to make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair”*.

Recommendations

The complainants would like to propose the following recommendations for the future conduct of GSL (Australia) to bring the company’s operations into compliance with the OECD Guidelines.

Children in Detention

1. The Convention on the Rights of the Child (CROC) requires that all children are detained only as a “measure of last resort and for the shortest appropriate period of

⁵⁴ The OECD Guidelines for Multinational Enterprises, chapter 1, Concepts and Principles (clarifications)

⁵⁵ http://www.gslpl.com.au/gsl/about_us.asp

⁵⁶ The OECD Guidelines for Multinational Enterprises-Preface

⁵⁷ <http://www.gslpl.com.au/gsl/contracts/contracts.asp>

⁵⁸ Introduction to GSL at http://www.gslglobal.com/press_centre/introduction.asp

⁵⁹ GSL UK Limited Human Rights Policy, October 2003

time”⁶⁰ and that in “all actions concerning children” the “best interests of the child shall be a primary consideration”⁶¹.

In order to avoid future breaches of CROC, GSL (Australia) should, as a minimum, seek assurance from DIMIA that, for all detained children:

- (a) all alternatives to detention were fully explored by DIMIA prior to the decision to detain;
 - (b) the child is being detained as a measure of last resort;
 - (c) detention has been, and will be for the shortest appropriate period of time;
 - (d) there will be continuing review of the need for detention of the child; and
 - (e) in all cases, the best interests of the child have been and will continue to be the primary consideration.
2. In the event of any of the above not being assured by DIMIA in respect of a particular child, GSL (Australia) should, as a minimum, refuse to detain, or refuse to continue to detain, that child.
 3. It should be a term of the contract between DIMIA and GSL (Australia) that GSL is not required to detain a child if the above minimum requirements are not met.

Indefinite and Arbitrary Detention

4. GSL (Australia) should, as a minimum, seek assurance before the detention of any “unlawful non-citizen” that the person is not an indefinite detainee.

An indefinite detainee is a person who (a) cannot be removed from Australia due to his or her lack of nationality or the refusal by their state of nationality to accept them; (b) is not granted a visa by DIMIA.⁶²

5. GSL (Australia) should, as a minimum, require DIMIA to notify GSL (Australia) if any “unlawful non-citizen” is determined to be an indefinite detainee. If that occurs, GSL should refuse to continue to detain that person.
6. It should be a term of the contract between DIMIA and GSL (Australia) that GSL is not required to detain a person who is an indefinite detainee.
7. GSL (Australia) should refuse to detain or to continue to detain any person for *lengthy and unreasonable periods*, unless a Court has reviewed that detention and determined that longer detention is appropriate, necessary and not arbitrary in light of the person’s personal circumstances. Where a Court determines that the person’s detention *may be prolonged*, GSL (Australia) should refuse to continue to detain such

⁶⁰ CROC, Art 37(b).

⁶¹ CROC, Art 3.

⁶² Such detainees are a result of s 196 and 198 of the Migration Act, and the High Court’s reasons in *Al-Kateb v Godwin*. Section 196 requires detention until either (a) or (b) is satisfied. Where neither (a) nor (b) can be satisfied in a particular case, the “unlawful non-citizen” remains in detention indefinitely.

a person unless there is periodic review of the necessity and appropriateness of the detention.

8. GSL (Australia) should refuse to continue to detain any person who has already been detained *for an unreasonable period*, unless the detention is determined by a Court to be appropriate, necessary and not arbitrary in light of the person's personal circumstances. Where a Court determines that *the person's detention may be prolonged*, GSL (Australia) should refuse to continue to detain such a person unless there is periodic review of the necessity and appropriateness of the detention by a court of law.
9. GSL (Australia) should, as a minimum refuse to continue to detain any person unless assured by DIMIA that there is continuing appropriate justification for it⁶³.

General

10. GSL (Australia) should, as a minimum, seek the advice of HREOC as to what actions GSL should take in order to ensure compliance with international human rights law.
11. GSL (Australia) should ensure that at all times it acts in accordance with the interpretations, decisions or views of any United Nations body responsible for interpreting any international human rights convention, or for deciding whether there has been a breach of any international human rights convention.
12. If any United Nations body responsible for deciding whether there has been a breach of any international human rights convention determines that a particular person's detention breaches any international human rights convention, GSL (Australia) must refuse to continue to detain that person under the conditions which lead to a finding of breach.
13. GSL (Australia) should, as a minimum, ensure that a clause in its contract with DIMIA is to the effect that: 'GSL is not required to do any act, or refrain from doing any act where that act or omission would be contrary to international human rights law'.
14. GSL (Australia) should ensure that where it is responsible for the provision of health, housing, education and recreation for detainees, those services meet international human rights standards.
15. If DIMIA refuses to allow GSL (Australia) to alter current contractual obligations so that GSL can meet its international human rights obligations, GSL must, in order to comply with the OECD Guidelines, not provide detention services to DIMIA.
16. That the Australian NCP, in accordance with its own guidelines for hearing a complaint, establishes an expert panel with representation from the complainants, or

⁶³ See *A. v Australia* Communication No 560/1993, Views of the UNHRC, 3 April 1997.

their nominated representatives, to provide advice during the investigation of the 'specific instance' against GSL (Australia).

Appendices

Appendix A: Amnesty International Australia report (hard copy available)

Appendix B: <http://www.users.bigpond.com/burnside/UNreport.htm>

Appendix C: <http://www.arts.uwa.edu.au/MotsPluriels/BhagwatiReport.pdf>

Appendix D: Al-Kateb v Godwin [2004] HCA 37 (6 August 2004) paragraphs 144 to 193
<http://www.austlii.edu.au/au/cases/cth/HCA/2004/37.html>

Appendix E: "Life in detention for seven years", "Facing a life in Limbo behind the wire", "New evidence 'casts doubt' on detainee" (hard copy available from complainants).

Appendix F:

www.amnesty.org.au/whats_happening/refugees/resources/fact_sheets/mandator...2/06/2005

Appendix G: Letter to Peter Olszak GSL (Australia) from HRCA (hard copy available)

Appendix H: Response from Director, Public Affairs, GSL (Australia) to HRCA (hard copy available)

Please note, a hardcopy version of this submission will be posted to the Australian NCP
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