NSW YOUNG LAWYERS

9 August 2005

Submission to the Inquiry into the administration and operation of the Migration Act 1958

Prepared by: Mila Cercina, Melissa Bromley, Lousie Jardim and Renee Saibi on behalf of the NSW Young Lawyers Human Rights Committee

9 August 2005

Committee Secretary
Senate Legal & Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Members,

Re: Inquiry into the operation and administration of the *Migration Act 1955 (Cth) ('Act')*

The Human Rights Committee of New South Wales Young Lawyers ('YLHRC') is a group of law students and lawyers who are concerned with a range of human rights issues in both Australia and abroad.

The YLHRC is grateful for the opportunity to make submissions regarding the Act and make the following remarks. We note that while this inquiry is not limited to any particular aspect of the Act, the YLHRC has chosen to focus its comments on detention under the Act.

1. Introduction

The YLHRC has for a number of years had concerns about the content and the practical application of the Act as it applies to 'unlawful non citizens'. Therefore, this submission will deal with the main concerns the YLHRC currently considers important, namely:

a) the obligation to detain unlawful non-citizens;
b) periods of detention and the lack of review of such detention;
c) detention in correctional centres; and
d) the outsourcing of detention facilities.

We will deal with these in turn.

2. The obligation to detain unlawful non-citizens

2.1 The mandatory nature of detention

The Act requires an officer to detain a person which he or she suspects is an unlawful non-citizen. This is a mandatory requirement1. An unlawful non-citizen must be kept in detention unless granted a visa or removed or deported from Australia.

The High Court has held that the mandatory detention of unlawful non-citizens under ss 189 and 196 of the Act is lawful and constitutional even where:

1. a stateless person is awaiting deportation or removal that will not occur in

[1] As recognized in *Al-Kateb v Godwin* [2004] HCA 37 at [254]

the reasonably foreseeable future2;

2. the period of detention is unlimited3;

3. the detainee is a child4;

4. the conditions of detention are harsh, unreasonable or inhumane5.

The majority of the High Court has also held that the detention of unlawful non-citizens is not punitive regardless of the conditions of detention6.

2.2 The indefinite nature of detention

The Act does not place a time limit on the period for which an unlawful non-citizen may be detained. This is particularly problematic for stateless persons who cannot be removed or deported from Australia because no country is willing to take them.

In *Al-Kateb v Godwin*, the majority of the High Court held that the wording of s 196 was unambiguous and that there was no implied temporal limitation on the time for which a person could be held in detention7. The majority of the Court held that a person could not be released even where DIMIA could not deport or remove the lawful non-citizen from Australia within a reasonable time or where there was no current prospect of removal from Australia. The requirement under s 198 that an officer must remove an unlawful non-citizen from Australia "as soon as reasonably practicable" upon the detainee's request did not imply a time limit on the period of detention8 . Consequently, it is conceivable that a person could remain in detention for the rest of their life.

The UN Revised Guidelines provide that a stateless person should not be placed in indefinite detention and that the person's status cannot be a bar to his or her release9. However, the current system of mandatory detention means that the period of detention will be indefinite for any person awaiting the outcome of a visa application or awaiting removal or deportation from Australia. The uncertainty and frustration of indefinite detention results in psychological harm to detainees10.

The YLHRC respectfully submits that the Act should be amended to place a time limit on the detention of unlawful non-citizens, especially in circumstances where DIMIA is unable to remove or deport the person within a reasonable time.

2.3 The provisions enabling detention to cease are unnecessarily restrictive

Under s 196 of the Act, an unlawful non-citizen can only be released from detention if he or she is granted a visa, or is removed or deported from Australia. The High Court has held that this detention is constitutional and that an unlawful non-citizen cannot be released from detention under any other circumstances.

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[2] *Al-Kateb v Godwin* [2004] HCA 37 at [33]-[35], [226].
[3] *Al-Kateb v Godwin* [2004] HCA 37 at [226]
[4] *Re Woolley; Ex Parte Applicants M276/2003 by next friend GS* [2004] HCA 49
[5] *Behzooz v Secretary of DIMIA* [2004] HCA 36
[6] *Al-Kateb v Godwin* [2004] HCA 37 at [263]; *Behrooz v Secretary of DIMIA* [2004] HCA 36 at [20].
[7] *Al-Kateb v Godwin* [2004] HCA 37 at [33]-[35], [286]; *MIMIA v Al-Khafaji* [2004] HCA 38 at [45].
[8] *Al-Kateb v Godwin* [2004] HCA 37 at [231]-[237], [295].
[9] *UN High Commissioner for Refugees Revised Guidelines on Applicable Criteria and Standard Relating to the Detention of Asylum Seekers* (February 1999) Guideline 9.
[10] See Amnesty International, *The Impact of Indefinite Detention: the case to change Australia's mandatory detention regime*, 2005 pp 30-34.

These criteria are unnecessarily restrictive and fail to allow for the consideration of the individual circumstances of each detainee and whether the detention is reasonable and proportionate in those circumstances11. As mentioned above, the application of s 196 leads to indefinite detention and could even result in the permanent detention of an unlawful non-citizen. The High Court has held such lifelong detention to be lawful and consistent with the Australian Constitution.

The YLHRC submits that the release of unlawful non-citizens should not be restricted to these limited criteria. The Act should be amended to enable DIMIA to consider the individual circumstances of the unlawful non-citizen and whether the detention is reasonable, necessary and appropriate in those circumstances.

2.4 The current system of mandatory detention is contrary to international law and basic human rights

By signing and ratifying a treaty, Australia is bound to refrain from acts which would defeat the object or purpose of that treaty and is under a general duty to ensure its domestic law is consistent with its international obligations12.

Article 9 of the *International Covenant on Civil and Political Rights 1966* ('ICCPR'), which Australia has signed and ratified, prohibits arbitrary detention and acknowledges a person's right to liberty and security of person13.

The UN Human Rights Committee has questioned Australia's compliance with the ICCPR on several occasions14. In *A v Australia*, the UN Human Rights Committee held that Australia's system of mandatory and non-reviewable detention was arbitrary and that Australia was in breach of its international obligations under Art 9 of the ICCPR15. The Committee also determined that 'arbitrary detention' involves notions of inappropriateness, injustice and proportionality16. This is consistent with an earlier statement by the UN Human Rights Committee that arbitrariness includes elements of inappropriateness, injustice, unpredictability and unreasonableness17.

The YLHRC considers that the current system of mandatory detention imposed by the Act fails to consider the necessity, appropriateness and reasonableness of detaining each unlawful non-citizen according to their circumstances.

The *UN Convention Relating to the Status of Refugees 1951* provides that a State must not impose penalties on refugees who enter the country without authorisation and must not apply unnecessary restrictions on the movement of refugees18. The Convention suggests that restrictions may only be considered necessary in "grave and exceptional circumstances"19

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[11] As recognized by Callinan J in *Al-Kateb v Gowdin* [2004] HCA 37 at [290]
[12] *Vienna Convention on the Law of Treaties* Articles 18 and 26; Principle of *pacta sunt servanda*; Goodwin-Gill G.S., *The Refugee in International Law*, Clarendon Press: Oxford, 1996 p 325
[13] Note also the *UN Declaration of Human Rights* Articles 3 and 9
[14] UN Human Rights Committee found Australia in breach of Article 9 of the ICCPR in *C v Australia*, UNHRC Communication No. 900/1999. See also *Concluding Observations of the Human Rights Committee, Australia* UN Doc A/55/40, 24 July 2000
[15] *A v Australia,* UNHRC Communication No. 560/1993; The UN Human Rights Committee also found Australia in breach of Article 9 of the ICCPR in *C v Australia*, UNHRC Communication No. 900/1999
[16] ibid Paragraphs 9.2 and 9.3
[17] *Hugo van Alphen v The Netherlands,* Communication No. 305/1988 Paragraph 5.8
[18] Articles 31(1) and 31(2)
[19] Article 9

The UNHCR Revised Guidelines20 state that detention may only be resorted to if necessary:

- to verify identity;
- to determine the elements on which the claim for refugee status is based;
- where an asylum seeker has destroyed travel or identity documents, or has used fraudulent documents; or
- to protect national security and public order.

The YLHRC submits that the detention of unlawful non-citizens is only necessary where it is carried out for any of the above-mentioned purposes. The Act should be amended to provide that unlawful non-citizens cannot be detained where such detention is no longer necessary for these purposes.

The UNHCR Revised Guidelines also recommend that States should adopt alternatives to detention unless there is evidence to suggest this will not be successful in the individual case. The Act does not adequately allow for alternatives to detention to be implemented where unlawful non-citizens are awaiting the determination of their visa applications or their removal or deportation from Australia. Although the *Migration Amendment (Detention Arrangements) Act 2005* enables the Minister to make residential determinations in respect of unlawful non-citizens, this power is discretionary and not subject to review. The YLHRC submits that the Act should be amended to require DIMIA to adopt alternatives to detention unless it is necessary and reasonable for the person to be detained in the circumstances. The notions of necessity and reasonableness should reflect interpretations provided by international law and jurisprudence.

Article 37(b) of the *UN Convention of the Rights of the Child 1989* states that the detention of children is only permissible where it is used as a last resort and for the shortest possible time. The best interests of the child should be a primary consideration21. The UN Working Group on Arbitrary Detention has also noted that the continued detention of children, sick or other vulnerable persons is not necessary for the purposes of Australia's immigration policy22. The detention of children under the Act is inconsistent with these international obligations23. Although the *Migration Amendment (Detention Arrangements) Act 2005* recognises that children should only be detained as a last resort, it fails to ensure their freedom from detention and the corresponding release of their parents from detention. The YLHRC submits that the Act should be amended to provide that unaccompanied children and unlawful non-citizens accompanied by children are not to be detained in immigration detention centres.

Australian Courts have been reluctant to consider Australia's obligations under international law in interpreting the provisions relating to detention under the Act24. On the other hand, the Human Rights and Equal Opportunity Commission has continually affirmed the views of International Committees and Commissions25. As

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[20] *UN High Commissioner for Refugees Revised Guidelines on Applicable Criteria and Standard Relating to the Detention of Asylum Seekers* (February 1999) Guideline 3. Also see *EXCOM Conclusion No. 85, International Protection* (1998)

[21] Article 3(1). See also *UNHCR Revised Guidelines* Guideline 6

[22] *Report of the Working Group on Arbitrary Detention on its visit to Australia* (24 May – 6 June 2002) UN Doc E/CN.4/2003/8/Add.2 (24 October 2002) at [12]-[13].

[23] See the decision of the UN Human Rights Committee in *Bakhtiyari v Australia,* Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003 and HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention*.

[24] For example, *Al-Kateb* at [63]-[73], [297]-[298].

[25] For example: HREOC, *Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program*; HREOC, *A Report on Visits to Immigration Facilities by the Human Rights Commissioner,* 2001; HREOC, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals,* 1998.

a result, the YLHRC respectfully submits that the Act should be amended to enable the elements of reasonableness, necessity and proportionality to be considered in light of the circumstances of each unlawful non-citizen in determining whether that person should be detained.

The UN Working Group on Arbitrary Detention has stated that detention may not be unlimited or of excessive length26. As noted earlier, the majority of the High Court has held that unlimited detention under the Act is lawful and constitutional. The YLHRC respectfully submits that the Act should be amended to place a time limit upon the ability to detain unlawful non-citizens.

3. Period Of Detention and Lack Of Review

3.1 International Law

The International Law principles which are particularly relevant and should inform migration detention are:

Right to judicial review of detention

Anyone who is deprived of his or her liberty has the right to challenge the lawfulness of his or her detention before a court (article 9(4), ICCPR; article 37(d), Convention on the Rights of the Child).27

Freedom from arbitrary detention

No one should be subjected to arbitrary arrest or detention (article 9(1), ICCPR; article 37(b), Convention on the Rights of the Child). To avoid being arbitrary, detention must be reasonable, necessary and a proportionate means to achieve a legitimate aim.28

The UN High Commissioner advises avoiding detention, but it is permissible in order to:

- verify identity;
- determine the elements on which the claim to refugee status or asylum is based;
- deal with refugees or asylum seekers who have destroyed their travel and/or identification documents to mislead authorities of the state in which they intend to claim asylum; or
- protect national security or public order29

3.2 International law and its application in Australia

The decision in *Teoh*30 indicated that where a relevant Convention has been signed by government but not implemented (as in the case of the above conventions), and an administrator decides not to have regard to it, then the applicant must be afforded an opportunity to convince the administrator otherwise. This was so even if the applicant did not personally entertain the expectation that the Convention in question be taken into account. The High Court has recently

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26 *UN Working Group on Arbitrary Detention, Deliberation No 5, Situation regarding immigrants and asylum seekers,* adopted by UNESCOR – UN Doc E/CN.4/2000/4, 28 December 1999. Affirmed by the UN Commission of Human Rights in Resolutions 2001/40 (23 April 2001) and 2000/36 (20 April 2000).

27 A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner, 2001, http://www.hreoc.gov.au/human_rights/idc/index.html

28 Ibid.

29 UNHCR Executive Committee (EXCOM), Conclusion No.44 (1986) – Detention of Refugees and Asylum Seekers.

30 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 184 CLR 273

retreated from this high water mark31, citing *Teoh* as a dangerous foray into merits review through its attempt to expand the notion of legitimate expectations and accord substantive rather than procedural fairness.

The Court attempted further in *Teoh* to establish a principle that "if the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations it imposes on Australia, then that construction should prevail.32"

McHugh J's dissent in *Teoh* has been affirmed in his decision as part of the majority in *Al-Khateb v Godwin* – the sheer volume of international law would make this requirement an unfair burden on both administrators and judges. Furthermore, McHugh J has rejected the attempt by the majority in *Teoh* to introduce a Bill of Rights by the back door in the guise of a cannon of interpretation.

It is clear that the current trend emanating from both the executive and judicial branches of government is to limit the bearing which international standards can have on the development of a more justiciable system of refugee processing.

3.3 Administrative and judicial review

Since the Act makes detention lawful, asylum seekers have highly circumscribed avenues of administrative and judicial review.

Many detainees are not informed of the 28 day time limit on an application for merits review in the Refugee Review Tribunal and thus may be unable to utilise this avenue33. Even if merits review is obtained, the RRT is known for its unsatisfactorily lengthy process34.

The problems plaguing judicial review are even more significant, since the available grounds of judicial review with respect to the Act are being constantly curtailed. Section 474 of the Act appears to oust review entirely:

> *"474(1) A privative clause decision*
> *(a) is final and conclusive;*
> *(b) must not be challenged, appealed against, reviewed, quashed or called into question in any Court; and*
> *(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari*
> *in any court on any account."*

It appears to contravene the power of judicial review in s75(v) of the Constitution and is a not so subtle erosion of the separation of powers, since it vests ultimate arbitration in the executive arm of government. Yet the High Court has adopted an interpretation that salvages this provision from unconstitutionality35:

1) Such a clause cannot oust inviolable and jurisdictional error
2) Such a clause excludes review of non-jurisdictional error unless the provisos from *R v Hickman; ex parte Fox and Clinton (1945) 70 CLR 598* are not satisfied i.e. it is not a bona fide attempt to exercise power or

31 *Re Minister for Immigration and Multicultural Affiars; ex parte Lam* [2003] HCA 6

32 Per Mason CJ & Deane J

33 Amnesty International Australia, Submission to Migration Legislation Review, nov 2003
http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/mig_judicial_04/submissions/sub08att.pdf

34 A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner, 2001, http://www.hreoc.gov.au/human_rights/idc/index.html

35 *Plaintiff S157/2002 v Cth* [2003] HCA 2

doesn't relate to subject matter of the legislation or isn't reasonably capable of reference to the power given.

This may be seen as a strained interpretation but perhaps it is a clever bid by the High Court to send a clear message to Parliament that the High Court would prefer to interpret such provisions on its own terms so as to retain some judicial review rather than invalidate them and thus give drafters more opportunities to create a constitutional yet iron clad provision completely ousting judicial review. Nevertheless, whatever the extent of the High Court's success in this interpretation, the fact remains that proving an error on the part of the decision maker that is in breach of an essential or inviolable36 aspect of the Act places an exorbitant onus on the applicant, in contravention of the international right to judicial review.

Not only is refugee detention a highly contentious political issue, but also litigation under the Act has become the focus of the power struggle between the executive and the judiciary on the validity of judicial review of administrative decisions and the nature of the separation of powers, hence deflecting attention from the human crisis that is at its core.

3.4 Detention

Section189 of the Act is phrased such that persons known or reasonably suspected to be unlawful citizens "must" be detained. The recent Palmer Report finds that the subtlety of the jurisdictional fact finding involved (i.e. that the relevant officer must form the requisite knowledge or suspicion first) is obscured by the mandatory nature of the action that follows, hence leading to the view that the provision is not subject to review.37 Furthermore, the attitude of officers from DIMIA towards the Act reveals an emphasis on detention rather than ensuring objective satisfaction of the requisite suspicion as well as a commitment to continued investigation lest that suspicion fall.38

The lack of a sense of urgency in follow up investigations leads to prolonged periods of detention and reveals a lack of appreciation within DIMIA of the seriousness of being deprived of one's liberty.39 The lack of certainty in the outcome and duration of processing of applications as well as a lack of efficiency in undertaking final security checks before release such that even successful applicants are forced to remain in detention40 is particularly difficult for detainees.41

The effect of inferior conditions or perceived ill-treatment of detainees in detention facilities is significantly compounded by prolonged periods in detention. Similarly, lack of information about the processing of visa applications becomes more and more intolerable as periods in detention lengthen. Not surprisingly, this has a marked effect on the mental well-being of detainees.42

The instances of applicants who have been in detention for years on end are all too frequent. These observations highlight the fact that the present regime violates the principles of freedom against arbitrary detention for its constant lack of proportionality.43

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36 *Craig v South Australia* (1995) 184 CLR 163

37 Palmer, Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, July 2005, page 21.

38 Palmer Report, page 22-25. *Goldie v Commonwealth* (2002) 188 ALR 708

39 Palmer Report, page 25

40 A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner, 2001, http://www.hreoc.gov.au/human_rights/idc/index.html.

41 Ibid.

42 Ibid.

43 Ibid.

According to s196 of the Act, detention should be for the purposes of removal from Australia or for the granting of a visa. The debate in the case of *Al-Khateb*44 centred on the fate of a detainee who was refused a visa and who was also stateless and thus had no place to be deported to. As a result Al-Khateb argued that continued detention was unlawful since it was not for the purposes outlined in s196 and the separation of power vests any other detention in the judiciary. Despite this, the majority justified this detention as being not punitive (which is traditionally a judicial rather than executive function) but rather protective and thus a valid exercise of executive power. The opposite conclusion was reached by the minority, who emphasised that punishment by the executive is unconstitutional. Importantly, the decision as to whether detention is punitive or not is a matter for the judiciary to determine.

4. Detention in Correctional Centres

Section 5(1) of the Act provides for immigration detention in a prison or remand centre of the Commonwealth or a State or Territory or in a police station or watch house.

The March 2001 report of the Ombudsman45 found that although a transfer to prison is a serious decision and is meant to occur only as a last resort, the evidence showed that when transfers of immigration detainees were made their welfare was not always monitored closely and detainees were not always given notice of the reasons for their transfer, nor was the counselling process consistently followed as required under DIMIA policy. In addition, it found that despite clear recommendations made in their report of 1995, DIMIA had still not reached clear agreements with the relevant State and Territory correctional authorities to ensure that appropriate lines of accountability, processes and standards of care were established. It is of serious concern that the recent Palmer report has raised these same concerns in 2005.46

DIMIA has a number of departmental instructions that are intended to provide direction and guidance to officers in the management and oversight of detainees. Migration Series Instruction 244 ('MSI 244') which was brought into force on 1 July 1999, partly in response to the findings in the December 1995 report of the Commonwealth Ombudsman's 'own motion' investigation into the transfer of detainees from immigration detention centres to state prisons. The Palmer report found that although it had not been updated since 1999, the 'Instruction is comprehensive and the roles and responsibilities are well explained.'47 MSI 244 clearly states in paragraph 2:1 that the 'detention of immigration detainees within prisons occurs as last resort'. In this restricted context it can occur for a number of reasons, which include behavioural concerns, the completion of custodial sentences and location which includes the absence of an immigration detention centre.

4.1 Supervision whilst being detained

DIMIA undeniably retains overall responsibility and accountability for the health, welfare and standard of care of detainees, where ever they are detained. However the Palmer report found that the culture of the department was contrary to this clear responsibility.48

The focus of MSI 244 is on detainees who, for reasons essentially related to their own behaviour, are to be transferred to a correctional facility. The instruction refers specifically to these transfers and outlines the factors likely to trigger such action as

44 Al-Khateb v Godwin [2004] HCA 37
45 The report Own Motion Investigation into Immigration Detainees held in State Correctional Facilities.
46 The last agreement made in Queensland, which came into operation in 1992 lapsed in 1995.
47 Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau page 32
48 Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau page 32

including unacceptable behaviour, continuing risk to other detainees, and a history of violence or psychiatric illness. Many of the requirements in MSI 244 focus primarily on responsibilities that apply if a detainee is transferred from an immigration detention facility for behavioural reasons. As a minimum requirement these guidelines should apply to any detainee held in corrective services custody and the requirement that DIMIA make 'alternative arrangements' should assume great urgency. Paragraph 4.11.1 expressly states that a detainee is to be placed in a prison (where there is no immigration detention centre) only 'until alternative arrangements are made'.

A significant review process of those detained in correctional facilities needs to be implemented by the Department of Immigration. On 26 February 2005 the Minister announced measures to minimise possible similar occurrences in future, including a limit of 28 days on the time individuals could be detained in a prison, watch house or similar corrections facility for immigration purposes. Although the YLHRC commends this move it remains concerned about the placement of detainees in correctional facilities where they are mixing with prisoners and subject to prison discipline and control which is obviously of a more rigid standard than the regime usually applied in an immigration facility.

4.2 Segregation and treatment of detainees

Detainees are treated in the same way as the rest of the prison population and subject to the same rules, regulations and breach actions. Although many of the agreements, formal or otherwise state that detainees will be afforded the same rights as other people at the relevant centre and specify a range of available health, welfare and recreational services and facilities, they make no mention of segregation or specific 'immigration detainee' care requirements and standards. The YLHRC remains concerned about the inability to segregate detainees from the general population even for limited periods.

The provisions of the detention services contract between the Commonwealth and GSL (4.2.4 and 4.3.1) are directly relevant as the standards expected for detainees in prisons are supposed to mirror those applicable to detainees in immigration detention centres. The contract emphasises 'immigration detention is for administrative not correctional purposes' and 'it is expected that consistent with legislative requirement to keep people in detention, detainees are able to go about their daily life with as few restrictions as possible. The contract goes on to state 'this imposes particular responsibilities on the Commonwealth with regard to duty of care for each and every person in immigration detention …' and 'the Commonwealth exercises this duty of care through the department'49.

5. Outsourcing of the management of detention facilities

The outsourcing of the management of detention facilities is part of a general trend that the YLHRC observes in Europe and the United States. It also comes at a time when Public Private Partnerships gain greater use in the provision of public services.

Prior to 1997, Immigration Detention facilities were run by the Australian Protective Services. In 1997, a tender process resulted in Australasian Correctional Services Pty Ltd (ACS) being awarded the contract to manage Immigration Detention facilities in Australia. It in turn subcontracted a related company, Australasian Correctional Management Pty Ltd (ACM) to run the detention facilities in Australia50. However, the YLHRC notes that the assessment

[49] Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau page 36
[50] Joint Committee of Foreign Affairs and Trade - A report on visits to Immigration Detention centres

of immigration status continues to be handled by DIMIA. The current arrangements are with GSL.

The YLHRC observes that this recent period of outsourcing has coincided with arguably the most turbulent period in Australia's immigration history with the Tampa, the Siev X, HREOC's Children in Detention inquiry, numerous judgments condemning the detention of unlawful non citizens, the detention of Cornelia Rau and the deportation of Vivian Alvarez-Solon. While some of the events mentioned above do not have a direct link to the outsourcing of management, the treatment of detainees in general falls squarely in the domain of management of facilities.

The YLHRC considers that there are 2 key issues to be reviewed:

(a) delegation of responsibility; and
(b) monitoring of compliance of contractors with key obligations.

5.1 Delegation of responsibility

The YLHRC is concerned that the complicated contracting arrangements that are currently used do not provide for either transparency or accountability. The YLHRC has had an opportunity to consider the current contract between DIMIA and Group 4 Falck Global Solutions Limited (GSL), the current contractor, which is presently available on the DIMIA website.

The lengthy contract sets out the obligations of GSL including preparing and providing the Operational Procedures to DIMIA for approval, and the various constraints on staffing. At Schedule 3 of the contract, a set of Immigration Detention Standards are set out, with which GLS must comply.

While the YLHRC acknowledges the benefits in including such obligations in the contract, the YLHRC is concerned that notwithstanding their inclusion, these standards are not being met. This is said given that ACM/ACS were under similar obligations yet showed that they were able to breach such standards without censure, at least based on publicly available information. Of course, this is excepting the fact that the contract with ACS was not renewed.

Most recently, the decision of Hindley J in S *v Secretary of the Department of Immigration and Multicultural Affairs [2005] FCA 549* ('S v DIMIA'), contained a scathing review of the provision of mental health facilities and services in detention centres. He noted that the complex web of contractual arrangements between DIMIA, its contractor and their subcontractors has resulted in the fragmentation of the provision of mental health services.

Notwithstanding that the contract can be terminated without notice in certain circumstances, the YLHRC continues to be concerned that what appear to be breaches of their obligations by GSL continue unabated and seem to only incur minor penalties.

The main concern for the YLHRC is the ability of DIMIA to avoid responsibility for what takes place within detention facilities as they are not the services provider. This results in a lack of accountability, for while GSL is accountable to DIMIA or the Commonwealth Government, it is not accountable to the many Australians who continue to voice their concern over detention standards. In addition, the contractor is able to sub contract out some, if not most, of the detention services, further diluting the link between the entity providing the service and the government department with the relevant obligations.

GSL is not the signatory to international treaties, nor is it obliged to comply with the standards and obligations those treaties impose. As raised above, the YLHRC has serious concerns that Australia is not meeting its international obligations in relation to detention. Therefore, the Government seems to have been able, in part, to avoid its obligations by delegating the provision of core services to a commercial entity that is not bound by them. While GSL is bound to comply with the International Detention Standards, these are determined by DIMIA and enforced by DIMIA, which, it will be argued, has not satisfactorily occurred.

5.2 Monitoring of compliance

The YLHRC here notes that in relation to the performance based aspect of the fees payable under the contract appear to be based, in part, on a self reporting scheme. This aspect of the contract as it was between DIMIA and ACM, was commented on by the Commonwealth Ombudsman in 2001 in 'Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs Immigration Detention Centres'. The Ombudsman there observed:

> *It is possible that the contractual terms that impose penalties on ACM if their performance results in escapes and other incidents could produce an incentive to ACM staff that would lead to under reporting. In my view, it is important that in negotiating any renewal or new contract that any incentives to under reporting be removed. I will be considering this issue in my own motion investigation into incident reports.*
>
> *While I do not see the role of my Office as participating in the assessment of the ACM performance in meeting the detention standards, my Office does respond to complaints about administrative issues and provides feedback to DIMA where we see an underlying cause that is capable of correction. I have raised the issue of the need to have a clear framework for DIMA to produce some public reporting arrangement of its own to indicate where performance targets were not being met.*

The YLHRC notes that, while the contract with ACS does not appear to be publicly available, and therefore a comparison between the obligations in the ACS contract and the GSL contract cannot be compared, the recommendation that there be a clear framework for public reporting does not appear to have been implemented. The YLHRC endorses the suggestion made by the Ombudsman, that a system of public reporting be devised so that Australians can be advised when GSL does not comply with its obligations and in turn DIMIA falls foul of its obligations.

It appears that compliance has been and is, in part, monitored not by DIMIA, but by concerned members of the public, and, at times, the judiciary.

The YLHRC calls on the Committee to recommend that DIMIA maintain public disclosure of breaches of its obligations by GSL, together with a closer monitoring of contractual relationships such that DIMIA is not able to distance itself from its obligations.

6. Conclusion

The YLHRC considers that this review of the operation and administration of the Migration Act is long overdue, in light of the various events of the past few years. The YLHRC asks the Committee to consider the points raised to make recommendations for an overhaul of how detention of unlawful non citizens operates under this important but cumbersome piece of legislation.