

**LINDELA**

**AT THE CROSSROADS FOR  
DETENTION AND REPATRIATION**

*an assessment of the conditions of detention*

*by the South African Human Rights Commission*

*Johannesburg December 2000*

## ***Foreword***

Since 1994, South Africa has become a signatory to a number of international conventions that set standards for the observance of human rights, including the rights of migrants and refugees. The government is in the process of legislating a new Bill on International Migration. The future of migration policy in South Africa is a cause for concern. This is because, in its anxiety to protect the country's borders from unwanted immigration, and to curb abuse of the asylum system, the forthcoming legislation on immigration retains elements of the old Aliens Control Act with its emphasis on restricting access to South Africa. But this does not take into consideration the fact that some people, such as asylum seekers, have a genuine need to seek protection from persecution.

Much of our continent is experiencing massive waves of voluntary and involuntary movements of people as a consequence of increasing poverty and wars. The challenge for South Africa is how to deal with this complex problem of a mixed flow of migrants. Certainly the answer does not lie in a policy of deterrence as reflected in this report, which represents yet another benchmark in the monitoring of the human rights of undocumented migrants in South Africa. The report is a follow up to the earlier investigation into the Lindela Repatriation Centre that was produced by the SAHRC in 1999. What comes across clearly is the huge gap between standards of treatment of various categories of migrants as set out in international human rights instruments and the practicalities of immigration management in our country today.

The arbitrary and indiscriminate detention of undocumented migrants has become a commonplace, everyday occurrence. This practice flies in the face of the many universally recognized human rights that migrants are entitled to, whether they are documented or not. When asylum seekers are affected, such detention becomes a serious violation of their special right to international protection. Even ordinary South African citizens are not spared the humiliation of having to prove to arresting officers that their presence in the country is legal. What is more alarming are the dangerously high levels of xenophobia and the callous attitudes of officials during the arrest and detention procedures.

Unfortunately, the principal driving force behind the present immigration control system is the misplaced human deterrent policy, which contributes to blurring the already difficult distinction between asylum-seekers and economic migrants. The narratives given by those who are apprehended are testimony to the enormous pain, physical and emotional suffering inflicted when people's human rights are blatantly violated.

In reiterating the recommendations arising out of the first Lindela investigation, the present report provides an additional methodological tool that human rights groups will find most useful in their monitoring work. This is the judicial inspectorate system. It is vital that policy makers in the immigration system take heed of the results of this second investigation. The report also provides useful information to all South African citizens and should bring us to the realisation that our new democracy cannot advance far if we continue to violate the human rights of the most vulnerable among us.

The report is also significant in that it once again demonstrated how the Commission in partnership with civil society could advance the cause of human rights and wishes in particular to thank Ms Emma Algotsson for her thorough research, Professor Jonathan Klaaren of the Centre for Applied Legal Studies, the staff and management of Dyambu Holdings and the Department of Home Affairs.

In conclusion we do hope that the report contributes to meeting the difficult, but attainable challenge of ensuring that the law and practice in so far as it relates to migrants is consistent with our national and international human rights obligations.

Jody Kollapen  
Zonke Majodina  
Human Rights Commission  
6 December 2000

## ***Author's Note***

This research has been conducted for the South African Human Rights Commission which engaged Emma Algotsson to author this report. The investigation was initiated by Jonathan Klaaren of the School of Law at the University of the Witwatersrand. Jonathan Klaaren, Commissioner Jody Kollapen of the SAHRC, and Andrew Rens of the Wits Law Clinic supervised the research jointly. The Olof Palme Foundation has financially assisted the research. The Centre for Applied Legal Studies of the Faculty of Law at the University of the Witwatersrand provided office space from September to December 1999.

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## ***List of Abbreviations***

ACA - Aliens Control Act 96 of 1991

CALS – Centre for Applied Legal Studies

CSA - Correctional Services Act 102 of 1997

CPA - Criminal Procedures Act 51 of 1977

CPT - The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

DCS - Department of Correctional Services

DHA - Department of Home Affairs

SAHRC – South African Human Rights Commission

SAPS - South African Police Service

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# 1 Introduction

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The Lindela Repatriation Centre (Lindela) serves as a centralised detention facility for the apprehension of undocumented migrants awaiting determination of their legal status in South Africa and/or deportation. Lindela is the largest detention centre for undocumented migrants in the country and is the only facility specially designated for that purpose. For the past two years, the facility has been under investigation by the South African Human Rights Commission. The Commission has Constitutional powers to “investigate and to report on the observance of human rights” and “to take steps to secure appropriate redress where human rights have been violated.”<sup>1</sup> The Commission visited Lindela in February 1997 to investigate the conditions of detention. In the period since its initial visit and findings, the Commission has noted increasing reports of violations of human rights.

In March 1999, the Commission published a report on the apprehension process and detention of undocumented migrants, *Illegal? Report on the arrest and detention of persons in terms of the Aliens Control Act*.<sup>2</sup> The *Illegal?* report argued that there was evidence of inadequate procedures for the processing of arrested undocumented migrants and inhuman treatment and indignity of persons held at Lindela. The report made recommendations to both the Department of Home Affairs (DHA) and Dyambu Limited<sup>3</sup>, the private company managing Lindela. These recommendations specifically indicated many unacceptable practices evident at the holding centre. Subsequent to the publication of the *Illegal?* report in March 1999, various sources indicated to the Commission that the conditions at Lindela remained unsatisfactory and that engagements had not been complied with.

This paper continues the Commission’s investigation of the conditions at Lindela. The aim of the research has been to follow up on the *Illegal?* report and to further address issues of human rights conditions at Lindela. Those issues specific to Lindela were only mentioned incidentally and briefly in the previous report. It was thus felt that a Lindela-focused

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<sup>1</sup>The Commission has constitutional obligations in terms of section 184(1) of the Constitution of the Republic of South Africa to: (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and address the observance of human rights in the Republic. It further has constitutional powers in terms of section 184(2) to: (a) investigate and report on the observance of human rights; and (b) take steps to secure appropriate redress where human rights have been violated. Constitution of the Republic of South Africa Act 108 of 1996.

<sup>2</sup> SAHRC, *Illegal? Report on the arrest and detention of persons in terms of the Aliens Control Act* (1999) (available at [www.sahrc.org.za](http://www.sahrc.org.za)).

<sup>3</sup> Dyambu Operations has recently been divided and a new company called Lindela is now operating the facility. The term Dyambu will be used in this report to differentiate between the private company managing Lindela (Dyambu), and the facility as a whole (Lindela).

investigation would be of value. Between September and December 1999, the Commission visited the facility on a regular basis. Findings from these visits confirmed the reports of the continuation of unsatisfactory apprehension processes as well as violations in terms of length of detention, abuse of power, assault and inadequate physical conditions.

The Aliens Control Act No 96 of 1991 provides the legal ground for the arrest and detention of undocumented migrants in South Africa. The Act is mostly concerned with control of immigration and provides controversial selection processes for who is allowed into the country. As demonstrated by the Constitutional Court's recent decision in *Dawood v Minister of Home Affairs, 2000 (8) BCLR 837 (CC)*, the constitutionality and practicality of these procedures are not clear. In particular, the Act does not set out any specific regulations on the conditions of detention of undocumented migrants.

The problem with such an omission is twofold. First, the government recognised that specific rights of the persons detained under the Act remain unclear. The opportunities for violations are thus increased. Second, for as long as the system fails to state the criteria, and the precise degree to which the conditions they find measure up to them, the public is none the wiser as to whether conditions are equitable, have improved or deteriorated. This lack of clarity decreases the opportunities of overseeing detention conditions.

The DHA has contracted out the operation of Lindela to a private company, Dyambu Operations. In its operation of Lindela, Dyambu is under a duty of care in relation to the detainees. All actions relating to the detention and care of detainees are to be consistent with relevant statutory law, the South African Constitution and various international human rights instruments.

It is appropriate in this situation to look at prison regulations, since one purpose of this paper is to clarify what are the rights of arrested and detained undocumented migrants. Dirk van Zyl Smit<sup>4</sup> describes prisoners' rights as positive rights, in the sense of enforcing claims that Dyambu, as managers, must organise life at Lindela in such a way as to protect the detained persons' fundamental rights. It is thus a question: how far does this right of the detained person to claim positive performance go? A legal framework for the apprehension and detention of undocumented migrants is laid out in Chapter Two of this report.

The report further aims to examine and advise on a conceivable future inspectorate system to

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<sup>4</sup>*Prison Law and Practice*, Butterworths, Durban (1992), page 65.

be established at the facility.<sup>5</sup> If basic democratic accountability is to be achieved, the DHA and Dyambu must be answerable to an outside body for the management of Lindela repatriation centre. For persons held in detention at the centre, accountability is of specific importance because of Lindela's special nature. Lindela is a closed institution where access to lawyers and means of communication in general are subject to regulation by staff. Extensive discretion over every aspect of the inmates' existence indicates the need for a correspondingly far-reaching and detailed system of accountability.

Experience from national and international accountability systems shows that, in order for inspectorate systems to be effective, they must be independent, have unlimited access to the places of detention, be given the opportunity to interview in private any person, and have the powers and resources to enforce their recommendations. Chapter Three of this report outlines experience from two national accountability systems for the inspection of prisons and police holdings in South Africa. It also looks at the lay visiting schemes in England and Wales, the police cell monitoring programme in Hungary, and the European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment.

The findings from the three months of investigation into the conditions at Lindela are discussed in Chapter Four. The first part of the chapter focuses on the apprehension process at the facility while the second part of the chapter outlines some of the general conditions at the detention centre. Several examples are given where both the DHA and Dyambu have failed to comply with current legislation. One example is the detention of persons at Lindela in excess of thirty days. Such detention is contrary to section 55(5) of the Act unless the detention is reviewed by a High Court judge. The SAHRC took this matter to court on 12 November 1999 and achieved the release of 40 persons who had been unlawfully detained for up to five months.

An effective way to enable the development of positive rights for persons held in detention is through the establishment of minimum standards of conditions of detention. The ACA does not include any terms of conditions for the management of Lindela by the private enterprise. This feature makes the legislatively recognised specific rights of the persons detained at the facility unclear.

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<sup>5</sup>See recommendation no 10 of the South African Human Rights Commission Report on Lindela March 1999. "A permanent inspectorate should be established to visit persons held in terms of the ACA to monitor compliance with arresting guidelines, the Act, and the constitutional provisions relevant to arrest and detention in terms of the Act."

Proper enforcement of minimum standards further requires an independent body with clearly defined powers and duties to inquire into specific incidents as well as general conditions of detention and with access to appropriate research and information. There must be a clear and transparent complaints system at Lindela with practical remedies and individual court actions available for the inspectorate system at the facility to have a real impact. In these circumstances, the role of the monitoring system cannot be limited to only the regular inspection of the contracted out facility, but should also include the monitoring of the relationship between the DHA and Dyambu.

## 2 Legal Framework

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### 2.1 Legislative Framework for Apprehension

Immigration arrest and detention are governed by the DHA under the ACA. In order to be arrested under the Act, certain criteria must be fulfilled. According to s 53 of the Act, a person can be detained if he or she is suspected on reasonable grounds of being an alien, but fails to produce proof that he or she is entitled to be in the country.<sup>6</sup> Such person shall, according to s 55(1), be dealt with within 48 hours of arrest in terms of s 7 and declared to be a prohibited person under s 9 or s 10(5)(b)(ii). Section 44(1)(a) gives authority to detain a prohibited person pending his or her removal from the Republic.

The constitutionality of these procedures is discussed in a working paper by Jonathan Klaaren.<sup>7</sup> The arrest of persons against whom action is being taken with a view towards repatriation falls within the ambit of the right to freedom and security in s 12(1) of the Constitution<sup>8</sup>. This means, according to Klaaren, that “in respect of the arrest of persons with a view towards deportation, the freedom and security right is implicated as their freedom and security is infringed”.<sup>9</sup> Given this, he argues that s 53(1) of the Act may be unconstitutional because the standard of ‘reasonable grounds’ is too broad. Also, the reverse onus presumption of the proof of entitlement to be in the country deprives the person of his right to remain silent when arrested and right to move without identification.

In practice, a person is arrested under the section on the grounds that he or she is not carrying identity documents<sup>10</sup>, has a particular physical appearance, does not speak any of the main national languages fluently, or fits a profile of suspected undocumented migrants. It is then up to the person arrested to prove that he or she does have a legitimate right to reside in the country. This is especially problematic as the person arrested has limited means to provide necessary documents to prove his or her right to remain in the country. Neither the arresting police nor the DHA have the policy of taking persons to their homes to look for identification

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<sup>6</sup> Section 53(1) reads: “If any immigration officer or police officer suspects on reasonable grounds that a person is an alien he may require such person to produce to him proof that he is entitled to be in the Republic, and if such person fails to satisfy such officer that he is so entitled, such officer may take him into custody without a warrant and if such officer deems it necessary, detain such person in a manner and at a place determined by the Director-General. And such person shall as soon as possible be dealt with under section 7”.

*The Arrest and Detention of Undocumented Migrants*, Human Rights Commission Enquiry paper, 6 December 1998, page 5.

<sup>8</sup>The Constitution of the Republic of South Africa, Act 108, 1996. Section 12(1) states “Everyone has the right to freedom and security of the person, which includes the right- (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial. . . .”

<sup>9</sup>*The Arrest and Detention of Undocumented Migrants*, page 5.

<sup>10</sup>The right not to have to carry a identity document is in itself protected by constitutional right of freedom and security of a person. See *R v. Duguay*, (1985) 1 SCR 93 (Canada).

documents or allowing free phone calls to contact friends and family. Furthermore, arrested persons are deliberately prevented from providing accurate documents, valid identity documents are destroyed, bribes are taken for avoiding arrest or for release without valid documents, and processes are delayed by inefficient investigation methods and poor communication between the different departments. As a consequence, many South African citizens are arrested and detained for several days while their citizenship is being confirmed.

Sections 7, 9 and 10 of the Act constitute the legal regime for most persons apprehended as illegal entrants.<sup>11</sup> Section 7 provides certain steps that an immigration officer must take when investigating whether a person has entered the country without a permit.<sup>12</sup> The process puts the onus of proof on the person rather than on the immigration officer and requires the person to satisfy the immigration officer that he or she is not a prohibited person. If the person fails to produce a valid South African identity card or permit to be in the country, the person will be declared a prohibited person under s 9. In cases of doubt the suspected person will be granted a s 10 permit to give him or her time to provide necessary documents. If the person fails to provide documents or to leave the country in time, he or she will be declared a prohibited person. The investigation procedure opens up questions of justification and is according to Klaaren<sup>13</sup> unconstitutional on the grounds that the section lays the onus of proof on the presumed prohibited person and that the examination is an administrative rather than a court procedure.

It is also uncertain exactly what procedural rights persons subjected to examination enjoy, either as a matter of departmental policy or as a matter of practice. The Commission has found the examination process at Lindela both insufficient and arbitrary. At arrival, each person only receives a few minutes with the allocated immigration officer to present his or her case. Also, there seem to be no definite routines. Indeed, it is unclear when the actual s 7 investigation is conducted and by whom.

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<sup>11</sup>Section 26(7) makes everyone who has overstayed a visitor's permit guilty of an offence and therefore liable to be dealt with as a prohibited person.

<sup>12</sup>Section 7 reads: (1) An immigration officer may require any person referred to in section 6(1), or any person who in the opinion of such officer is not entitled to be in the Republic - (i) to make and sign a declaration in the prescribed form; (ii) to produce documentary or other evidence relative to his claim to enter or be in the Republic; (iii) to submit to any examination or test to which he may be subjected under this Act; and (iv) if it is subjected that such is afflicted with any disease or physical infirmity which under this Act would render him a prohibited person, to submit to an examination by a medical practitioner designated by the Director-General.

<sup>13</sup>Klaaren, Jonathan, *The Detention and Repatriation of Undocumented Migrants*, Working paper, 28 May 1999, page 4.

Where a person has been declared a prohibited person under ss 9 and 10, there is no formal right of appeal to an independent court. In terms of s 52(1) of the Act, individuals who have been declared prohibited persons in terms of s 9 or s 19 of the ACA shall be informed that he or she may make written representation to the Minister against the decision. The right to make representation is however not available for over-stayers in terms of s 26(7). It further seems that these internal departmental appeal procedures are not available to most persons held at Lindela. In practice, most persons are treated as prohibited persons without the declaration taking place. Neither is it the practice to inform the persons held at Lindela about the right to appeal. Also, the appeal system is dependent on the approval of immigration officers, sometimes even the same officers whose decisions are being appealed. It is further unclear whether possible appeals to the Minister are successful or not.<sup>14</sup> A second appeal system may be available through s 4(3) of the Act which gives the Minister power to review any decision taken under the Act. The practice and availability of these appeal procedures are also not clear.<sup>15</sup>

## **2.2 Legislative Framework for Detention**

A person may be detained under s 44(1)(a) of the ACA “in a manner and at a place determined by the Director-General”. The Act does not include any section to determine what rights undocumented migrants enjoy while they are held in detention, although s 55 of the Act provides for certain restrictions on the detention. A person detained under the Act may only be held in arrest for 48 hours pending the determination of his or her status. The detainee should be informed in writing of the reasons for continued detention. This rarely happens.

Section 55(5) of the Act states that a prohibited person, pending his or her removal from the country, may not be detained for a period in excess of thirty days unless his or her detention is reviewed by a judge of the High Court. Any detention in excess of thirty days in the absence of review by a High Court judge is therefore unlawful and a violation of the fundamental right to freedom and security protected by s 12 of the Constitution. The Commission has in the course of its continued research at Lindela discovered several cases of detention in contravention of the section. Only one of the persons involved had been informed of her case being reviewed by a judge, although she was not given the opportunity

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<sup>14</sup>According to a Human Rights Watch report, there has never been any decision that a person is a prohibited person reviewed by the Minister. *Prohibited Persons* (New York, 1998) page 167.

<sup>15</sup> In a letter to the DHA dated 15 October 1999, the Commission requested to be advised on the appeal system at Lindela. No reply has been received. Officials of the DHA argued informally that cases of appeal from Lindela have been reviewed by the Minister, but could not give any specific examples.

to give written input for the decision. Moreover, there is no absolute maximum period of detention after determination of status.

Detention in terms of s 53(1) of the ACA is an administrative detention, not a prison or correctional sentence. Undocumented migrants are not arrested upon suspicion of having committed an offence in terms of the Criminal Procedure Act. Likewise, the purpose of the detention is not for punishment or retribution, but with a view towards determining their legal status in the country or to find means for repatriation. The rights enjoyed by arrested and detained undocumented migrants pending repatriation should thus in the view of international human rights standards be equivalent to or exceed the conditions required by for example the Correctional Services Act 102 of 1997.<sup>16</sup> By adopting regulations from or incorporating the management of Lindela under the CSA, it would be clear what are the legislatively recognised specific rights of the persons detained under the ACA.

Chapter III of the CSA provides general conditional requirements for all prisoners. Among other things the Act notes that:

- Prisoners must be held in cells which are adequate for detention under human dignity;
- Male prisoners must be kept separate from female prisoners;
- Children must be kept separate from adult prisoners;
- Prisoners must be provided with an adequate diet to promote good health which must make provision for nutritional requirements, take into account religious/cultural requirements and be served at intervals of not less than four and a half hours (14 hours between evening meal and breakfast);
- The Department must provide means for prisoners to keep his or her personal clothing and bedding clean;
- At least one hour of exercise daily;
- Provision of adequate health services;
- Opportunity to communicate with relatives, chosen religious counsellor, medical practitioner, consular representative or NGO's;
- On admission or transfer, the person must notify his/her next of kin;
- Freedom of conscience and religion;
- Consultation with a legal practitioner;
- Access to reading material of his or her choice;
- Provide education for children; and

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<sup>16</sup> The UNHCR Guidelines on the Detention of Asylum Seekers recognises that “the basic standards and norms of treatment contained in international human rights instruments applicable to Detainees generally should be applied to both asylum seekers and stateless persons”, UNHCR/IOM/22/99 page 2.

- Be given the opportunity of making complaints.

Detention of undocumented migrants further raises several legal issues regarding the detained persons' legal rights. One is whether the detaining institute has a duty to report to the police any criminal offence within their premises?

The ACA does not explicitly establish a duty for persons who are performing actions under the Act to assist in cases of assault at the facility. Instead, the law of omission could be used to argue that the security guards at Lindela are under a legal duty to assist assaulted persons and that both the DHA and Dyambu could be held liable in the case of an omission. In *S v. Van As en'n ander*<sup>17</sup> it was held that the duty to avert harm to another "is a duty to take reasonable care to avert harm" and that the duty to avert harm depends on the relationship of the parties. It was thus suggested in *Mtati v. Minister of Justice*<sup>18</sup> that the basis for liability for the omission of a goaler to protect a prisoner from assault was "that the control which the goaler was in a position to exercise which laid (...) a duty on him towards the detainees who were unable to protect themselves against attack by escape." The goaler was in control over the situation in the sense that he had the ability to protect the prisoner from harm. In *Minister van Polisie v. Ewels*<sup>19</sup> it was held that a number of policemen who had witnessed the assault of an arrested person and who negligently and in breach of the duty under s 5 of the Police Act 7 of 1958 had been in breach of their duty "to prevent it or to protect" the assaulted person. It was further held that the failure to assist the arrested person had taken place in the course of their employment and that it was an omission for which the Minister was responsible.

Also, the ACA does not explicitly provide any duty for a security guard at Lindela to report any crime to the SAPS. Section 100 of the CSA gives a correctional service officer powers as a peace officer in the terms of s 40 of the Criminal Procedure Act. This means that correctional officers have the same powers as police officers without a warrant to arrest a person who commits or attempts to commit a crime.<sup>20</sup> As far as the duty to report a criminal offence to the police is concerned, correctional officers "are just as obliged as any other law abiding citizen to do so, but it is not specifically expected of correctional officials by means of

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<sup>17</sup>1967 (4) SA 594 (A)

<sup>18</sup>1958 (1) SA 221 (A)

<sup>19</sup>1975 (3) SA 590 (A).

<sup>20</sup>Section 41 of the CSA, No 111 of 1998.

a regulation.”<sup>21</sup>

Nonetheless, s 21 of the CSA gives prisoners some protection by ensuring that every prisoner, on a daily basis, is given the opportunity of making a complaint. All complaints must be recorded and dealt with. The prisoner must be informed of the outcome and if the complaint concerns alleged assault, the Head of the Prison must ensure that the prisoner undergoes an immediate medical examination and receives the prescribed treatment. Also, according to working procedures as set out by the Inspectorate Judge, the assaulted prisoner must be invited by the Independent Prison Visitors to lay criminal charges with the SAPS against the Correctional Official concerned in the case of slight assault. If the prisoner wishes to do so, the matter must be referred to the Head of Prison by the Independent Prison Visitor. If not, the prisoners’ decision must be recorded in the Complaints register. The Head of Prison must report serious cases of assault by prisoners on prisoners to SAPS, owing to the fact that it is a criminal offence. These cases must also be reported to the Inspecting Judge by the Independent Prison Visitors.<sup>22</sup>

### **2.3 Contractual Framework for Detention**

The DHA has contracted out the operation of Lindela to a private company, Dyambu Operations. Facilities of the DCS, which previously have been used for the detention of undocumented migrants, were found to be chronically overfull and the DHA felt compelled to find alternative holding facilities urgently. The contract between the DHA and Dyambu consists of a tender document from Dyambu which was accepted by the DHA in August/September 1998. The duration of the contract is for a period of three years.

The ACA does not include any explicit provision for the contracting out of private holding facilities. Other legislation does. For example, the CSA provides that the Minister of Correctional Services may enter into a contract with a private party, for the design, financing, management and operation of a prison, subject to “any law governing the award of contracts by the State.”<sup>23</sup> Accordingly, ACA does not include any terms for the conditions of the management of Lindela by the private enterprise. This makes it unclear what are the legislatively recognised specific rights of the persons detained at the facility. These limitations

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<sup>21</sup>Reply on e-mail sent to Charmaine Gerber, Department of Correctional Services, 8 October 1999.

<sup>22</sup>An Introduction to the Judicial Inspectorate, informal publication by the Judicial Inspectorate, page 19.

<sup>23</sup>The Correctional Services Amendment Act 102 of 1997 empowered the Minister for the first time to contract out prisons to private contractors. See Section 20A(1) of the CSA.

in the ACA make it arguable whether the DHA under any condition has statutory rights to contract out the operation of Lindela. Perhaps more importantly in this case, it is arguable whether the contracts between the two parties constitute a sufficient legal framework for the detention of undocumented migrants.

Activities that are within the contract between the DHA and Dyambu include provision for a facility specially designed for the detention of undocumented migrants that involves “accommodation, meals and health care whilst aliens are in custody.” The facility further should consist of:

- “sleeping quarters for a minimum of 1500 detainees, each allocated a minimum of 4.5m<sup>2</sup>”;
- “dining hall and kitchen equipped with necessary facilities”;
- “ablution facilities with cold and hot water”;
- “sick bay to be manned by a doctor and/or qualified nurse(s)”;
- “reception area/waiting area for visitors”; and
- “offices for a minimum of 32 Home Affairs immigration officers”.<sup>24</sup>

However, the contract has only limited provisions regarding adequate standards and regulations at the facility and is inadequate as exclusive legal framework for the management of Lindela. Also, the contractually regulated standards at the centre often do not fulfill national and international regulations for the detention of undocumented migrants. Standards that are outside the scope of the contract include:

- Freedom of religion, belief and community;
- Access to legal advice;
- Access to reading material;
- Segregation within facilities of men and women and children from adults;
- Placement of children/mothers of young children;
- Regulations for discipline;
- Regulations for security;
- Visitors and communication;
- Access to information in different languages;
- Complaints and requests; and
- Establishment of internal and external inspectorate systems.

The most effective way to enable the development of positive rights for persons held in detention is through the establishment of minimum standards of confinement and treatment.

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<sup>24</sup> Section 5.1 Appendix “Specifications” of tender document no RT706SP.

The existing difficulty of directly enforcing the provisions of the ACA could be resolved by an amendment of the present Act, which would set out various standards of confinement. The DHA and Dyambu would then have a statutory duty to comply with such minimum standards.

Meanwhile, these minimum standards should be included in the contractual arrangement between the DHA and Dyambu. The contract should also include an inspectorate system to ensure that ultimate control by the state of the management over Lindela is maintained and that the minimum standards are complied with.

Lessons can be learnt from Australia where the Minister for Immigration and Multicultural Affairs has contracted out the day-to-day operational management of the immigration detention to the private sector. The contract contains a reporting and contractual managing regime, which links payment to performance. The standards of care required to be provided by the private company are regulated by a set of Immigration Detention Standards<sup>25</sup>. The Standards include principles which should underpin the provision of the detention function and the standard of care to be provided by the service provider. The standards also set up regulations for the management and security of the facility, its selection and training of personnel and the requirements for dignified treatment of detainees.

The CSA further provides regulations on the privatisation of prisons, which could serve as a framework for the legal relationship between Dyambu and the DHA. For example, the CSA stipulates that a private contractor must ensure that all prisoners are treated with dignity and in a humane manner, and must comply with all international law standards and conventions.<sup>26</sup>

#### **2.4 Constitutional Right for Detainees**

The South African Constitution constitutes a binding obligation on “the legislature, the executive, the judiciary and all organs of the state”<sup>27</sup>, to “respect, protect, promote and fulfil the rights under the Bill of Rights”<sup>28</sup> and makes up the legitimate foundations for the detention of undocumented migrants in South Africa.

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<sup>25</sup>Joint Standing Committee on Migration, *Report of inspection of detention centres throughout Australia*, August 1998, Appendix 1.

<sup>26</sup>Section 20A(3) and (b) as introduced by s 2 of the 1997 Correctional Services Amendment Act.

<sup>27</sup>Constitution of the Republic of South Africa (1996) s 8(1)

<sup>28</sup>*Ibid* s 7(2)

Section 35(2) of the South African constitution declares the rights of “everyone who is detained”. This section does not reserve rights for citizens only but ensures them for all persons under detention. Everyone would therefore include non-South Africans, and would include undocumented migrants as well. This view was supported in *Baloro and Others v. University of Bophuthatswana and others* where Friedman J states that the words “no person” in section 8(2) of the Constitution also apply to aliens. “Persons does not mean only citizens of South Africa”.<sup>29</sup> Also in *Larbi-Odam and Others v. Members of the Executive Council for Education*<sup>30</sup> the Constitutional Court held that discrimination on the grounds of citizenship was unfair in terms of the equality provision (section 8 of the Interim Constitution), and therefore the term “anyone” in the provision can be applied to undocumented migrants.<sup>31</sup> The ACA itself further does not place any particular limitations on the interpretation of the rights for detained undocumented migrants under s 35 of the Constitution.

There is no section in the ACA which empowers the Minister to contract out the operation of Lindela to a private contractor. It seems however, incontestable that contracted-out detention facilities will be bound by the Bill of Rights, including the requirements of s 35. Profs Hugh Corder and Dirk Van Zyl Smit<sup>32</sup> argue that since contracted-out detention facilities remain organs of the state, they would have to be administered in terms of the constitutionally prescribed basic values governing public administration. When detainees have enforceable rights, they will have a basis for proceeding both against Dyambu and against the DHA whose duty it is as representative for the state to ensure that contracted-out facilities provide the required services.

The specific rights, as set out by s 35(2) of the Constitution include the right:

- (a) To be informed properly of the reason for his or her detention;
- (b) To choose and consult with a legal practitioner;
- (c) To have a legal practitioner assigned at the expense of the state “if substantial injustice

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<sup>29</sup>1995 (4) SA 197 at 247

<sup>30</sup>1998 (1) SA 745 (W)

<sup>31</sup> C. Cooper argues in *Undocumented Aliens: An International Human Rights and Constitutional Assessments*, February 1999, that the case makes a distinction between different levels of aliens as it related to aliens lawfully in the country. However, the case does not make any direct suggestions for such limitations and the term 'anyone' should therefore apply for all aliens.

<sup>32</sup>Corder, H & Van Zyl Smit, D *Privatised prisons and the Constitution* in SACJ 1998(11)

would otherwise result”;

- (d) To challenge the lawfulness of the detention before a court;
- (e) “To conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material, and medical treatment”;
- (f) To be visited by one’s spouse or partner, next of kin, religious counsellor of choice and medical practitioner of choice.<sup>33</sup>

Also s 35(4), which provides the right to receive required information in a language one understands, will apply to persons held at Lindela. This does not mean that one has to be addressed in one’s own language, but in a language one understands. It is thus incumbent upon arresting and detaining authorities to ascertain whether the detainee understands the language the authorities are employing.

In addition it is clear that the following rights will hold special importance in the detention context - the right: to equality<sup>34</sup> (including the prohibition of unfair discrimination); to human dignity<sup>35</sup>; to freedom and security of the person<sup>36</sup> (in particular “not to be tortured in any way”, nor “to be treated or punished in a cruel, inhuman or degrading way”); not to be subjected to slavery, servitude or forced labour;<sup>37</sup> to privacy<sup>38</sup> (in particular, not to have the privacy of their communications infringed); to freedom of conscience, religion and belief<sup>39</sup> and to just administrative action.<sup>40</sup>

## **2.5 International Legislation**

Undocumented migrants are entitled to benefit from the protection afforded by various international and regional human rights instruments, which set out the basic standards and

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<sup>33</sup>Constitution (1996), s 35(2)

<sup>34</sup>Section 9

<sup>35</sup>Section 10

<sup>36</sup>Section 12

<sup>37</sup>Section 13

<sup>38</sup>Section 14

<sup>39</sup>Section 15

<sup>40</sup>Section 33

norms of treatment. Whereas each state has a right to control those entering into their territory,<sup>41</sup> these rights must be exercised in accordance with a prescribed law, which is accessible and formulated with the sufficient precision for the regulation of individual conduct. For the detention of undocumented migrants to be lawful and not arbitrary, it must comply not only with applicable national law, but also with international legislation.<sup>42</sup>

The content of international instruments is especially of relevance in understanding the applicability of the Constitution. In terms of s 233 “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law”. Also, as outlined by Chaskalson J in *S v. Makwanyane*,<sup>43</sup> in interpreting the Bill of Rights, international law, which includes both binding and non-binding treaties, customary law, general principles of international law and judicial decisions must be considered.

It is a fundamental principle of international human rights that no one should be arbitrarily placed in detention.<sup>44</sup> Detention is considered arbitrary if it is not authorised by law or in accordance with law<sup>45</sup>. It is also arbitrary when it is random, capricious, or not accompanied by fair procedures for legal review. If a person has been detained in accordance with a valid law, he or she is nonetheless entitled to a prompt and expeditious appeal procedure.<sup>46</sup> It also requires that detention should be reviewed as to its legality and necessity, according to the standards of what is reasonable and necessary in a democratic society<sup>47</sup> and that all persons in detention have the right to be protected from cruel, inhuman or degrading treatment.

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<sup>41</sup>See decision from the European Court of Human Rights, *Ahmed v. Austria*, ECHR (1996) 24 EHRR at 276, “contracting states have the right, as a matter of well established international law and subject to their treaty obligations, including the convention to control the entry, residence and expulsion of aliens”.

<sup>42</sup>Views of the Human Rights Committee on Communication No. 560/1993, 59th Session, CCPR/C/D/560/1993.

<sup>43</sup>*S v. Makwanyane and Others* (1995) 6 BCLR 665 (CC)

<sup>44</sup>Article 7 of the Universal Declaration of Human Rights (UDHR) proclaimed and adopted by U.N. General Assembly resolution 217 (III) 1948, states that “no one shall be subjected to arbitrary arrest, detention or exile”.

<sup>45</sup>Article 9(1) of the International Covenant on Civil and Political Rights, (ICCPR) adopted by U.N. General Assembly Resolution 2200 A (XXI) 1966 and entered into force 1976, provides that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law”.

<sup>46</sup>Article 9(4) of the ICCPR states that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.

<sup>47</sup>See G. Goodwin-Gill, *The Refugee in International Law*, Clarendon Paperbacks, Oxford (1998), page 248.

Immigration detainees are held to ensure their presence for deportation rather than for the purpose of punishment. Therefore, international norms regarding the treatment of pre-trial detainees rather than convicted prisoners offer the best guidance on specific conditions for individuals in immigration detention. The norms include regulations on detention in decent and human conditions, the right not to be treated punitively and the right to be held in the least restrictive setting possible and given the maximum freedom consistent with their remaining in detention. As for s 35(2) of the Constitution which applies to “everyone who is detained”, most international instruments on detention do not reserve their rights to citizens but to all persons under detention.<sup>48</sup>

*The United Nations Standard Minimum Rules for the Treatment of Prisoners*<sup>49</sup> hold that all those held in detention, whether nationals, non-nationals, asylum-seekers or refugees, criminally accused or convicted, should be held in conformity with the non-binding but authoritative minimum standards for treatment of all individuals in detention. The Minimum Rules provide authoritative guidance in interpreting the principles laid out in documents such as the UDHR and the ICCPR and serve as a set of minimum standards, which is accepted as suitable for the United Nations. Among other things the Minimum Rules note that:

- Administrative detainees are to be held separately from criminal detainees;
- Women should be separated from men;
- Separate beds with clean bedding should be provided;
- At least one hour of outdoor exercise daily;
- Access to qualified medical practitioner with knowledge of psychiatry;
- Information about regulations and complaints procedures;
- Communication with friends and relatives;
- Access to newspapers and books; and
- Access to religious practitioner.

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<sup>48</sup>For example, *The International Convention on Civil and Political Rights* (G.A Res 2200A (XXI), December 16, 1966) in article 2(1) grants the right in the Covenant to “all individuals”. *The Body of Principles for the Protection of All Persons under Any form of Detention* (GA res 43/173, annex, 43 U.N. GAOR Supp. (No 49) at 298 U.N. Doc A/43/49 (1988)) applies “for the protection of all persons under any form of detention”. *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (G.A. res 39/46. Annex, 39 U.N. GAOR Supp. (No.51) at 197, U.N. Doc A/39/51 (1984) gives recognition of the equal and inalienable rights “of all members of the human family”.

<sup>49</sup>Adopted by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977. Appendix II.

Another important international instrument is the *UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment*.<sup>50</sup> The Body of Principles serves as a non-binding but authoritative set of minimum standards for treatment of all individuals in detention. The relevant basic rights set out are:

- To be given an effective opportunity to be heard promptly by a judicial or other authority, the authority to challenge the lawfulness of the detention before a judicial or other authority, and to be advised of all relevant rights/rules in a language they understand;
- To be allowed adequate opportunities to communicate with and receive visits by legal counsel and family members;
- To make a request or complaint regarding treatment.

The Body of Principles further assures that stateless persons, those who are not considered to be nationals by any State, are entitled to benefit from the same standards of treatment as those in detention generally. Special focus is given to persons held in detention without being suspected for a crime to ensure treatment appropriate to their unconvicted status.

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>51</sup> was designed to prevent and punish torture committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in a official capacity”.<sup>52</sup> The Convention defined torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for the purpose, *inter alia*, of “obtaining from him or a third person information or a confession”.<sup>53</sup>

The *UNHCR Guidelines on the Detention of Asylum-Seekers*<sup>54</sup> deal specifically with the detention of asylum-seekers. However, the Guidelines also highlight the majority of stateless persons which are not asylum-seekers and recognise that “the basic standards and norms of treatment contained in international human rights instruments applicable to detainees generally should be applied to both asylum seekers and stateless persons”. The guidelines are therefore applicable to all persons held at Lindela.<sup>55</sup> The relevant guidelines are:

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<sup>50</sup>Adopted by General Assembly resolution 43/173 of December 4, 1988.

<sup>51</sup>Adopted by the UN General Assembly on December 10, 1984 and entered into force on June 28, 1997.

<sup>52</sup>Article 1(1)

<sup>53</sup>Ibid

<sup>54</sup>UNHCR/IOM/22/99 and UNHCR/IOM/22/99

<sup>55</sup>Ibid page 2

Guideline 5: Asylum-seekers should be entitled to the following minimum procedural guarantees:

- To receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand;
- To be informed of the right to legal counsel; where possible asylum-seekers should receive free legal assistance;
- To have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by a regular periodic review of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend;
- To contact and to be contacted by the UNHCR, available refugee bodies (...) And an advocate; and that
- Detention shall not constitute an obstacle to an asylum-seeker's possibilities of pursuing their asylum application.

Guideline 6: Detention of Persons under the age of 18:

- Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members. Where this is not possible, alternative care arrangements should be made by competent child care authorities for minors to receive adequate accommodation and appropriate supervision;
- If none of these alternatives can be applied, the detention of minors should, in accordance with article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time; and
- A legal guardian or advisor familiar with the minor's language and culture should be appointed for unaccompanied minors;

Guideline 8: Detention of Women:

- As a general rule the detention of pregnant women in their final months and nursing mothers should be avoided;
- Where women asylum-seekers are detained they should be accommodated separately from male asylum-seekers, unless they are close family relatives. In order to respect cultural values and improve the physical protection of women, the use of female staff is recommended; and
- Women should be granted access to specific services in response to their special needs (gynaecological and obstetrical services);

Guideline 10: Conditions of Detention:

- Conditions of detention should be prescribed by law;
- Segregation within facilities of men and women, children from adults;
- Separate detention facilities to accommodate asylum-seekers. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand;
- Opportunities to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;
- Opportunities to receive appropriate medical treatment, and psychological counselling;
- Opportunities to conduct some form of physical exercise through daily indoor and outdoor recreation activities;
- Opportunities to continue further education or vocational training;
- Opportunities to exercise their religion and to receive a diet in keeping with their religion; and
- Access to a complaints mechanism where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

### 3 Accountability Systems

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Principle 29 of the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* stipulates that “in order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the places of detention on imprisonment.”<sup>56</sup> The concept of accountability represents the relatively new virtue of transparency and provides a mechanism of external independent supervision of alleged mistreatment of detained persons. The efficient and credible handling of the complaints of detainees can also be regarded as an important factor in promoting efficiency at Lindela.

This chapter outlines experiences from national and international accountability systems with special attention drawn to the controversial concept of a privately operated detention centre for undocumented migrants. Any accountability system at Lindela must clearly identify the division of responsibility between the DHA and Dyambu as set up by the ACA and more pertinently the contract between the two. While the DHA is responsible for the processing and declaration of who is a prohibited person and decisions of deportation, Dyambu is responsible for the provision of facilities for detention of the undocumented migrants including the detention services such as guarding, maintenance, cleaning, food and health. The division of accountability is however not as clear as this. Although Dyambu may not be involved in the determination or declaration of who should be detained at Lindela, they share the duty of care with the DHA to make sure that nobody is illegally detained at the facility. The DHA as contractors equally share the accountability for the day-to-day management of the facility with Dyambu.<sup>57</sup>

#### 3.1 Internal Control

The ACA provides no statutory limitations or immediate oversight on the operation of Lindela. Further, there are at the present time no formal procedures for the inspection of the facility. The problem has three aspects. Firstly, the DHA has no apparent statutory powers to review, monitor or report on activities at Lindela. Nor does the Department have the authority

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<sup>56</sup>UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, Adopted by the General Assembly resolution 43/173 of 9 December 1988.

<sup>57</sup>The Joint Standing Committee on Migration argues that the Australian Government and ACM, as service provider, have a shared duty of care to detainees, *Report of Inspections of Detention Centres throughout Australia*, August 1998, page 5. Section 1.1 of the Immigration Detention Standards rules that the contractor must satisfy itself that the detention of any person is authorised by the Migration Act.

to intervene in a situation at the centre which threatens to get out of hand.<sup>58</sup> The contract between the DHA and Dyambu provides no such powers. Dyambu's accountability for the management of Lindela thus relies on the inspection and supervision from an independent body.<sup>59</sup> Equally, public confidence in the DHA and its concept of a privately operated detention centre for undocumented migrants relies on a mechanism of external civilian control of the facility.

However, no external body is specially designated by the DHA to visit the facility with the aim of supervising its operation. The SAHRC, with limited means to visit the facility regularly, has for the last three years exercised its powers to investigate and report on the conditions at Lindela. However, the intention of these visits has not been to report on the day-to-day operation of the facility, but to make recommendations for structural improvements. For example, the SAHRC has recommended that a permanent inspectorate should be established to "visit persons held in terms of the ACA to monitor compliance with arresting guidelines, the Act, and the constitutional provisions relevant to arrest and detention in terms of the Act."<sup>60</sup>

Thirdly, both the DHA and Dyambu have chosen to conceal information on matters relating to their internal investigation and control instruments. Dyambu, as a private entrepreneur, has argued that they do not have any legal obligation to disclose information about Lindela to the public. For example, Dyambu has repeatedly held internal disciplinary hearings on matters concerning the treatment of detainees and any corrupt or dishonest practices at the facility. The last observed hearing was held on 23 September 1999 and concerned the alleged assault of a man from Mozambique. The SAHRC was initially invited to attend the hearing, but was later refused access as Dyambu held that the hearing was to take place only in the presence of staff from Dyambu. The SAHRC was also denied access to part of the report from the hearing, and was only informed verbally that four staff members were dismissed because of

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<sup>58</sup>Prisons in South Africa have been contracted out to private contractors since the Correctional Services Amendment Act 102 of 1997. There are specific statutory limits on the contractor as set out in section 104 of the new CSA 1998. The contractor must for example "enforce the sentence of the courts in a manner prescribed by the Act" and be "detaining all prisoners in safe custody whilst ensuring their human dignity". Further, any prison rules proposed by the Contractor must be approved by the Commissioner of Services. Section 112 of the Act rules that the Commissioner in an emergency may take over the management of a contracted-out prison.

<sup>59</sup> The CSA provides for the inspection and supervision of contracted-out prisons by the inspecting Judge (section 25A) his assistants (section 25B), the Independent Prison Visitors (section 25G) and the Visitors' Committee (section 25I) as if they were fully part of the department.

<sup>60</sup> Recommendation no 10 of the South African Human Rights Commission Report, *Illegal? Report on the arrest and detention of persons in terms of the Aliens Control Act*, March 1999.

the assault. Dyambu indicated in a meeting on 8 December 1999 that all disciplinary hearings at Lindela would be open to the SAHRC in the future. Also, the DHA has been conducting internal investigations at the facility, none of which have come to the attention of the SAHRC. For example, the Departmental Anti-Corruption Unit has been present at Lindela after there had been allegations that immigration officers were accepting money in exchange for release of detainees from the facility. Ms Makola informed the SAHCR on 8 December 1999 that there had been no convictions as result of the investigation.

### **3.2 The Judicial Inspectorate**

It is worthwhile to look at the accountability framework of the Department of Correctional Services. Section 85(1) of the CSA 1998<sup>61</sup> provides for the establishment of an independent office, called the Judicial Inspectorate, under the control of the Inspecting Judge. The objective of the Judicial Inspectorate is to “facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners and on conditions and any corrupt or dishonest practices in prisons.”<sup>62</sup> The Act makes provisions for the appointment of a number of officials and assistants to report to the Inspecting Judge on matters relating to the treatment of prisoners and conditions in the prisons. The assistants often have a legal, medical or penological background and conduct particular investigations requested by the Inspecting Judge.

A complaints system for persons is established in terms of the Independent Prison Visitors programme. Inspections of prisons are conducted by lay persons from the local community, as appointed by the Inspecting Judge. A Visitor may not on his or her own volition conduct any inspections or enquiries into any matters besides attending to the complaints of prisoners.<sup>63</sup> Complaints of an urgent nature, such as assaults, hunger strikes, detention in prison, segregation and solitary confinement must receive priority treatment to ensure that the resolution of such complaints is monitored efficiently.

In terms of provisions of s 93(1) of the CSA, the Visitors shall deal with these issues by:

- Regular visits;

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<sup>61</sup>Act 111 of 1998

<sup>62</sup>Ibid section 85(2).

<sup>63</sup>In terms of s 21(1) of the CSA, “every prisoner must, on admission and on a daily basis, be given the opportunity of making complaints or requests to the Head of Prison.” All complaints must be recorded and dealt with promptly and the prisoner must be advised of the outcome. The matter is only referred to the Independent Prison Visitor if the prisoner is not satisfied with the internal investigation.

- Interviewing prisoners in private;
- Recording complaints in an official diary and monitoring the manner in which they have been dealt with;
- Discussing complaints with the head of prisons, with a view to resolving the issues internally;
- Reporting any unsolved complaints to the visitors' committee and the inspecting judge.<sup>64</sup>

An Independent Prison Visitor must be given access to any part of the prison and to any documentation or record related to the performance of his or her duties. The right of access may not be limited by security rules. Should the Head of Prison refuse any request from a Visitor, the dispute must be referred to the Inspecting Judge, whose decision will be final.

The establishment of the Judicial Inspectorate was only introduced a few years ago and no evaluation of its impact on prison conditions has, to my knowledge, yet been conducted.

### **3.3 Community Visiting Schemes at Police Holdings**

The police have a different system of accountability. The purpose of the Community Visitor Schemes “is to enable members of the local community to independently observe, comment and report on the conditions (...) governing their welfare and in accordance with the fundamental human rights, with a view to secure greater public understanding and confidence in these matters (...) and is aimed at promoting confidence in the work of the Police and to bring the Police and the community closer together.”<sup>65</sup>

Community visiting is concerned with the making of unannounced visits through which random checks can be made by independent persons on the detention and custody of detainees in police cells. Community visitors are authorised to enter police stations and, subject to the consent of detainees, are entitled to talk to detained persons about the conditions of their detention and welfare while in police custody and to peruse their custody records. The guidelines prescribe that such interviews should take place out of hearing, but in sight, of escorting police officers. After completion of visits, community visitors submit written reports on their experience to relevant parties (i.e. the Station Commander and District Commissioner).<sup>66</sup>

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<sup>38</sup>For a detailed guideline of the work procedures for dealing with complaints see Appendix III.

<sup>65</sup>Policy Guidelines: Community Visitor Systems, para.2.

<sup>66</sup>Ibid. Para.4.1.

Items to be monitored include the conditions of the cells, accessibility of legal advice, whether parents of juveniles have been informed and access to medical attention. Experience from the visitors' reports has shown that physical conditions of detention predominate in the complaints whereas issues related to hygiene, food and medical complaints head the list of reports.<sup>67</sup>

The guidelines also stipulate that visitors must be persons of good character, over the age of 21 and resident in the area served by the police station. In most instances, the consultative committees or other interested individuals are nominated for the lay visiting panels.<sup>68</sup>

Criminologist Elena van der Spuy<sup>69</sup> has been evaluating the impacts and merits of the visiting schemes and suggests that the system has been beneficial for the interaction between community representatives and the police. Yet, she is more critical as to whether the lay visiting schemes in fact have been contributing to the actual prevention of human rights abuses by the police. Van der Spuy concludes that to make the visiting schemes effective, it is imperative to provide the kind of monitoring and infrastructure whereby both minor and serious complaints recorded by lay visitor are speedily processed and attended to. It is thus clear, in the view of van der Spuy, that there is a need for a centralised structure to monitor and follow up complaints and serious allegations by the visitors. Local visitors, as the scheme is structured today, have no resources beyond the local station commander.

She also suggests a need for professionalisation of the visiting schemes through proper training, provision of organisational resources and infrastructural support for lay visitors, the creation of opportunities for networking among lay visitors, the establishment of minimum guidelines for visitors and publication of annual reports.<sup>70</sup>

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<sup>67</sup>Ibid page 64.

<sup>68</sup>See report by the Association for the Prevention of Torture, *The Impact of external visiting of police stations on prevention of torture and ill-treatment*, Geneva 1997, page 63.

<sup>69</sup>See Van der Spuy, *Civilian Scrutiny of Once Forbidden Territory: Reflections on Lay Schemes to Detainees in Police Custody, From Little Ad Hoc Assault to Systematic Patterns of Torture: Does Lay Visiting to Police Detainees Make a Difference*, delivered at VII International Symposium, Caring for Survivors of Torture, Cape Town 15-17 November 1995 and *Civilian Scrutiny on Once Forbidden Territory: Reflections on Lay Visiting Schemes to Detainees in Custody*, delivered at IDASA conference, Civic Involvements in Correctional Services, Johannesburg, 17-18 March 1995.

<sup>70</sup>See also Thomas Winslow, *Recommendations for Improving Community Visitor Scheme Africa*, e-mail sent to Elena van der Spuy, 24 June 1998, where these recommendations are addressed to the Minister of Safety and Security.

### 3.4 Lay Visiting Schemes in England and Wales

Introduced in 1983, the National Association for Lay Visiting (NALV) was established to promote lay visiting and to help formulate and promote good practice. The NALV is funded by a grant from the National Lottery and in part by the Police Authorities. The regulatory framework of the lay visiting system in England and Wales is not statutory but is governed by the Home Office through Circular 4/1992. This could be considered a weakness as it does not give lay visitors any real power. At best "they can identify shortcomings and make recommendations regarding general conditions and facilities of detention in police stations".<sup>71</sup>

There are two aspects of the lay visits; the welfare and treatment of the detainees and the conditions and environment of their detention. This is based on the Codes of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C), PACE.<sup>72</sup> The main aspects of the Circular are the following:

- Visits to police holdings should be made unannounced and not at regular or predictable times;
- Visitors should be appointed from members of the public and most often get some kind of training. It is recommended that the visits are undertaken in pairs;
- The lay visitors should have access to visit any part of the custody area and be admitted to speak to detained persons in private and examine the documents relating to their detention and treatment but not the investigation of the alleged offence for which they are being held;
- The lay visiting does not include the observation of interrogation and interviews. They should neither take up individual cases nor make representation on behalf of detained persons.<sup>73</sup>

It is recommended that concerns and internal solutions be raised at the time of a visit so that custody staff can remedy the situation. Formal feedback of the complaint is requested from a senior officer of the concerned police station while reports on actions taken and procedures followed are provided to the Chief Constable and the Police Authority. Despite the positive

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<sup>71</sup>Kemp, C & Morgan, R, *Lay Visitors to Police Stations-Report to the Home Office*, Bristol and Bath Centre for Criminal Justice (1990), page 13 as cited by van der Spuy in *Civilian Scrutiny on Once Forbidden Territory*, page 3.

<sup>72</sup>The Police and Criminal Evidence Act, 1994. PACE states that a detainee has the right: to have a third party informed of his or her detention; to have access to legal advice; and to request and be examined by an independent medical doctor of his or her choice. PACE further stipulates special protection for juveniles and the mentally disordered in police interrogations.

<sup>73</sup>See Association for the Prevention of Torture, *The Impact of External Visiting of Police Stations on Prevention of Torture and Ill-treatment*, (1999), pages 30-32.

aspects of the lay visiting scheme and its potential to contribute to the general improvement of the physical conditions of detention, a weakness of the system is that it does not provide any formal or institutional back-up with credibility as an independent oversight mechanism.

### **3.5 Police Cell Monitoring Programme in Hungary**

Following reports on the need for critical investigation into the conditions in police cells<sup>74</sup>, the independent organisation Hungarian Helsinki Committee was given access to monitor the situation of detainees in Hungarian police holdings. According to the agreement between the Hungarian Helsinki Committee and the National Headquarters of Penitentiary Institutions (the National Commander in Chief of Penitentiary Institutions), the monitoring should include the following:<sup>75</sup>

- Conditions of the detention buildings and their sections;
- Treatment of the detainees;
- Conditions of detention;
- Ensuring rights of detention;
- Care for detainees' physical and other medical and hygienic needs;
- Quality of relations between detainees and cell guards.

The monitoring groups were permitted to visit police facilities at any time, even at night, without any advance notice. The members were authorised to view the holding and booking areas, cell blocks and cells and to converse with persons held under arrest without the security guard listening to the conversation.

The three-member group visiting jails was led by a practising attorney who had worked in human rights programmes or in human rights advisory offices. The other two members were either physicians, sociologists, psychologists, teachers or social workers recruited from certain groups of human rights activists.<sup>76</sup>

If the detainees reported conspicuous irregularities or violations of their rights, the monitors

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<sup>74</sup>See reports from the European Committee for the Prevention of Torture, the Hungarian Prosecutor General, the Commissioner for Civil Rights and the Human Rights Commission.

<sup>75</sup>A copy of the agreement is enclosed as Appendix 2/a in Arie Bloed: "Preface II" in *Punishment before Sentence - Detention and Police Cells in Hungary 1996*, (1998).

<sup>76</sup>See Appendix 5 of *Punishment Before Sentence* (1998) for a list of names and professions of the members of the working groups.

reviewed, with their consent, the personal documents relating to their detention.

The work of the Committee resulted in a report to the National PHQ Public Order Department which included opinions of the observers expressed together with a report on the action taken or proposed for the elimination of any discovered shortcoming.<sup>77</sup> According to Ferenc Koszeg, Executive Director of the HHC, the monitoring programme did not initiate much change in the situation of the police cells, but mainly contributed to changes in the legal regulation of detention.<sup>78</sup>

### **3.6 The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

The Convention provides non-judicial preventive machinery to protect persons held in detention and is based on a system of visits by members of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The CPT's members are independent and impartial experts from a variety of backgrounds, including law, medicine, prison affairs and politics and are elected for a four-year term.

The CPT visits places of detention to observe the treatment of detainees and, if necessary, makes recommendations for improvements. Delegations, usually two or more CPT members, visit for one or two weeks, accompanied by other experts, members of the Committee's Secretariat and interpreters. CPT delegations visit Contracting States periodically but may organise additional "ad hoc" visits if necessary.

Under the Convention, CPT delegations have unlimited access to places of detention and complete freedom of movement within them. They interview detainees without witnesses and have free access to anyone who can provide information. Their recommendations, if any, are included in a report, which is a basis for dialogue with the state concerned.<sup>79</sup>

The CPT pays special attention to immigration detainees and suggests that "they should be accommodated in centres specially designed for the purpose, offering material conditions and

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<sup>77</sup>Circular No. 3/1996, printed in Appendix 2/a of *Punishment Before Sentence* (1998).

<sup>78</sup>Association for the Prevention of Torture, *The Impact of External Visiting of Police Stations on Prevention of Torture and Ill-treatment*, (1999), page 59.

<sup>79</sup>The Human Rights Information Centre, Council of Europe, Secretariat of the CPT.

a regime appropriate to their legal situation and staffed by suitably qualified personnel.”<sup>80</sup>

Such centres should provide accommodation which is clean and which offers sufficient living space for the numbers involved. As regard activities, they should include outdoor exercise as well as access to appropriate means of recreation.

Immigration detainees should, in the same way as other categories of persons deprived of their liberty, be entitled to inform a person of their choice of their situation and have access to a lawyer and a doctor. Further, they should be expressly informed, without delay and in a language they understand, of all their rights and of the procedure applicable to them. More generally, immigration detainees should be entitled to maintain contact with the outside world during their detention.

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<sup>80</sup>Ibid page 35

## 4 Findings

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This investigation was conducted over a four month period, September to December 1999. The findings in this report are based on visits to the Lindela repatriation centre during which information about the facility has been collected, mainly through participant observation. Most of the findings in this report are direct observations by the researcher. The selection of persons interviewed has been done randomly though informally and does not necessarily represent all persons detained at Lindela. Instead, the intention is to allow detained persons at Lindela to have voices of their own to express their personal experiences of the facility. Also, the findings in this report are mainly aimed at providing evidence on continued intolerable conditions at the facility and do not purport to give a comprehensive assessment of the facility.

On 3 September 1999, a team consisting of Jody Kollapen, Commissioner of the South African Human Rights Commission, Andrew Rens of the Wits Law Clinic, Jacob van Garderen from Lawyers for Human Rights, and Emma Algotsson made an initial visit to meet up with representatives from DHA and Dyambu. Despite the initial positive response to the investigation, Emma Algotsson was denied access to the facility on her first two attempts to visit Lindela on her own. Only after further pressure was she given access to the facility.<sup>81</sup>

The first few visits at Lindela were spent mainly with staff from both the DHA and Dyambu to gain an understanding of security issues and the administrative process at the facility. The operation of Lindela is complex and it took several visits to Lindela to gain a complete understanding of the facility. The remaining visits were mainly spent in either the entrance hall for the observation of conditions relating to the apprehension or deportation of persons or in the two main courtyards trying to grasp an understanding of the conditions at the facility. As a general rule, all interviews with detainees were conducted in confidentiality without the presence of staff from Lindela. Some of the interviews were completed with the assistance from students from the Wits School of Law who served as interpreters. The following chapters contain the findings from these visits, including a discussion about some of the problems that were discovered.

### 4.1 Apprehension Process

The *Illegal?* report published by the Commission in March 1999 made several findings about inadequate methods relating to apprehension, both by the arresting police and the DHA.

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<sup>81</sup> See chapter on SAHRC access to Lindela.

Arrested persons were deliberately prevented from providing accurate documents, valid identity documents were destroyed, bribes were taken for avoiding arrest or for release without documentation and processes were delayed by inefficient investigation methods and insufficient communication between the different departments. As a consequence, many persons with valid documents were arrested and brought to Lindela. The SAHRC recommended in its report that the DHA should disseminate concise guidelines to arresting officers to ensure clear and consistent criteria for the arrest.<sup>82</sup> This report can, without focusing directly on the arrest of undocumented migrants, confirm that such misconduct is still occurring.

Two girls from Swaziland had been arrested while on holiday visas in SA. The arresting police did not ask to see their passports and refused to look at them when shown by the girls. Another man from Zimbabwe had his passport torn by the arresting police officer.

South African residents with valid passports complain about being arrested because they cannot prove that they have valid papers to be in the country. A woman explained that she had been arrested outside her own house but was not allowed to fetch her documents. She had been at Lindela for 3 days before her documents were brought to Lindela by her relatives.

Other persons explain that they have paid money to avoid being arrested. A woman from Mozambique had been arrested and brought to Lindela for the first time although the police approached her "at least every week". She had avoided being arrested by paying the police between R40 and R500 on five different occasions for not being arrested. She had also bought a South African ID book for R500. "There is a difference between black and white police officers. White police officers let you go if you can show them any kind of documents, while black police officers tear your papers even though they are valid."

A mother of two daughters explained that she had once paid R200 for each of her daughters to get them released from a police holding where they had been arrested for two days. Both of the daughters had paid R500 for their South African ID books. The woman had also been arrested once herself and then paid R100 to the arresting police officer at the police station.

It is also evident that unnecessary violence is used by arresting police officers. One woman had surgery on her leg just a few days before she was arrested. She had told the police that she could not walk fast for that reason. The police, however, ignored her complaints and

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<sup>82</sup> See recommendation no 1, SAHRC *Illegal?* report, March 1999.

pushed her into the police van. The force that the police used had caused her great pain and complications with her surgery. Another man showed his hands, arms and shoulders which were swollen and blue from violence he had been exposed to during his arrest. The police assaulted the man for refusing to help them in locating his friend who had escaped from the police. His hands were beaten against the pavement with a brick and the doors of the police van jammed his arms. He was then arrested and brought to Lindela. His South African documents were destroyed by the arresting police officers.

*The South African Human Rights Commission recommends that regulations for the arrest of undocumented migrants shall be made and published and that DHA should disseminate concise guidelines to arresting officers to ensure clear and consistent criteria for the arrest.*

#### **4.1.1 Conditions relating to Arrival at Lindela**

Lindela serves as the only specialised detention facility for undocumented migrants and receives arrested persons from all over the country. Some individuals are arrested under either s 53 or s 10(5)(b)(ii) of the ACA and are transported to the facility the same day by the arresting police or immigration officer. These persons have not been declared prohibited persons in terms of s 9 of the Act prior to their arrival to Lindela and are still to be examined by an immigration officer according to the steps as set out in s 7 of the Act. This administrative procedure should be conducted within 48 hours of the arrest.<sup>83</sup> These procedures were pointed out to the DHA by the SAHRC in their previous report on Lindela.<sup>84</sup>

Others may have to spend some time in ordinary police holdings before they arrive to Lindela. A suspected undocumented migrant may be held for 48 hours in the police cell before a s 7 investigative procedure by an immigration officer followed by a s 9 declaration of the person to be a prohibited person should be conducted. The Act does not regulate the maximum time an undocumented migrant may be held in police detention except for the regulations under s 55(5) of a maximum of 30 days without being reviewed by a judge. However, as a general rule it should be respected that the conditions in police stations are not adequate for prolonged periods of detention and should be kept to the absolute minimum.<sup>85</sup>

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<sup>83</sup> Section 55(1) reads: “If any person is detained under the provision of this Act (...) such detention shall, (...) not be for a period longer than 48 hours from the time of his or her arrest, or from the time on which he or she was taken into custody, or from the time on which an examination in terms of section 7 commences”.

<sup>84</sup> See recommendation no 7, SAHRC *Illegal?* report March 1999.

<sup>85</sup> As pointed out by the CPT (The Human Rights Information Centre, Council of Europe, Secretariat of the CPT, page 22)

Persons arriving at Lindela from police custody and who have been arrested for more than 48 hours should have been declared prohibited persons prior to their arrival. Documents from police holding facilities should include the date of arrest, the result of the s 7 enquiry, country of origin, and whether or not the person has been declared a prohibited person.<sup>86</sup>

Persons arrested under the ACA, mostly from parts of South Africa other than Gauteng, may also be held in prisons until suitable transport to Lindela is provided. In certain exceptional cases it might also be appropriate to hold an undocumented migrant in prison because of the person's known potential for violence. As for persons held in police detention, individuals who arrive at Lindela from prisons should have been examined by an immigration officer and declared prohibited persons prior to their arrival.

Although the actual conditions of detention for undocumented migrants held in prison are adequate, a prison by definition is not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence. Furthermore, such detainees should be held quite separately from prisoners, whether on remand or convicted.<sup>87</sup> Five men who arrived to Lindela from Pollsmor prison explained that they had been held together with suspected criminals both at the prison and at different police stations prior to their arrival to Lindela. They had all been robbed by other detainees at Pollsmor.

Given this, it is unfortunate that the apprehension process at Lindela does not take into consideration whether or not persons have been detained prior to their arrival at Lindela. According to Mr Mogali, senior immigration officer at Lindela, few have been examined by an immigration officer prior to their arrival to Lindela. In the cases where an examination has taken place, their papers rarely state the result of such an investigation. It is also common that immigration officers at Lindela will not be informed of the date individuals were arrested. One reason seems to be that persons are transferred between different prisons and police holdings prior to their arrival at Lindela with no or little communication between the different institutions. "As it is right now, many persons come to Lindela without any documentation and the staff at Lindela have to start from the beginning with the investigation." Mr Mogali further explained that immigration or police officers from other districts are reluctant to give away any information regarding the arrest.

One person stated on 8 October 1999 that he had been held in a police cell for two days

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<sup>86</sup>See recommendation no 4, SAHRC *Illegal?* report, March 1999.

<sup>87</sup>Ibid

before he was taken to Pollsmor prison where he was detained for five days. During those five days he did not talk to any immigration officer and was thus not declared a prohibited person prior to his arrival at Lindela. He arrived at Lindela on 1 October and was thus registered that day.

Another man from Ghana explained that he had spent 32 days at Pollsmor prison before he was transferred to Lindela on 1 October 1999. His papers from Pollsmor stated that he had been declared a prohibited person during his detention at Pollsmor, although he argued that he had never talked to anybody from the Home Affairs until his arrival at Lindela. He had even asked to see an immigration officer but this had been denied. The man had applied for asylum a few weeks before he was arrested. While at Lindela, he had not been able to talk to anybody about his asylum application, but only had once seen the immigration officer for a few minutes. "The man was only interested in my nationality and not the reason why I came to South Africa".

A third man explained that he had been held for 12 days at Sea Point police station before he arrived at Pollsmor prison where he was held for 17 days. He had spoken briefly with an immigration officer the day before he arrived at Lindela on 1 October 1999, but not been able to talk to anybody about his situation since then. All three persons described how the security staff at Pollsmor prison refused assistance to any person who was detained under the Aliens Control Act "as they were not dealing with undocumented migrants".

In the *Illegal?* report from March 1999, the SAHRC addressed this problem and recommended that "arresting officers should, simultaneously with arrest or as soon as is practically possible thereafter, document the date, place and reason for arrest (...) and a copy should be presented to Home Affairs at Lindela upon the admission of the detainee at Lindela."<sup>88</sup> No such measures seem to have been taken by the DHA so far. Immigration officer Mr Mogali has been contacting immigration and police officers, requesting relevant documentation of persons admitted to Lindela. Initial contacts have also been made with the SAPS in Gauteng West to start negotiations about a joint effort to solve the problem in the region. The SAHRC has pointed out to the DHA that measures ought to be taken to implement a national system for the monitoring of persons arrested under ACA.

***The South African Human Rights Commission recommends:***

- ***That persons arrested under the ACA and held in prisons, police holdings or at***

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<sup>88</sup> See recommendation no 4, SAHRC Report on Lindela March 1999.

*Lindela shall be determined to be prohibited persons or not by an immigration officer within 48 hours of arrest;*

- *That detention in prisons and police holdings shall be kept to the absolute minimum and that individuals detained under the ACA shall be held separate from suspected criminals and arrested persons; and*
- *That documentation from prisons and police holdings shall be incorporated in a standardised form, which shall include the date of arrest, the result of the immigration investigation and country of origin.*

#### **4.1.2 Investigation process at Lindela**

In the case of a s 7 examination, immigration officers should initiate an investigation process on which they later base their decision as to whether someone should be declared a prohibited person or not. In practice however, individuals are treated as prohibited persons without a declaration taking place at all. Persons arriving at Lindela are brought into a large entrance room where their country of origin is confirmed, from the accompanying police or body receipts, and whether they have valid documents to remain in the country. This process only takes a few minutes and does not constitute a proper s 7 investigation. The examinations are carried out with a lack of both privacy and accuracy. It was observed on 18 October 1999 that a female immigration officer stood 10 metres from the persons she interviewed, calling their names from the list. None of the persons were given the opportunity to speak to the immigration officer in person.

It has also been observed that persons are taken directly from the arrival room into the main building of Lindela without even being reported. The reason given by the consulted immigration officer was that they were occupied administrating the repatriation of 600 persons to Mozambique at the time and that there were no personnel available to deal with the arrivals on that particular day.

Persons suspected of being illegally in the country shall also be given the opportunity to produce documents or other evidence of their right to be in the country. In its previous report on Lindela, the SAHRC recommended that all suspected prohibited persons should be advised of their right to satisfy the arresting officer that they are entitled to be in the country. Arresting officers should also assist such suspects to obtain and retrieve such documentation.<sup>89</sup> This right is limited for several reasons. Immigration officers often make a judgement of where a person comes from based only on facts or the body receipts. It is rarely

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<sup>89</sup> See recommendation no 2, SAHRC *Illegal?* Report March 1999.

taken into account that a person claims to come from a different country. This may indicate a preconceived attitude among immigration officers at the facility that the suspected persons are lying about their identity. For example, a number of detainees have explained that they were forced to state wrong country of origin in the examination, while some persons have argued that they had been beaten by immigration officers to state a given country of origin.

It was observed on 18 October 1999 that a woman was registered as a Mozambican despite her efforts to explain to the immigration officer that she was from SA. The reason given by the immigration officer in charge was that she needed to register as an undocumented migrant until the investigation was completed. However, once a person has been registered and issued an identity card at Lindela it is very rare that the country of origin of that person is changed and corrected.

The unconstitutionality of arresting a person on the grounds that he or she does not carry identity documents has been discussed above. Furthermore, the DHA has no statutory right to detain a person who can produce valid evidence that he or she has a right to stay in the country. Persons with, for example, South African identity documents or s 41 asylum should be released upon showing such documents. A woman had been arrested by the police on 18 October 1999 at 7.30 in the morning. She had shown her South African ID book to the arresting police but was still brought to Lindela. She arrived at Lindela at 10am and had, by 2.00 that afternoon, still not been given the opportunity to show her documents to the immigration office. At least 10 people in the same situation were observed on the same day.

A further problem is that demonstration of identity documents does not automatically guarantee that the person will be released, since the immigration officer must be convinced that the person is telling the truth. Individuals are often asked to produce other forms of proof such as birth certificates, school records, parents' ID books etc. Consider next that the burden of proof of entitlement to be in the country lies with the person arrested. Many persons are arrested on the street and choose not to carry their documents because of the threat of them being torn by the arresting police officers. Ms Makola from the DHA, Gauteng West, has explained that the DHA suggests that individuals take a photocopy of their documents because of this evident risk.<sup>90</sup> Individuals are further asked questions about their perception of South African languages, geography and culture. These questions can be illustrated by examples of conversations in English, which were observed on 18 October 1999:

“Where are you from? *Durban*. What languages do you speak? *Zulu*. Only *Zulu*? *Yes*. Is your

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<sup>90</sup> Expressed in a meeting with the SAHRC on 8 December, 1999.

name in Zulu? *Yes. Go away. You are just taking a chance.*”

“Where are you born? *In Pietersburg. In what area exactly? In Pietersburg.* If you are born there, you must know the area. Where exactly are you born?” The immigration officer thought the man was too vague and left him.

“Who are you? *I am .... Do you have an ID? Show me your arm.*” (The man had a mark from his TB-vaccination on his forearm) “Sit down you are wasting my time. “

The woman who was asked whether she spoke Zulu was told that she would not be released until she could produce either a birth certificate or her mother’s ID book because she did not understand what the immigration officer said. The man who had been requested to show his arm was deported because of his TB-mark. The immigration officer presumed that all South Africans have TB-marks on their upper arms.

As a consequence, persons with valid South African documents may be held at Lindela until they can produce satisfactory documents. According to an immigration officer, this takes “normally not more than five days, all depending on our workload and access to equipment to investigate the legality of produced documents”.

Persons detained at Lindela have limited means to produce necessary documents, as one detainee expressed it, “how can I prove anything when I am here at Lindela and when I have got no money to make any phone calls?” This is of special concern for persons truly without further proof of identification or individuals living in remote rural areas with difficulties in contacting friends and relatives. One woman, whose mother was South African but whose father was from Zimbabwe, explained on 8 October 1999 that she had tried to contact her family for over a week, but that they did not have any phone at home. She was thus held at Lindela for a week although she had a South African ID book at home and consequently missed her final secretaries’ exams. Other persons explain that immigration officers at Lindela had lost their papers or that Home Affairs refused to accept them as valid proof of their identity.

***The South African Human Rights Commission recommends that the burden to prove that a person resides illegally in the country should be on the DHA.***

#### **4.1.3 Free phone calls**

A vital instrument for being able to provide requested documents is the access to phones,

both at police holdings and at Lindela. Chapter 3 of the CSA allows a prisoner to notify his or her next of kin on admission or transfer to a prison. Access to phones is also important for detainees to be able to exercise their right and to communicate with legal practitioners and different organisations which provide legal services. Five persons who were asked whether they had been allowed to make any phone calls while detained at Pollsmoor prisons all stated that they had not. One of the men had been detained for 32 days at Pollsmoor before he arrived to Lindela.

Both the DHA and Dyambu have confirmed the right for every detained person to make at least one free phone call upon their arrival to Lindela.<sup>91</sup> Nonetheless, it is unclear when this right can be exercised and who should be responsible for the provision of phones at Lindela. There are no phones, public or free, located in the entrance room and nobody has been observed making any free phone call from the facility. Once an immigration officer informed a woman of her rights, but she was even so not allowed to make the free phone call. When asked for the reason, the immigration officer explained that all free phone calls were made within the main office under supervision of Dyambu staff. There are two telephones in the Dyambu office, both of which are situated behind partitions but with no privacy for the person using them. Only Dyambu staff have access to these telephones.

A woman with a 1½-year-old child at a day care centre explained on 22 October 1999 that she had tried to phone from the police station where she had been detained for one day before she arrived at Lindela. She had paid the police officer, but was still not permitted to inform her relatives about her arrest and to make arrangements for them to collect her child at the day care centre. She had been detained at Lindela for three days before she was allowed to make her first phone call. This phone call was not free.

There are public phones available at different places at Lindela. Some are placed in the male courtyard, which gives the men free access to phones most days. However, most phones, and all phones for the women, are situated in a room outside the living areas. Men and women have to ask permission to use these phones. Three women explained on 22 October 1999 that they had been at Lindela for four days without being able to contact their families. None of them had been offered a free phone call. One woman had tried to use the pay phone the first day she arrived but had been threatened by the security staff: “When we ask to phone, they always tell us it is the wrong time, but they have never told us when is the right time to call so we don’t know what to do now”. Persons held at Lindela also express a concern about the

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<sup>91</sup>Section 35 (2)(f) of the Constitution gives the right to every detained person to communicate with his or her spouse or partner and next of kin.

cost of making phone calls. Persons who did not carry money when they were arrested can often not afford to keep in contact with their families. It is therefore important that Lindela provide the opportunity to make collect calls from the facility.

Dyambu has agreed to make arrangements so that new arrivals will be offered the service of at least one free phone call. Only national phone calls will be permitted. The DHA has argued that all free phone calls should be completed in the first stage of the apprehension process, as expressed by one of its immigration officers on 1 October 1999. "When someone is taken into Lindela, it should be clear that he or she is a prohibited person and it is therefore not necessary for those individuals to receive the same service." However, for basic accountability to be achieved, it is necessary that opportunities are given to persons who have been declared prohibited persons to appeal such decisions and to consult with legal practitioners.

*The South African Human Rights Commission recommends:*

- ❑ *That opportunities are provided for arrested persons under the ACA to make at least one free phone call shortly after the arrest; and*
- ❑ *That opportunities are provided for persons detained under the ACA to make an unlimited number of phone calls from public phones.*

#### **4.1.4 Information about rights and obligations**

Every detainee has the right to be informed about his or her rights and obligations in a language that he or she understands.<sup>92</sup> Dyambu previously had an information board placed in the entrance room and in the telephone rooms. The board contained a list of rights and obligations at Lindela along with a list of contact numbers for NGO's and human rights organisations. The list was translated in different languages. The board was subsequently taken down and it is assumed that the Dyambu staff pass on this information in the introduction to Lindela. However, experience has shown that few are properly introduced to the facility and that the staff are not trained well enough to be able to pass on information about the rights and obligations correctly. Also, there have been indications that the staff do not believe in the utility of this information regarding human rights. The problem has been addressed to Dyambu, who gave an assurance that new notice boards were to be put up as soon as possible and that all detainees at the facility would be informed about their rights and obligations before being admitted into the main building.

*The South African Human Rights Commission recommends that persons detained under*

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<sup>92</sup> See recommendation no 9, SAHRC *Illegal?* report, March 1999.

*the ACA should be informed about their rights and obligations in a language that they understand.*

#### **4.1.5 Registration**

Detainees at Lindela are recorded by a computerised registration system managed by Dyambu.<sup>93</sup> The registration is completed by the issuing of identity cards with pictures and finger-prints, which include the name, country of origin and date of arrival at Lindela.

It is unclear at what stage of the apprehension process this registration takes place. The official version given by senior immigration officers is that no persons are registered at Lindela before they have gone through a thorough investigation and been declared a prohibited person. A more realistic estimation is that investigations take place “within the first few days of detention but [persons are] registered at the facility at the first day of arrival.”<sup>94</sup> A woman who, according to an immigration officer, was under a s 7 investigation claimed on 10 September 1999 that she had been at Lindela for three days before she talked to an immigration officer about her status in the country. The woman was registered at Lindela and was in possession of a registration card.

The s 7 investigation consists of an interview by an immigration officer. The suspected undocumented migrant is asked questions from country-specific questionnaires.<sup>95</sup> The questionnaires include questions of nationality, date and place of birth and parents’ name and nationality. The interview takes no longer than it takes to fill in the assigned forms. No additional questions are asked and the interviewed person does not get the chance to explain his or her story any further. The entire process presupposes that the interviewed persons come from a specific country and corrections of nationality are not only rare but also conducted at leisure.

Individuals who fail to declare that they are lawfully in the country are thus declared prohibited persons according to s 9. Immigration officers can also choose to issue a s 10 provisional permit to persons suspected of being prohibited. The Act does not give any

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<sup>93</sup> As set out in the tender agreement between the DHA and Dymabu, “the successful tender shall keep proper records of the number of illegal aliens processed, on a daily basis, that is incoming, outgoing and remaining in custody”.

<sup>94</sup> Citation from an interview with a junior immigration officer who claimed that no person were to be held at Lindela for more than a week without having been declared a prohibited person. A s 7 examination must in terms of s 55(1) of the ACA take place “no longer than 48 hours from the time of his or her arrest”.

<sup>95</sup> Examples of questionnaires from Zimbabwe and Mozambique are found in appendix IV.

governance or guidelines in the reasons for issuing such a permit, but it is generally held that the section is used in cases of doubt and when the immigration officer needs more time to investigate the matter. This uncertainty in the implementation of the section makes the decisions inconsistent and arbitrary.

A man and a woman were initially issued s 10 permits on 16 September 1999 after they had convinced the immigration officer that they had been wrongfully arrested for having false identity documents. The two had been involved in a controversy with their neighbours who had burned their house down. However, the immigration officer changed his mind when he found out they did not have any additional papers to prove their identity as everything had been destroyed by the fire. The two were detained at Lindela.

A young man, who argued that he was South African, was arrested and brought to Lindela on 27 September 1999. He had shown the arresting police his duplicate ID card from South Africa. However, the police arrested him and confiscated the ID card. The man said he was from Bushbuck, which is on the border to Mozambique. He had applied for an ID a few months ago and but had so far only received a duplicate ID which does not have a photo or ID number. The immigration officer who dealt with the case said that they often had similar cases. "The police don't even ask where they come from. They only arrest them according to how they look and let us do all the work". The young man was granted a s 10 permit to return home to fetch his documents. Many other persons with similar stories are held in detention until they can arrange for their documents to be delivered to Lindela.

***The South African Human Rights Commission recommends:***

- ❑ ***That DHA and Dymabu shall introduce a separate registration system for persons who have not yet been declared prohibited persons;***
- ❑ ***That procedures and regulations for section 7 investigations shall be revised to assure fair and consistent criteria for the investigation;***
- ❑ ***That investigation interviews shall be conducted in a language that the suspected person understands; and***
- ❑ ***That DHA shall disseminate consistent guidelines for the issuing of section 10 provisional permits.***

**4.1.6 Access to Immigration Officers**

After an individual has been registered at Lindela and brought into the main building, his or her communication with immigration officers is subject to an agreement between Dyambu and the immigration officers at Lindela. In terms of this agreement, only persons who are

called by the immigration officers or who are escorted by Dyambu staff are allowed in to the immigration office. Immigration officers often refuse to see the detained persons due to lack of capacity and there is a reluctance among the officers to take on a case which according to their records is already settled.

Detainees at Lindela have been complaining about this system and argue that it is almost impossible to come into contact with the immigration officers. A man from Nigeria explained that he had been at Lindela for three weeks and that he still had not spoken to anybody from the DHA. He did not know the reasons for his arrest or what would happen to him.

It has also been observed that persons who have retained necessary documentation for their release have been denied access to the immigration office. One man reported on 22 October 1999 that his brother had brought his South African ID book two days before, but that he had still not been able to show it to any immigration officer. He had tried to contact one immigration officer the previous day but had been told “No, go back, I don’t have time for you”.

Another man received his ID book the same day that the researcher was visiting Lindela, on 22 October 1999. A female security guard was asked to assist the man and to make sure that he would be able to speak to an immigration officer as soon as possible. The man was later prevented from doing so by another security guard and had not been able to show his ID book to the immigration office in order to assure his release.

Section 104 (4) (b) of the CSA declares that a contractor for a joint venture prison may not be involved in the determination or the computation of sentences. Applied to the ACA, a contractor for the management of Lindela should not be involved in the declaration of a certain person to be a prohibited person or the decision to detain such person pending deportation. This becomes a serious problem when Dyambu staff act as a barrier between the individuals held at Lindela and the immigration officers.

Individuals held at Lindela also do not know the difference between the DHA and Dyambu and rely on the information obtained from Dyambu staff. The problem has its origin in the unclear roles between the DHA and Dyambu. Both parties have expressed a concern that the other party gets involved in issues which are not related to their work. Immigration officers who feel responsible for the detention of persons at the facility intervene in issues which are not related to their legal status at the facility. Dyambu staff likewise intervene in the apprehension process, especially when there are no immigration officers available. The DHA and Dyambu intend to solve this problem by dividing the administration of the facility into

two main areas. One section, which will be assigned only for the DHA, will be used for the apprehension process. Not until persons have been declared prohibited persons will they be transferred into the main detention facility. Dyambu, who will be responsible for detention and treatment of detainees awaiting repatriation, will operate this section. They will thus not be involved in the apprehension process and immigration officers will have limited access to the section where prohibited persons are being detained. This reconstruction of the facility will hopefully make the apprehension process more efficient. At the same time it is important to assure a person's right to a fair application process conducted by the DHA. Persons who, through a short apprehension process, have been declared prohibited persons must be able to appeal and have the decision overturned even though they have been transferred to the section managed by Dyambu.

*The South African Human Rights Commission recommends:*

- ❑ *That access to immigration officers shall not be conditioned by permission from Dyambu staff;*
- ❑ *That Dyambu staff shall not take part in the immigration investigation; and*
- ❑ *That DHA shall ensure continued access to immigration officers even after a person has been declared an undocumented person.*

#### **4.1.7 Asylum Application Practice**

Another major concern in the apprehension process is the identification of refugees and the treatment of asylum seekers. It is not only questionable whether the DHA has the capacity to process these individuals in 30 days but also whether persons held at Lindela are given appropriate assistance in applying for asylum or renewing their permits to stay in the country. In their last report on Lindela, the SAHRC recommended that immigration officers should advise persons who claim to be asylum seekers of their rights to apply for asylum and that the DHA should render reasonable assistance to such person in this regard.<sup>96</sup> The right for detained persons to apply for asylum is also pointed out by the UNHCR, who in their Guidelines on the Detention on Asylum Seekers highlight that “detention shall not constitute an obstacle to an asylum-seekers’ possibilities to pursue their asylum application.”<sup>97</sup>

Different reasons bring alleged refugees to Lindela. Ms Makola argued on 8 December 1999 that most of the persons who claim to be asylum seekers make their assertions up as they

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<sup>96</sup> See recommendation no 5, SAHRC *Illegal?* report, March 1999.

<sup>97</sup> UNHCR/IOM/22/99 guideline 5.

arrive at Lindela. “What would we do if we let all those persons who want to seek asylum instead of being deported stay in the country?” Indeed, many of the persons at Lindela who claim to be asylum seekers had not applied for asylum in South Africa before they were arrested. Their reasons may vary. Many claim that they either did not understand the application procedures or that they declined to apply for asylum because they were afraid of being arrested.<sup>98</sup> One man from the Ivory Coast explained on 18 October 1999 that he had been arrested at the Home Affairs office in Braamfontein while applying for asylum for the first time. He was never told the reasons for his arrest. A brother and sister from Eritrea applied for asylum two weeks after they arrived in South Africa but had been informed that their applications were too late and were as a result arrested and brought to Lindela.

Other persons explained that they had been arrested while renewing their permits because they either had applied at the wrong refugee office or had failed to renew their documents in time.<sup>99</sup> Some persons even claim that they had valid documents when they were arrested and that their papers had expired while in detention at Lindela. Others claim to have been arrested under the assumption that their documents were forged.

A man from Ghana explained on 29 September 1999 that he had valid documents as an asylum-seeker before he was arrested. He was detained for 32 days at Pollsmor prison before he arrived at Lindela. The asylum documents expired while he was detained at Pollsmor prison. The man had not talked to any immigration officer about his asylum application during his detention although he had asked to see an immigration officer both at Pollsmor and Lindela. At Pollsmor prison he had been told that he could not receive any assistance as the correctional officers did not deal with undocumented migrants. All his documents were still with the police who arrested him.

Persons who at Lindela claim to be asylum seekers should, like every other foreign national in South Africa, be given the opportunity to apply for asylum. Senior officials at the DHA have stated that the DHA policy is that those who do affirmatively state they are refugees should be taken to an asylum application office.<sup>100</sup> In terms of practice this is seldom the case at

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<sup>98</sup>Persons at Lindela explained that the exclusion method used by Home Affairs officials causes persons from other countries than those which are considered refugee producing to avoid applying for asylum as they risk being arrested at the Home Affairs offices upon application.

<sup>99</sup>Persons applying for asylum at one Home Affairs office will have to report to the same office every third month to renew. If they fail to renew their application in time, whatever the reason, they will automatically be excluded from the process and be arrested as illegal immigrants.

<sup>100</sup>See Jonathan Klaaren, *A Guide to South African Refugee Law*, May 1999, page 26.

Lindela. No asylum applications are dealt with directly at Lindela as the staff does not have sufficient training, but all applications should be completed at the office in Braamfontein. However, few persons detained at Lindela are given the opportunity to make applications at the office in Braamfontein. Persons are thus denied the right to apply for asylum. Lindela is not only understaffed, but priority is not given to these kind of applications.<sup>101</sup> The DHA does not have a policy of asking persons who have been arrested under the ACA whether they want to apply for asylum. There is a pre-assumption among immigration officers that individuals arrested and brought to Lindela are “illegal immigrants”. It was explained on 1 October 1999 by senior immigration officer Mr Mogali that persons held in detention at Lindela are dealt with as if they were prohibited persons under the ACA and that any person who would like to apply for asylum should apply through the refugee office in Braamfontein. “If you arrest someone from Angola, why don’t you take that person to the office in Braamfontein immediately instead of taking them to Lindela?” Ms Makola further argued on 8 December 1999 that only persons who have applied for asylum prior to their arrest would be permitted to finish their applications at Lindela. “It is the practice in most other countries that only persons who apply for asylum at the border should be allowed to apply for asylum at all.” A new computerised system will be installed at Lindela to allow immigration officers to conclude whether individuals have applied for asylum prior to their detention.

Mr Mogali argued on October 1 1999 that immigration officers at Lindela should not deal with asylum applications and that asylum seekers should not be detained at Lindela before decisions about deportations have been taken. Also, there is an information gap between the immigration officers at Lindela and the head office of the DHA. All decisions about asylum applications are made at the head office in Pretoria, which leaves the officers at Lindela only to perform the repatriation of these persons. Immigration officers at Lindela thus have no information or influence in determining the reason for or the length of the detention. Meanwhile, asylum seekers are held at Lindela for indefinite periods. Human Rights Watch believes that when immigration detainees are held indefinitely and do not know when, if ever, they will be released, their detention becomes arbitrary, even if the initial detention was carried out in accordance with the law.<sup>102</sup> Mr Mogali wished there were better communications between the head office and Lindela concerning asylum applications. “If the Refugee Office cannot solve the problem in 30 days, then Lindela cannot have the 30 days to hold a person detained.”

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<sup>101</sup> According to Ms Makola persons are taken from Lindela to Braamfontein every day.

<sup>102</sup> Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States, 1998*.

*The South African Human Rights Commission recommends:*

- *That immigration officers shall advise persons who claim to be asylum applicants of their right to apply for asylum in a language that they understand; and*
- *That DHA shall ensure reasonable opportunities for persons detained at Lindela to apply for asylum by introducing refugee officers who are permanently stationed at the facility.*

#### **4.1.8 Excessive Detention**

Over the last two years the SAHRC has investigated the length of detention of undocumented migrants at Lindela and has established that there have been repeated violations of the provision of s 55 of the ACA. Individuals are regularly detained for periods in excess of thirty days without any review of their detention by a High Court judge.<sup>103</sup> The matter has been discussed with immigration officers at Lindela and the Director General at the DHA, who have both undertaken to ensure that no person at Lindela exceeds the 30 days limit without the necessary authority.<sup>104</sup>

It was observed on 3 September 1999 that 102 persons were being held in excess of 30 days, which was confirmed by the register list of detainees at the facility. Further investigation also showed that the cases had not been reviewed by a High Court judge as provided by the ACA. Both Mr Mabote and Mr Schrevasande from the DHA undertook on 16 September 1999 to speed up the administrative process to prevent similar incidents in the future and to ensure that the persons at Lindela would be released before the 30 days limit.

Mr Mabote further gave the assurance that he would appoint specific immigration officers at Lindela who would only deal with the length of detention. Shortly after, the DHA decided to release 150 persons, who had been held at Lindela unlawfully, between 19 and 21 September 1999. They were all each issued a section 41 permit to leave the country within seven days. Only a few persons from Nigeria, Uganda and Eritrea were not released. These persons had been at Lindela for up to five months, but could, according to Mr Mogali, not be processed because of problems with their embassies.

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<sup>103</sup> ACA s 55(5) “(S)uch a detention shall not be for a longer period than is under the circumstances reasonable and necessary, and [that] any detention exceeding 30 days shall be reviewed immediately, by a judge of the Supreme Court of the provincial division in whose area of the jurisdiction, the person is detained, designated by the Judge President of that division for the purpose, and provided that such detention shall be reviewed in this manner after the expiry of every subsequent period of 90 days.”

<sup>104</sup> See recommendation no 8, SAHRC *Illegal?* report, March 1999.

The decision to release 150 persons from Lindela was initiated by the SAHRC who drew attention to the problem and who threatened the DHA with legal action if measures were not taken to cease the violations of the ACA. Mr Mabote and Mr Schrevasande from the DHA explained on 16 September 1999 that they did not have the capacity to make legitimate decisions about 150 persons within such a short time period and therefore decided to release the persons. Both acknowledged the problem of releasing alleged asylum seekers under these circumstances without applications being reviewed properly by the DHA. According to Mr Mogali, it is not in his mandate to deal with asylum applications. "If they want, these persons have the chance to go to the Refugee Office to sort out their papers during the seven days we are giving them".

Also, many of the released persons would not be safe if they returned to their home countries. If persons stayed in South Africa, such persons further ran the risk of being arrested and brought to Lindela again. On a later visit to Lindela two men from Angola and Ghana, who had been released from Lindela on a Section 41 permit to leave the country, were observed. They had, according to their own stories, tried to leave South Africa but were arrested on their way to Mozambique. They both stated that they had needed more than seven days to sort out their personal belongings before they could leave the county.

#### **4.1.9 Registration**

Section 55(5) of the ACA states that *any detention* under the Act, which exceeds 30 days, should be reviewed and does not reserve this protection to persons held in detention at Lindela. *Any detention* would therefore include both detention in prisons and police holdings as well as detention at Lindela. This means that the DHA must keep record of the length of detention prior to arrival at Lindela. However, there seems to be no mechanism to record this information or to ensure meeting this requirement.<sup>105</sup>

Registration of persons at Lindela is managed by Dyambu, which does not maintain records of the date of arrest. Furthermore, there is, according to Ms Makola, no money available to install a separate computerised system for this purpose. As a consequence, individuals are held under the ACA without any recording of the total length of detention.

On 29 September 1999 it was observed that at least four persons had been detained for in excess of 30 days if one included the time in detention before they had arrived at Lindela. One

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<sup>105</sup> See discussion in the chapter Conditions relating to Arrival at Lindela.

person from the Congo said that he had been arrested and held in a police cell from 23 August 1999 while his registration card said that he had arrived at Lindela on 3 September 1999. A man from Nigeria was arrested on 11 August 1999 and registered at Lindela on 3 September 1999, while two men from Ghana and Nigeria were arrested on 9 June 1999 and registered at Lindela at 9 September 1999.

Four men who arrived at Lindela from Pollsmor prison also showed their arrival documents from the prison, which indicated that they had been detained for more than 30 days. They had been held at Pollsmor for between eight and 24 days prior to their arrival at Lindela.

A further problem is that Dyambu re-registers every person who for any reason leaves the facility only to re-enter a few days later. A man from Egypt was arrested on 25 August 1999 and arrived at Lindela on 3 September 1999. He was taken to the police station on 9 September 1999. He stayed at the police station for one night and returned to Lindela on 10 September 1999. He was then taken to the police station again on 1 November 1999 and arrived at Lindela on 9 November 1999. The man was registered at Lindela as arrested on 9 November 1999.

Dyambu intend to renounce their responsibility of excessive detention at Lindela through a reconstruction and, at the same time, a division of assignments at the facility. Dyambu will in the future not agree to detain anybody who has not been issued a warrant of arrest and will likewise release anybody who has been detained in excess of thirty days without an extension being issued. However, there is still an unsolved problem with DHA and how they intend to deal with persons who have been detained prior to their arrival to Lindela. Dyambu has advised the SAHRC that they will provide the necessary computerised system for the registration of these persons, provided the DHA will bear all extra costs involved.

***The South African Human Rights Commission recommends that the DHA ensure that the 30 days limit for detention under section 55(5) ACA shall include the total number of days detained at prisons and police holdings, as well as detention at Lindela.***

#### **4.1.10 Continued Unlawful Detention**

Notwithstanding pressure on the DHA to ensure that the rights of individuals would be respected at Lindela, the problem of prolonged detention soon emerged again. On 18 October 1999 it was observed that 23 persons had been in custody for between 31 and 140 days. Only two persons from Eritrea had had their case brought before a judge and received an extension of 90 days according to s 55(5) of the ACA. Both of the reviews had been conducted after they had been detained for more than 30 days. Neither of the two detainees had been

informed of the reasons why it was likely that their detention would exceed 30 days nor were they given the opportunity to make a written statement to the High Court judge. This is contrary to s 29 of the Aliens Control Regulations No.R.999, 28 June 1996.

The Commission decided to take the continued unlawful detention of undocumented migrants to court on 12 November 1999. 40 persons had stated that they wanted to challenge the lawfulness of their detention. The Commission accordingly submitted for an immediate release of the 40 individuals and an interdict for the DHA and Lindela to “make all reasonable arrangements necessary (...) to ensure that the rights of detained foreign nationals are not violated”.<sup>106</sup> In order to protect detainees at Lindela from further unlawful detention, the Commission further requested to be given a list of persons held at Lindela to identify whether unlawful detention continued and to be able to secure the release of any such unlawfully detained person. Monitoring and litigation regarding this case was ongoing at the time of conducting the research for this report.

Despite repeated assurances from both the DHA and Dyambu that this history would not be repeated, the practice of unlawful detentions has continued. On a visit to Lindela on 28 November 1999 it was observed that several persons had been detained at Lindela for more than thirty days.

The problem seems to be twofold. Firstly, the DHA has not implemented any particular actions to prevent unlawful detention in the future. For example, no measures have been taken to collect information about time spent in prisons and police cells. Nor have they started to keep their own records of how long persons have spent at Lindela. Ms Makola has, since the court case, concentrated on temporary solutions locally at Lindela and wishes to “clean her own house first.” However, the SAHRC has suggested that the DHA should recognise the problem of excessive detention in prisons and police cells and that a complete new system of recording the total amount of days in detention should be implemented.

Second, only one person has, since the court case, had his case reviewed by a judge. The reason given by the DHA is that the courts require fingerprints of the suspected undocumented migrants. At least 10 persons have made reviews about their detention impossible, by refusing to have their fingerprints taken, believing they will be granted a section 41 permit to leave the country in certain days if they refuse to co-operate with the DHA. A system must be implemented where either the court will have to accept applications

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<sup>106</sup>*The South African Human Rights Commission and Forty Others v. Minister of Home Affairs and Dyambu (Pty) Ltd*, case no. 28367/99, Witwatersrand, page 37.

from the DHA without fingerprints, or whereby persons at Lindela will be encouraged to have their fingerprints taken. Alternatively, fingerprints can be taken of all detainees on arrival at Lindela. The DHA has recently assigned an unknown magistrate to deal with all extended detentions at the facility. There is however a statutory regulation that cases of extension should be handled by high courts.<sup>107</sup>

***The South African Human Rights Commission recommends:***

- ❑ ***That the DHA ensure that no one is held in detention under ACA in excess of 30 days without their case being reviewed by a High Court Judge;***
- ❑ ***That the arrested person or his/her representative shall have the right to attend this review; and***
- ❑ ***That registration lists at Lindela which include the total number of days detained under the ACA shall be made available to the SAHRC for supervision of the total length of detention at Lindela.***

#### **4.1.11 Shortage of and untrained staff**

A shortage of staff and the high percentage of untrained immigration officers could partly explain the unsatisfactory apprehension process as described. This problem was also noted in the previous *Illegal?* report where the SAHRC recommended that appropriate training programs should be formulated and presented to all persons involved in arrest and detention in terms of the ACA.<sup>108</sup> There are 16 immigration officers at Lindela who are dealing with as many as 600 arrivals and deportations a day. Mr Mogali estimates that at least 30 immigration officers would be needed at Lindela for them to be able to make thorough interviews and proper decisions about deportation and asylum applications. At least ten of these officers would be used only for transportation to different embassies and to the refugee office in Braamfontein.

There is further evidence that most immigration officers are not sufficiently trained to deal with cases that do not follow standard procedures in the apprehension process. Most immigration officers are occupied with the issuing of warrants, either for the s 7 investigation or for the repatriation process, by completing simple tasks such as filling in forms or taking fingerprints. They are not trained to make any decisions about asylum applications, unclear documents or regarding the issuing of s 10 permits but refer all these cases to a few, overloaded senior immigration officers. The immigration officers at Lindela further have no

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<sup>107</sup> ACA s 55(5).

<sup>108</sup> See recommendation no 15, SAHRC *Illegal?* report, March 1999.

access to necessary facilities to examine documents presented at Lindela, but have to refer these cases to the Head Office.

Immigration officers at Lindela have repeatedly requested sufficient training, not only to handle asylum applications, but also to be able to deal with all situations at Lindela properly. There are, as far as the SAHRC has been informed, no outlined training schemes for the immigration officers. The DHA relies on organisations such as the SAHRC and the UNHCR to deal with training. There is also a disagreement between the Head Office of the DHA and the Gauteng West region. While the Head Office has initiated an arrangement with the UNHCR for training of immigration officers specifically on asylum applications, Ms Makola from Gauteng West expressed a concern about persons from the outside getting involved in the asylum application system at Lindela and wishes to “to deal with the issue (her) own way.”

***The South African Human Rights Commission recommends that DHA and Dyambu shall appoint sufficiently trained staff and the appropriate number of staff to be able to operate Lindela in a satisfactory way.***

#### **4.2 Conditions at Lindela**

Continued complaints about the conditions at Lindela and allegations that they do not reach an acceptable standard of living is a problem which has to be addressed seriously. In the report of March 1999, the SAHRC noted that the three most common reported complaints were: lack of adequate nutrition, irregular or inadequate medical care and systematic, and forced interruption of sleep. Similar problems have been found in this study while additional issues such as general living conditions, access to information, assault and the treatment of minors have further been added to the list of unsatisfactory conditions at the facility. It has been noted that detainees who have been transferred from prisons often argue that these provide better standards than those at Lindela. Some of the inadequate conditions at Lindela are direct results of the low tariff of R24.95 that Dyambu receives per person per day; DCS pays almost three times as much for those awaiting trial and four times as much per day for those sentenced.

##### **4.2.1 SAHRC access to Lindela and any document**

The SAHRC has for the last two years been conducting research on the conditions at Lindela. For this research to be effective, the SAHRC has requested free access to the facility and to any documentation or record relating to the detention of undocumented migrants. In terms of the Human Rights Commission Act, the SAHRC is expressly given the power to “conduct or cause to be conducted any investigation that is necessary” and for that purpose to “enter any

premises on or in which anything connected with that investigation is or is suspected to be.”<sup>109</sup> The SAHRC, has as part of its investigation of Lindela, power to “require from any person such particulars and information as may be reasonably necessary in connection with any investigation.”<sup>110</sup> However, history has shown that access to Lindela has varied and that both Dyambu and the DHA have been restrictive in assisting in the process.

It was explained above how the researcher, despite direct instructions from Commissioner Jody Kollapen, was initially restricted as access to the facility was denied on two occasions. Internal friction at the DHA and unclear division of power between the head office and the Gauteng West office seems to have caused confusion as to who is responsible for allowing the SAHRC access to Lindela. Free access to the facility was only given after instructions from the head office of the DHA.<sup>111</sup> This decision was in direct conflict with Ms Makola’s ambition to supervise and control all visits to Lindela from the Gauteng West Office.

There is also a misconception that Dyambu, as the private operator of Lindela, has a mandate on the management of the facility. Dyambu argues that the reason for denying the SAHRC access to the facility was that proper channels were not followed and that authorisation was not received for the researcher to enter. The main reason for denying access seems to be that the junior management at Dyambu were not aware of the SAHRC visit or its mandate.

In the view of the SAHRC, both the DHA and Dyambu have tried to limit the accessibility for the research by denying the SAHRC access to the centre at certain times or at specific sections of the facility. This has made it difficult and very time-consuming to gain a comprehensive understanding of the facility. On 27 September 1999, both the SAHRC representative and her translator were denied access to Lindela because the Dyambu junior manager had not been informed of the surprise visit to the facility. Both Mr Mabote and Mr Meyer at the DHA had agreed to the visit the same day but had failed to inform Dyambu about the arrangement. The junior manager further advised that he wanted to have the final word before each inspection. “This is my home, and if you would like to visit my home you have to have my permission”. The problem was further increased as the junior manager initially insisted that a Lindela staff member should accompany each inspection of the facility and that no inspections were to be completed out of office hours. “This is how I work and if you want to visit Lindela you have to follow my rules.” Several detainees indicated that only

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<sup>109</sup>Section 7(1d) & 9(1c) of the Human Rights Commission Act, No 54 of 1994.

<sup>110</sup>Section 9(c) of the Human Rights Commission Act, No 54 of 1994.

<sup>111</sup>Verbal agreement with Mr Meyer, Head of the Communications at the DHA, 17 September 1999.

specially arranged parts of the facility were made available for the inspection and that they were afraid to talk about the conditions at Lindela in front of personnel from Dyambu and the DHA. Similarly, Andrew Rens, an attorney at the Wits Law Clinic, was denied access to the facility by both DHA and Dyambu when attempting to visit clients who had been held for in excess of 30 days at the facility. Mr Rens was visiting Lindela for the preparation of a case for the SAHRC.

The DHA further has a consistent history of denying the SAHRC free access to information about Lindela. The Commission has, for example, repeatedly requested access to the register lists at the facility. On 3 September 1999, Mr Mogali first denied that such a list existed, but provided the information after it became clear that Wits researchers and the SAHRC had seen such lists during earlier visits.<sup>112</sup> However, on a later occasion, it was explained that the register lists were confidential and that it was a mistake that the Wits researchers and SAHRC ever had been given access to the lists. Neither Mrs Makola and Mr Mabote of the DHA, Gauteng West, nor Mr Schrevasande from the head office have replied to the Commission's continual requests to obtain the lists for the purpose of this research.

The Commission has experienced similar difficulties while attempting to get access to the contract between the DHA and Dyambu. The contract constitutes the necessary basis for the understanding of the legal agreement between the Department and Dyambu. Commissioner Jody Kollapen asked for access to the contracts in a letter directed to the acting Director-General, Mr Mbatha, who did not reply. On 8 December 1999, DHA Gauteng West and Dyambu agreed to arrange for any information about the facility to be available to the SAHRC in the future. The contract was made available at the meeting while the lists and other information were to be provided upon request.

***The South African Human Rights Commission recommends that DHA and Dyambu shall provide the Commission with free access to Lindela and to any documentation or record relating to the detention of undocumented migrants in regard of their current investigation of the facility.***

#### **4.2.2 Adequacy of the Detention Facility**

New arrivals and visitors are all admitted at the main entrance hall. The admission process at Lindela can take almost the whole day. Two women explained that they had arrived at Lindela at 9 am and that they had not been admitted into the main building until 4 p.m. The

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<sup>112</sup> In the tender agreement between the DHA and Dymabu it is stipulated that "the successful tender shall keep proper records of the number of illegal aliens processed, on a daily basis (...) officials of the Department and representatives of the Auditor-General shall at all reasonable times have access to such documentation."

arrivals are held in a large room furnished with plastic chairs and two small tables. The room is often crowded, holding up to 70 persons at times. There are often too few chairs available and individuals use the floor to sit on.

There are no toilets and no drinking water available in the admission room. A woman was once observed crying because she urgently needed to use the bathroom. She had asked the Dyambu staff several times for a toilet to use, but was repeatedly denied assistance. The staff explained that there was a toilet available next to the admission room which arrivals could use but still argued that the woman should wait to use the toilet until she was admitted into the main detention area.

The detention facility at Lindela consists of two main sections, one for men and one for women and their children. A wall and a communal kitchen divide the two sections. Each area contains a large courtyard surrounded by sleeping compartments. The male courtyard consists of a large paved expanse with long benches placed in the middle. There is also one communal television, a small room with public telephones and a small shop which is open for a few hours every day. The cleaning areas and two toilets are situated so that the men have access to them throughout the day.

The women's area consists of an equally large courtyard planted with trees. Generally the women's area is more spacious with better arranged social space. There are for example arranged grass areas with stools where the women often sit and talk in small groups. The area is however used by Dyambu as a holding facility for persons who are being deported by train. This means that the area is filled up with waiting men and women three days a week. Also, one of the rooms is used as a sanction room (room 33) where persons are held in isolation.

The women have free access to cleaning areas and toilets throughout the day. There are however no telephones, no shop and no television in their section. Women have to ask for permission to use these facilities in the men's area. There is also one telephone room, which is situated outside the two courtyards, which is used by both men and women. The detainees need permission from the Dyambu staff to have access to these telephones.<sup>113</sup>

There are few activities provided at Lindela. There is no reading or writing material available and detainees are not provided with adequate means to be able to communicate in writing. Chapter III of CSA provides that a prisoner must have "access to reading material of his or

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<sup>113</sup> See chapter 4.1 of Free Phone Calls

her choice” and section 32(2)(e) stipulates that detained persons must have “access to reading materials”. The problem became evident at Lindela when detainees asked for pen and papers for writing down their experiences at the facility as a contribution to the conducted research.

Detainees held at Lindela should, as explained above, not expect to be detained for more than 30 days at the facility. It is thus argued that the facility should not need to provide opportunities for the persons to conduct studies. However, there is no reason why being arrested as undocumented migrants should stop persons from continuing their studies conducted elsewhere while in detention. This is even more important as so many persons are arrested on false grounds and released after a few days of detention. A young woman who turned out to be South African explained that she had missed her final exams for a secretarial course while she was being held in detention.

The sleeping areas at Lindela consist of large rooms with generally 25 metal bunk beds in each room. Most detainees state that they are forced to sleep two and two in each bed, which should not be necessary, as there are plenty of beds available.<sup>114</sup> However, the issue is constantly brought up and seems to be one of the main complaints that the detainees have about the conditions at Lindela. It is only on Tuesdays and Wednesdays, which are deportation days, that there are beds available for everyone. It has also been observed that some rooms are kept empty while other rooms are overcrowded. Sometimes up to 85 persons sleep in the same room. An inventory list found in the Dyambu office said that there are 657 mattresses and 1114 blankets at Lindela. There are sometimes up to 1500 persons detained at the facility.

Dyambu has plans to install toilets in each of the bedrooms and has so far made arrangements for installation in two of the rooms. The bedrooms are locked between 8 or 9pm to 6am, which means that access to toilets during the night is limited. Dyambu staff argue that detainees are allowed to use the bathroom at any time of the day and that there are personnel on night shift to assist during the night. However, detainees have explained that most of them are using buckets, which they keep under their beds. Buckets used for this purpose have been observed in most rooms and there were also indications that faeces had been thrown out of the windows.

Furthermore, there is not enough toilet paper available and detainees are constantly told to save on the paper “because it is so expensive.” Some individuals explained that they only received two rolls of paper a day to share between 15 persons. The women are, according to

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<sup>114</sup> The tender agreement between the DHA and Dyambu stipulates that the “successful tender shall provide beds,

several persons, provided with one napkin for the night and one for the day. Dyambu is, according to the tender agreement between DHA and Dyambu, obliged to supply a cleaning service, which includes “supply of toiletries.”

Dyambu have alleged that they provide each room with one bar of soap a week and have shown their stock of soap to the SAHRC. Nevertheless, free soap has not been seen or heard of at the facility; there is however, soap for sale in the small shop. The cleaning service at Lindela is also regulated by the tender agreement between DHA and Dyambu, which specifies that Dyambu shall provide chemicals and cleaning materials “to maintain the required standard of hygiene at the premises.”

The facility is also filled with fleas, which can be seen all around, in the blankets and the cloths. Fleas at Lindela bit the SAHRC representative on two occasions. All blankets are, according to the manager of Dyambu, dry-cleaned twice a month and the rooms are fumigated once a month. Fumigation has been observed once. Detainees at Lindela claim, however, that the blankets are dirty, even when they are to be used by new arrivals. “When you arrive at Lindela you have to sleep in someone else’s bedding.”

The canteen is situated between the two main detention areas, with the entrance placed in the male area. Food is served in a small kitchen with space to eat in three communal rooms furnished with chairs and tables. Detainees have complained about dirty cups and plates. “They only wash them with cold water which does not remove the grease.” Detainees are not permitted to use their own cups and plates.

Room 33 is used as a disciplinary and segregation room and is situated in the women’s area. The premises consist of a bare room with wires on the windows to prevent escapes. There are no beds or blankets in the room and it is for this reason not supposed to be used during the night. The room is, according to Dyambu staff, rarely used and then only for at the most 3-4 hours at a time. One man explained that he had been held segregated in the room at least seven times in the last three months for selling cigarettes and that he had been held for up to 48 hours at a time. Another man said that he had been held there for 36 hours after he had been involved in a fight. They both had slept directly on the stone floor, which during winter was very cold. There are no cleaning facilities or toilets in the room.

The SAHRC has also observed incidents that indicate that room 33 is used to keep track of persons who are to be deported. Four men who had refused to leave by train for Mozambique

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mattresses and blankets.”

were all threatened by an immigration officer with segregation until the next train was to leave five days later. Only after it was pointed out by the researcher that immigration detention is not supposed to be punitive were the four men released into the main area. Five witnesses were locked up for four days before an internal hearing of an alleged assault case.<sup>115</sup>

Dyambu has made several improvements to Lindela since the first visit by the SAHRC. The buildings have been painted and renovated, toilets have been installed in some of the rooms and changes have been made to simplify the deportation process. Also, new facilities for visiting embassies and a new medical room have been built.

*The South African Human Rights Commission recommends that Dyambu shall provide:*

- ❑ *Toilets and drinking water for persons under immigration investigation in the admittance room;*
- ❑ *Means to communicate with friends and relatives in writing and access to reading material;*
- ❑ *Opportunities for further educational or vocational training;*
- ❑ *Telephones and recreation specially allocated for the womens' section to keep men and women separated at all times; and*
- ❑ *Separate beds with clean bedding and a supply of toiletries.*

#### **4.2.3 Food**

Food at Lindela is served twice a day. Depending on the activities at the facility, the first meal is served between 5 and 7 in the morning. The next meal is served between 4 and 6 in the afternoon, which means that sometimes there can be more than 12 hours between each meal.<sup>116</sup> The food consists, according to both detainees and Dyambu staff, of 4-6 slices of white bread and porridge in the morning and pap (maize meal porridge) and some kind of soup in the afternoon. Only once has a detainee said that they had been served meat. This is contrary to the menu in the tender agreement between DHA and Dyambu. Examples of foods which are supposed to be served during one day in the original agreement are:

- Breakfast: maize meal porridge, chicken breakfast stew, brown bread, margarine, tea;
- Lunch: grilled worst, stiff porridge, beef soup, carrot casserole, cool drink; and

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<sup>115</sup>Segregation of prisoners under section 26 of the CSA may be due to the following reasons: written request from the prisoner, on medical grounds as prescribed by a medical officer, displays of violence or threats of violence, escapes or attempted escapes, or on the request of the police. Section 30 (6) outlines that the Head of Prison must report all forms of segregation to the Inspecting Judge. Section 104 (4)(a) of the CSA further stipulates that a Contractor may not “take disciplinary action against prisoners or impose penalties against them.”

<sup>116</sup>Section 8 (5) of the CSA stipulates that food must be served “at intervals of no less than four and a half hours and not more than 14 hours between the evening meal and breakfast during each 24 hour period.”

- Dinner: chicken stew, maize rice, chicken soup, mixed vegetables, coffee.<sup>117</sup>

The medical doctor has agreed, that “it might not be enough to serve food only twice a day.” The problem was discussed with Dr Smith of Dyambu who accompanied the researcher to the kitchen to see what was prepared for dinner. According to the menu, the detainees were to be served mince and rice. However, when arriving at the kitchen there was no mince to be found. The chef first explained that the mince was kept in the refrigerator and that he was just about to start preparing it. When no mince was to be found in the refrigerator he changed his mind and said that the meat was kept frozen in another building. The man could not explain how he had planned to prepare food for 900 persons in two hours from meat, which had to be defrosted, but instead changed his mind again and said that the meat was to be delivered fresh.

Lindela does not provide any food for those detainees who require Kosher or Halaal food.<sup>118</sup> A few men from Pakistan had obtained permission to have Halaal food delivered to the facility by relatives every day. Detainees can also buy food and snacks from the small shop in the men’s area. However, the food available is, according to the detainees, expensive and few can afford to buy anything.

Dyambu argues that the food at Lindela is sufficient and that they provide better food than what is served in prisons. The food is monitored regularly by the Health Inspection, which according to Dyambu rarely lays any complaints about the quality of the food. Dyambu, on the other hand, agrees the quantity of the food served is insufficient and that it is not enough to serve food only in the early morning and in the evening. It is because of special requests from the DHA that Dymabu has revised the original arrangements to serve food three times a day. However, the quantity of food served in the morning should, according to Dyambu, be enough for the detainees to save for the rest of the day.

***The South African Human Rights Commission recommends:***

- ❑ ***That sufficient food shall be served at the facility three times a day;***
- ❑ ***That Dyambu shall provide opportunities for detained persons at Lindela to exercise their religion and to receive a diet in keeping with their religion.***

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<sup>117</sup> The menu has, according to Dyambu, been revised since it has become clear that the DHA only requires two meals a day. The SAHRC has not by the time of writing had access to this new agreement.

<sup>118</sup>Section 8 (3) of the CSA, “dietary regulations must take into account religious requirements and cultural preferences.”

#### **4.2.4 Medical Treatment**

Lindela provides for medical attention for the detainees when necessary. Three rooms are set aside for a doctor's reception, a dormitory and a waiting room. There is a new clinic under construction, which will have room for up to four persons under observation. The medical doctor does not think that the present clinic is suitable for medical treatment.

The medical doctor at Lindela has a private practice close to Lindela and visits the facility for a few hours every day. He is also available evenings and at night in the case of an emergency.

Many detainees have complained about limited access to medical care at Lindela. People who ask to see a doctor must get permission from the security guards to leave the main area in order to visit the clinic. It has on several occasions been observed that detainees have been denied medical treatment because the guards have not let them through the gates. One man explained that he had asked to see the doctor for three days but had still not been attended to. The man was allowed through the gates through pressure from the researcher.

Women seem to have better access to the clinic than men. A woman explained on 8 October 1999 that she had asked to see the doctor as she had woken up with a swollen tongue. She had been attended to only a few hours later and was expecting the doctor to bring some medicine for her the same day.

As most detainees only stay at Lindela for a few days, the system does not allow any treatment for serious illnesses. The medical doctor has explained that he mostly treats persons for colds and stomach problems. Lindela also provides for transportation to the closest hospital for everyone who needs urgent treatment. However, security guards have explained that they are reluctant to take persons to the hospital as they are afraid that the detainees will try to escape.

*The South African Human Rights Commission recommends that Dyambu shall provide free access to a qualified medical practitioner with knowledge of psychiatry.*

#### **4.2.5 Security**

The Lindela repatriation centre is situated in an old mining compound on the outside of Krugersdorp, about 40 kilometres from Johannesburg. The facility is surrounded by two barbed wired fences with watchdogs, 24 hour security by CCTV cameras and armed security guards. Dyambu initially indicated that the security guards operated without armed control, although they had access to both tear gas and a water cannon as preventative measures.

However, later observation made it evident that several senior guards carry smallarms and that all Dyambu staff are equipped with batons.

Dyambu has 55 staff employed at Lindela. The number of security guards is, according to the manager, sufficient to keep the place safe. In the case of an emergency, the staff at Lindela will call in extra staff from the Dyambu head office, which has the capacity to move staff from other facilities. Few detainees escape from Lindela and uprisings are rare. Security guards are found both at the gate and at the entrance hall. Few guards patrol on a regular basis inside the main courtyards, although there is always at least one guard at the gate. Female security guards have to a greater extent been observed inside the courtyard.

#### **4.2.6 Assault and Degrading Treatment**

Violence towards detainees is frequently present at Lindela. A security guard once hit a man in the face without paying attention to the fact that he was being observed by the researcher. Another guard told his colleague in Zulu not to use force in an argument between the guard and a detainee. "Don't hit him now, you know you cannot hit him when she [the researcher] is around." Also, there is evidence that individuals have been abused verbally and laughed at by the staff at Lindela.

However, most violence at Lindela occurs, according to the detainees, at night when no one is there to observe the situation. Every night the detainees are woken up between 2-5 times for security reasons. The security guards wake everyone up by shouting and banging on the doors. They also walk into the room and hit those who do not wake up fast enough. The detainees are told to stand in two rows with their heads between their legs. If someone looks up to see what is going on, the guards will, according to information received by interviewed detainees, use their belts and batons to beat that person up. It has further been argued that detainees may have to stand in the same position for half an hour while they are counted. Others explain that they risk being beaten up by the guards if they ask to use the bathroom at night.

An example of assault that occurred at night but which was reported by colleagues of the Dyambu staff is an incident involving five men from Mozambique. The five men explained to the researcher that, on the night of 18 September 1999, they had been beaten up by four security guards. The problem started when a man reported to the guards that someone had stolen R80 from him. Four guards came in and searched everybody in the room for the money. When they did not find any money they beat everybody up one by one. In total eleven persons were assaulted. They were told to bend over and hold on to their toes while they were beaten on their backs and behinds with batons. One of the men protested about the

treatment and was then taken aside and was further assaulted by the four guards. As a result of the assault, the man was suffering from bruises on his face and shoulder. Also, his eyes were swollen and his lips broken. The guards then took R20 from each person in the room to give to the man who had lost his money. When the man asked for his share of the money, the guards beat him up too and left with the R220.

The person assaulted was examined and the incident reported by the medical doctor to Dyambu, who decided to deal with the situation internally. The four suspected guards were suspended while awaiting the internal hearing. Three men from Mozambique were held for an extra week at Lindela as witnesses for the hearing. The men were not asked whether they wanted to stay in the country for the hearing. Also, they were held in room 33 to keep them separated from the rest of the detainees.

Exclusively staff from Dyambu were present at the hearing. Neither the DHA nor the Commission was allowed to participate in the meeting. As an outcome of the hearing, the four guards were dismissed from their work. The victims were never asked whether they wanted to bring criminal charges against the guards. However, the men explained that they probably would not have reported the assault to the police if they had known that as a consequence they would be held in custody until the trial.

There is no systematic complaint system available at Lindela. Detainees are not given the opportunity to lodge a complaint to a formal body, which would file a review on the issue accordingly.<sup>119</sup> Instead, individuals may raise their complaints with any staff from Dyambu who can choose either to try to solve the problem with the persons involved or to inform the human resources unit at Dyambu about the situation. The human resources unit will then arrange for a formal hearing with dismissal as a possible remedy. Also, there is a sign on the walls at Lindela with a reward of R1000 for anyone who reports “assault, ill-treatment, bribery or denial of one free phone call which results in the conviction and/or dismissal of any official or guard involved in such unlawful activities.” However, no person is specially assigned to deal with the situation and it is unclear whether security guards have the motive to report an incident with, for example, their colleagues to the senior managers of Dyambu. Furthermore, there are no provisions at Lindela for how complaints should be followed up.

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<sup>119</sup> Australia has adopted several different complaint systems where the detainees may either complete a general request form, write a letter to the management, advise the staff of the situation, or raise their voice at the monthly meetings. The complaints are reviewed by the private company who, according to the Immigration Detention Standards, must resolve the problem. Joint Standing Committee on Migration, *Report of inspection of detention centres throughout Australia*, August 1998.

Dyambu's way of dealing with reported incidents raises several legal issues. Firstly, what are the legal rights for protection by Dyambu of the detainees from the guards and does Dyambu have a duty to report to the police any criminal offence within their premises? Secondly, on what legal grounds did Dyambu keep the three men as witnesses for an extra week?

There has been, according to Director Ugalungu, Station Commander at the Krugersdorp police station, only one reported case from Lindela registered in the six months before the period of research. The Station Commander further argues that all criminal offences should be reported. The Krugersdorp police station frequently investigates criminal offences, which are reported to them from the local prison in Krugersdorp. The offences are either reported to them by the victims or by correctional officers. Similarly, detainees at Lindela should be given the opportunity to report an offence to the police as the police have no authority to investigate possible offences before they are reported.

Apart from the problem of inadequate follow up of complaints, a legal question remains around cases which are dealt with internally by Dyambu. In the case above, Dyambu kept three witnesses in detention for an extra week before their internal hearing. The ACA says that an immigration officer may take a person into custody and if the officer *deems it necessary* detain such person for a certain purpose. Further, the purpose of the detention is to be *pending his or her removal* from the Republic.<sup>120</sup> It is uncertain whether an immigration officer could argue that it would be necessary, in accordance with the ACA, to detain someone pending an internal hearing at Dyambu. Furthermore, the decision to hold persons detained as witnesses must not be taken by Dyambu but surely by DHA.

Also, for as long as immigration detainees risk having their detention extended pending an internal hearing, few persons will report ill-treatment at Lindela. Similarly, a recent case at Lindela has shown that immigration detainees risk being held in custody as witnesses of a criminal offence under the CPA. A group of detainees from Mozambique had on 16 September 1999 bribed transporting officers to assist their escape on their way to the train. The escape failed and the drivers were charged with bribery. Pending the trial, all the immigrants were held at Krugersdorp police station as witnesses under s 185 of the CPA. The section allows detention in custody of a person who is a witness of any offence referred to in Part III of Schedule 2 for 1) the person's personal safety and 2) for the interest of that person or of administrative justice. Director Ugalungu explained that it had been seen as necessary to detain the witnesses until the trial because of the likelihood that the witnesses would

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<sup>120</sup>Section 53(1) and s 44(1)(a) of the ACA

disappear before the trial.<sup>121</sup> Persons could be discouraged from reporting such incidents because of the risk of long investigation processes. In their earlier report on Lindela, the SAHRC recommended that complaints of assault, corruption or degrading treatment should be given priority and fast-track treatment during both the investigation and prosecution stages.<sup>122</sup>

***The South African Human Rights Commission recommends:***

- ❑ ***That Dyambu shall make a systematic complaint system available at Lindela to lodge complaints to a formal body;***
- ❑ ***That internal hearings at Dyambu shall be open for observation by the DHA;***
- ❑ ***That the use of “room 33” shall be regulated and that the practice of holding victims and witnesses awaiting internal hearing in detention shall cease;***
- ❑ ***That criminal offences are not dealt with internally at Lindela but are handed over to SAPS for criminal investigation;***
- ❑ ***That all persons who are filing complaints of assault undergo an immediate medical examination; and***
- ❑ ***That Dyambu shall ensure that every detained person on a daily basis is given the opportunity of reporting criminal offences to SAPS.***

#### **4.2.7 Women**

Experience from custodial settings similar to Lindela has shown that women and girls risk violation of their human rights by being targeted as victims of sexual abuse.<sup>123</sup> The abuse can be as flagrant as rape and abduction or as subtle as a passage to safety brought at the price of sexual favours. Perpetrators of such violence may include arresting police officers and personnel from Lindela, as well as male detainees.

There have been several reports that female detainees have been sexual harassed by the arresting police and that some police officers may ask for sexual favours instead of money in order for the woman to avoid being arrested or to secure her release from custody. A woman explained on 22 October 1999 that she and her friend had been arrested in a group of 20 women and that only six of these women had been taken to Lindela. The woman held that most of the other women had been released because they had offered sexual favours to the

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<sup>121</sup>Interview with Director Ugalungu at Krugersdorp Police Station 7 October, 1999.

<sup>122</sup> See recommendation no 12, SAHRC *Illegal?* report, March 1999.

<sup>123</sup>See Goodwin-Gill, *The Refugee in International Law*, Claredon paperbacks-Oxford (1998) page 255.

police. One police officer had intimated that he would release one of the women from custody if she “gave him what he wanted”.

However, there seems to be less evidence regarding whether women are sexually harassed or assaulted while at Lindela. Few women were willing to discuss the issue and most of them walked away when asked about their experiences at Lindela. Also, Dyambu officials have insisted that they had never had any reports of sexual assault at Lindela. However, a Dyambu staff member has advised the Commission that a letter was sent to the DHA with a report of sexual harassment by Dyambu staff. Both Dyambu and the DHA denied that such harassment ever existed and suggested that male detainees had assaulted the woman. The woman was repatriated without any measures taken to investigate the case. It can further not be assumed that sexual abuse does not exist because it does not come to anybody’s attention. In a paper prepared by the UNHCR Women’s Commission for Refugee Women and Children to highlight the key points of the Guidelines for NGO field workers<sup>124</sup> it has been suggested that physical and sexual abuse is a highly sensitive issue, which the women involved in would not readily want to discuss.

The problem becomes evident when looking at the physical arrangement at Lindela. Men and women are kept separately in two different courtyards. However, the women’s section is used by Dyambu to keep both men and women before they are deported. Also, men and women constantly mix in common areas such as the canteen and the phone room and female detainees have to enter the male courtyard to use common facilities.

UNHCR has acknowledged the special needs for women in the refugee determination context and that of physical safety in a special policy on refugee women<sup>125</sup>. UNHCR thus noted that special measures were needed in settlements in order to protect women from abuse. Such measures should include basic preventive steps, such as total separation of men and women, adequate lighting etc. In addition, the UNHCR suggests that female protection officers work with the women. At Lindela, only female security guards are allowed into the women’s area during the day. However, several women have expressed concerns about the fact that only male guards patrol the facility at night. In order to prevent sexual harassment, Dyambu should also make a system available for the women to report confidentially on physical and sexual abuse.

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<sup>124</sup>UNHCR, *Guidelines on the Protection of Refugee Women*, paper prepared by the Women’s Commission for Refugee Women and Children, Geneva 1991, page 2.

<sup>125</sup>UNHCR *Policy on Refugee Women*, UN Doc. A/AC 96/754 (20 Aug.1990)

*The South African Human Rights Commission recommends that women and men shall be accommodated separately at all times of detention.*

#### **4.2.8 Children**

Children are accepted into Lindela in the company of their parents. UN rules for the Protection of Juveniles Deprived of their Liberty<sup>126</sup>, article 37 requires states to ensure that the detention of minors be used only as a measure of last resort and for the shortest appropriate time. Section 28 (1) (g) of the Constitution further provides guidelines for the detention of persons under the age of 18. Every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be “(i) kept separate from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child’s age.” It is also a matter of practice by the Department of Welfare not to detain anybody under the age of 14 in a juvenile prison.

There are no special facilities available at Lindela for women with children, but adults and children sleep in the same room, eat the same food and receive the same treatment from the staff. Dyambu supplies napkins to women who arrive with small children, but women often have to ask their families to bring food and clothing for their children to the facility. It was once observed that an immigration officer sent the arresting police officer back with a woman who had a newborn child so that she would be able to fetch the child’s belongings.

Young immigration detainees who are arrested without the company of their children should be kept separate from adults. Lindela does not have the facilities to keep children separated from adults and has therefore decided not to accept anybody under the age of 15 into Lindela.<sup>127</sup> A 14 year old girl from Angola was brought to Lindela on 29 September 1999 by a social worker who wanted the DHA to assist the girl’s transport back home. The girl had been sexually abused by her father and wanted to go back to her aunt in Angola. Immigration officer Mr Mogali refused to accept her into Lindela and argued that he could not assure her safety at the facility. However, it was observed on 18 October 1999 that a 14 year old boy from Somalia was kept at Lindela for two weeks. The boy was observed the day he arrived at

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<sup>126</sup>1990

<sup>127</sup> There is no legislation which regulates the detention of persons under 15 years. The age limit is created as a matter of principle by the DHA. However, the age limit should constitutionally be set at the age of 18 as Dyambu does not require measures to keep persons under 18 years separated.

Lindela and the immigration officers were made aware of the situation. Still he was registered and accepted into the facility. The situation was pointed out to Mr Mogali and Mr Mabote who said that there was nothing they could do as long as the boy was already registered at Lindela. “We don’t have the facilities to detain children separately, so what should we do?”

***The South African Human Rights Commission recommends that children under the age of 18 years shall:***

- ❑ ***Be detained as a measure of last resort;***
- ❑ ***Be kept separate from detained persons over the age of 18 years; and***
- ❑ ***Be treated in a manner, and kept in conditions, that take account of the child’s age.***

#### **4.2.9 Abuse of Power and Corruption**

In the previous report on Lindela, the SAHRC recommended that the DHA and the South African Police Service should put in place effective strategies and should use all appropriate legal means to identify and eradicate corrupt practices at the facility.<sup>128</sup> The report included findings of incidents where officials had accepted bribes in order to release or facilitate the processing of detainees. It was also suggested that corruption at Lindela contributed to incidents of unlawful detention.

Findings from the present research confirm a continuation of corruption among immigration officials at the facility. As most bribery at Lindela concerns the release of detained persons in exchange for a sum of money, individuals detained at the facility have most often not yet been exposed to any corruption. However, two men who had been re-arrested after being released from the centre only a few month ago, explained that they had paid R300 and R200 in April and July respectively. “If you do not have an ID book you might have to pay up to R450 to be released.” Detainees at Lindela have further explained how friends and relatives have paid bribes to be released from the facility.<sup>129</sup> One man explained that his friend had paid R500 to an immigration officer in order to be released from Lindela in the middle of October 1999. The Commission has also been informed that bribes were taken from the 150 individuals who were released by the DHA because of prolonged detention. It has been suggested that some persons had to pay up to R2000 for their section 41 permit. It has also been suggested that arrangements about the exchange of money are made within the main detention area while the actual transfer of money takes place at the immigration office or in an

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<sup>128</sup> See recommendation no 13, SAHRC *Illegal?* Report, March 1999.

<sup>129</sup> There is an evident problem of proving that exchange of money actually occurred in the situations explained above as the handing over of money always seem to occur at the immigration office. However, there is evidence

empty room next to the public phones.

The DHA does not seem to take the problem of bribery seriously and has so far not implemented any actual strategies for the prevention of corruption at the facility. The internal fraud squad at the DHA conducted an investigation at the facility during 1999 but did not find any evidence of corruption there. Dyambu, in contrast, has expressed serious concerns about the problem and has for example implemented a system which allows for immediate dismissal of staff members who accept as little as R3 from the detainees. Dyambu has also announced a reward of R1000 for anybody who reports bribery at the facility, resulting in the conviction and/or dismissal of any official or guard involved in bribery.

***The South African Human Rights Commission recommends that the DHA, Dyambu and the South African Police Service shall put in place effective strategies and should use all appropriate legal means to identify and eradicate corrupt practices at the facility.***

## 5 Recommendations

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### 5.1 Summary of Recommendations

*The South African Human Rights Commission recommends that:*

- 1. Regulations for the arrest of undocumented migrants shall be made and published and that the DHA should disseminate concise guidelines to arresting officers to ensure clear and consistent criteria for the arrest;*
- 2. Persons arrested under the ACA and held in prisons, police holdings or at Lindela shall be determined to be prohibited persons or not by an immigration officer within 48 hours of arrest;*
- 3. Detention in prisons and police holdings shall be kept to the absolute minimum and that individuals detained under the ACA shall be held separate from suspected criminals and arrested persons;*
- 4. Documentation from prisons and police holdings shall be incorporated in a standard form, which shall include the date of arrest, the result of the immigration investigation and country of origin;*
- 5. The burden to prove that a person resides illegally in the country shall be on the DHA;*
- 6. Opportunities are provided for arrested persons under the ACA to make at least one free phone call shortly after the arrest;*
- 7. Opportunities are provided for persons detained under the ACA to make an unlimited number of phone calls from public phones;*
- 8. A person detained under the ACA shall be informed about his or her rights and obligations in a language that he or she understands;*
- 9. Procedures and regulations for section 7 investigations shall be revised to assure fair and consistent criteria for the investigation;*

10. *Investigation interviews shall be conducted in a language that the suspected person understands;*
11. *The DHA shall disseminate consistent guidelines for the issuing of section 10 provisional permits;*
12. *The DHA and Dyambu shall introduce a separate registration system for persons who have not yet been declared prohibited persons;*
13. *The DHA shall ensure continued access to immigration officers even after a person has been declared an undocumented person;*
14. *Access to immigration officers shall not be conditioned by permission from Dyambu staff;*
15. *Dyambu staff shall not take part in the immigration investigation;*
16. *Immigration officers shall advise a person who claims to be an asylum applicant of his or her right to apply for asylum in a language that he or she understands;*
17. *The DHA shall ensure reasonable opportunities for persons detained at Lindela to apply for asylum by introducing refugee officers who are permanently stationed at the facility;*
18. *The DHA shall ensure that the 30 days limit for detention under section 55(5) ACA shall include the total number of days detained at prisons and police holdings, as well as detention at Lindela;*
19. *The DHA ensure that no one is held in detention under ACA in excess of 30 days without their case being reviewed by a High Court Judge;*
20. *The asylum seeker or his representative shall have the right to attend this review;*
21. *Registration lists at Lindela which include the total number of days detained under the ACA shall be made available to the SAHRC for supervision of the total length of detention at Lindela;*
22. *The DHA and Dyambu shall appoint an appropriate number of sufficiently trained staff*

*to be able to operate Lindela in a satisfactory way;*

*23. The DHA and Dyambu shall provide the Commission with free access to Lindela and to any documentation or record relating to the detention of undocumented migrants in regard of their current investigation if the facility;*

*24. Dyambu shall provide:*

- ❑ Toilets and drinking water for persons under immigration investigation in the admittance room;*
- ❑ Means to communicate with friends and relative in writing and access to reading material;*
- ❑ Opportunities for further educational or vocational training;*
- ❑ Telephones and recreation specially allocated for the women's section to keep men and women separated at all times; and*
- ❑ Separate beds with clean bedding and a supply of toiletries;*

*25. Sufficient food shall be served at the facility three times a day;*

*26. Dyambu shall provide opportunities for detained persons at Lindela to exercise their religion and to receive a diet in keeping with their religion;*

*27. Dyambu shall provide access to a qualified medical practitioner with knowledge of psychiatry;*

*28. Dyambu shall make a systematic complaint system available at Lindela to lodge complaints to a formal body;*

*29. Internal hearings at Dyambu shall be open for observation by the DHA;*

*30. The use of "room 33" shall be regulated and that the practice of holding victims and witnesses awaiting internal hearing in detention shall cease;*

*31. Criminal offences are not dealt with internally at Lindela but are handed over to SAPS for criminal investigation;*

*32. All persons who are filing complaints undergo an immediate medical examination;*

33. *Dyambu shall ensure that every detained person is given the opportunity of reporting criminal offences to SAPS on a daily basis;*

34. *Women and men shall be accommodated separately at all times of detention;*

35. *Children under the age of 18 years shall:*

- Be detained as a measure of last resort;*
- Be kept separate from detained persons over the age of 18 years; and*
- Be treated in a manner, and kept in conditions, that take account of the child's age.*

36. *The DHA and the South African Police Service should put in place effective strategies and should use all appropriate legal means to identify and eradicate corrupt practices at the facility.*

## **5.2 Implementation of recommendations**

*In order to ensure the development of legislative rights for undocumented migrants, the South African Human Rights Commission recommends amendments of current legislation to include a set of minimum standards based upon the above mentioned recommendations with attention paid to national and international legislation on the arrest and detention of undocumented migrants.*

*The South African Human Rights Commission also recommends the introduction of a separate Judicial Inspectorate for undocumented migrants arrested and held in detention at correctional services, police holdings and other specialised facilities such as Lindela.*

*During this transformation process, the South African Human Rights Commission recommends that the DHA and Dyambu introduce interim measures where they include in their contract a set of detailed minimum standards for the detention of undocumented migrants at Lindela. These minimum standards shall reflect the above mentioned recommendations.*

*To ensure that these minimum standards are implemented and complied with, the South African Human Rights Commission also recommends that DHA and Dyambu shall facilitate an independent inspectorate system at the facility based on the following conditions:*

- *The inspectorates, the DHA and Dyambu shall co-operate with each other. The role of the inspectorates shall not be to condemn the DHA or Dyambu, but to assist them in the process of detaining undocumented migrants;*
- *It appears to be suitable for a non-governmental organisation to undertake the task of monitoring facilities of detention. Such an organisation would have the political and organisational clout to penetrate the facility and would stand its ground against any opposition by the DHA and Dyambu;*
- *Members of inspectorates shall be recruited from among persons of high morals, known for their competence in the field of human rights or having professional experience in the field;*
- *The inspection shall be carried out by at least two inspectorates. The inspectorates may, if they consider it necessary, take assistance by experts and interpreters. Experts shall act on the instruction and under the authority of the inspectorates;*
- *The DHA and Dyambu shall provide to the inspectorates the following facilities to carry out its task:*
  - *Unlimited access to any place of detention under the ACA, including the full right to move inside such places without restrictions;*
  - *Opportunities to interview in private any person in detention or to communicate freely with any person with relevant information; and*
  - *Other information available to the DHA or Dyambu, which is related to the performance of the inspectorates to carry out its duty;*
- *After each visit, the inspectorates shall draw up a report on the facts during the visit which shall contain:*
  - *Any observation which may have been submitted to the DHA or Dyambu;*
  - *Any recommendations or improvements on the protection of persons deprived of their liberty the inspectorates consider necessary;*
- *If the inspectorates, in the course of a visit, come across any cases of mistreatment, the inspectorates shall verify that this assertion will be brought to the attention of the DHA and Dyambu and that it has been given due consideration;*
- *If the DHA or Dyambu fail to co-operate or refuse to improve the situation in the light*

*of the inspectorate's recommendations, the inspectorates shall pass on the case to the South African Human Rights Commission where complaints and serious allegations shall be processed and attended to;*

- ❑ *The inspectorates shall be accountable to the South African Human Rights Commission to whom they regularly shall submit a report on their activities;*
- ❑ *Any information gathered by the inspectorates in relation to their visits, the report, the consultation with the DHA and Dyambu and the outcome from the formal notification shall be open to the public. However, no personal data should be published without the consent of the person concerned; and*
- ❑ *The DHA and Dyambu shall assist the process by creating a budget and generating funds to contract this work out to civil society.*

## **6 Conclusions**

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In the course of preparing this report for publication, the SAHRC has met with both DHA and Dyambu to discuss the above mentioned findings, recommendations and possible solutions for the future. Both institutions have also been given the opportunity to respond to the recommendations and to the content of this report in general. Dyambu, a private company, has largely responded positively to the recommendations and has, since the conclusion of the research, taken an active interest in cooperating with the SAHRC in order to improve the conditions at the centre. The DHA, a state department, on the other hand, has not responded to the recommendations. DHA also has not taken any major steps in order to elucidate what are the recognised specific rights of the persons detained under the ACA or to improve the conditions under which persons are detained at the facility. The problem with the lack of response seems to originate in an unclear division of roles and responsibilities between the head office of the DHA and the regional office in Gauteng West. For example, it has become clear that the head office has not informed the regional office about the proceedings and not even furnished them with the report as such. Although many of the recommendations made by the SAHRC in the March 1999 report and in this report require policy decisions to be made on a national level, and in some cases may even require legislative amendments, it is evident that the regional department must be involved in the process to make any substantial changes at the facility.

### **6.1 Dyambu Response to Recommendations**

On 20 July 2000 Dyambu furnished the SAHRC with a report on the implementation of the recommendations made by the SAHRC. In short, Dyambu has largely responded positively to the recommendations and has implemented several significant improvements at the facility. They have also, in collaboration with the researcher, been able to comment on the report and to correct a few misstatements regarding the situation at Lindela. Emma Algotsson and Jonathan Klaaren visited the facility on 13 September 2000 in order to follow up on made recommendations and to inspect the alleged improvements implemented. Also, at a meeting between Dyambu and Commissioner Kollapen of the SAHRC on 15 September 2000, Dyambu agreed to take further steps towards amelioration of conditions at Lindela.

In the report Dyambu has commented on each recommendation made regarding issues pertaining to Dyambu's area of responsibility. The following points were agreed to regarding the recommendations;

6. Dyambu has agreed with the DHA that the Department should take responsibility for free phone calls as costs for phone calls were not included in the tender agreement.

*SAHRC comments: It was agreed on 15 September 2000 that Dyambu and DHA should keep a record of all free phone calls made at the facility in order to estimate the costs involved. Dyambu is prepared to arrange for free phone calls to be made available as long as the DHA pays for the service.*

7. Dyambu undertakes to provide for unlimited number of phone calls from public phones.

*SAHRC comments: It was observed on 13 September 2000 that new phones have been installed at the facility and that phones now are available in the women's section.*

8. Dyambu undertakes to inform any person detained at the facility about his or her rights in a language he or she understands. A person has been employed full time for this purpose.

*SAHRC comments: It was observed that new boards with instructions of regulations and rights at the facility, including the Bill of Rights, have been installed at the facility and that a person has been employed full time for the purpose of informing persons of their rights and obligations. The board and the introduction to the facility are translated into several languages including English, Afrikaans, Zulu, Xhosa, Venda, Ndebele and Shangaan.*

12. Dyambu agrees to introduce a separate registration system for persons who have not yet been declared prohibited persons:

*SAHRC comments: A new structure has been implemented at Lindela where persons not yet declared undocumented migrants are held on the DHA side of the facility and only those that have undergone a section 7 investigation and been declared undocumented migrants are registered and held at the Dyambu side of the facility. The transfer process from one side to another is completed by the handing over of body receipts from SAPS. Persons released from the facility are taken off the list without further information given to the Dyambu staff about the reason for the release. The SAHRC recommends that DHA should issue new body receipts rather than relying on the police body receipts in order to prevent persons from being wrongly registered at the facility.*

14. Dyambu argues that access to immigration officers has never been conditioned by permission from Dyambu staff:

*SAHRC comments: As a result of the new structure mentioned above, access to immigration officers may be more difficult. Dyambu argues however that there is freedom of movement within the facility. The freedom of movement is only restricted upon requests from the DHA. Dyambu has further introduced a registration system where all those persons detained who, for example, want to see immigration officers may sign up to do so. The SAHRC noted*

*that the DHA does not cooperate with a similar system for complaints. It was agreed on 15 September 2000 that DHA immigration officers will sign the register used by Dyambu when persons are handed over to their side. The register will also contain a column for the DHA to fill in how the complaint was dealt with and the actions taken.*

15. Dyambu argues that their staff members have never taken part in the immigration investigation.

19. Dyambu has agreed to immediately release any undocumented migrant who has been detained for more than 30 days.

*SAHRC comments: The SAHRC noted on 13 September 2000 that on that date 37 persons had been held in excess of the thirty days limit. This was the same problem surfacing again. A further problem is that the registration system at Lindela does not include information about the date of first arrest. Thirteen persons were noted to have been arrested for up to 60 days, if one includes detention at police cells and prisons.*

21. Dyambu has agreed to fax the registration list at the facility to the SAHRC every Monday morning.

22. Dyambu has agreed to appoint sufficiently trained staff at the facility. They have also employed more staff. Lindela currently employs 113 staff. Four new management staff, including a senior manager, have been appointed.

23. Dyambu argues that it has always provided the SAHRC with free access to Lindela and to any documentation about the facility and that information in the future shall be requested in writing from Dr J Smith or Mr D Sadie.

*SAHRC comments: SAHRC has, since the issuing of recommendations, had free access to Lindela and any document asked for from Dyambu.*

24. Dyambu has completed a reconstruction of the facility, implementing several of the recommendations made by the SAHRC. Improvements that have been implemented include:

⇒ Six toilets are available in the DHA admittance room and an additional six toilets in the visitor's room;

⇒ A room has been made available for use as a library for the detainees. The library contains writing material, daily newspapers and books to read. The library may also be used for studies, although materials for studies are not supplied;

⇒ The female section has been separated from the rest of the facility. An area has been set

aside where women and men may meet for those who wish. Special hours have been set aside for the women to have access to the canteen. Women use the dining hall at separate times to the men. Only female custodial officers are allowed into the female section;

- ⇒ One room has been set aside for a crèche for children at Lindela;
- ⇒ Recreation facilities such as netball have been provided in the female section;
- ⇒ Recreation facilities such as a soccer field, basketball court and Ithjuba throwing courts have been provided in the male section;
- ⇒ Televisions have been installed in both section;
- ⇒ New beds and bedding have been provided, all blankets are to be dry cleaned once a month. Also, the rooms are to be fumigated once a week;
- ⇒ Toilet paper and soap is to be provided by Dyambu;
- ⇒ SGA laboratories do regular inspections of kitchen and dining facilities at Lindela.

*SAHRC comments: Significant improvements have been made by Dyambu. The company has implemented most of the recommendations made by the SAHRC regarding the conditions at Lindela. Dyambu has introduced a registration system where all improvements, issuing of soap and toilet paper, dry cleaning of blankets and fumigation of the facility and food inspections are recorded and open for inspection by the SAHRC. Persons at Lindela still complain about blankets being dirty.*

25. Food is served twice a day after instruction from the DHA, due to the logistical difficulties of interrupting the daily routines at the facility during the middle of the day. If the DHA instructs Dyambu to serve meals three times a day, they are willing to comply with this.

*SAHRC comments: A menu of the food served at the facility is placed on a large board for everyone to take notice of.*

26. A room has been set aside for residents to hold religious services when desired. Bibles and the Koran will be made available for these services. Halaal and Kosher food will be made available, provided the food can be sourced at the same price as the current food. Halaal and Kosher food will be available in the shop at Lindela.

*SAHRC comments: Dyambu has yet not implemented the serving of Halaal and Kosher food.*

27. There is a qualified medical practitioner, with knowledge in psychiatry, that attends to all patients on a daily basis. In addition, there is a qualified female nursing sister who is permanently on duty. Persons who wish to see the doctor may register to see him on a daily basis. All visits to the doctor or to the nurse are recorded. Several months ago, a new clinic was built.

*SAHRC comments: An inspection of the records of the clinic showed that several persons have been seeing the doctor daily and that persons with serious diseases have been transferred to the a medical hospital. All persons with Hepatitis, Yellow Fever, Meningitis, HIV/Aids and pregnant women are either released or repatriated as soon as possible.*

28. A formal complaints system has been set in motion where all complaints are recorded. In writing it is stated how the complaints were dealt with and the actions taken. On a weekly basis, a complaints committee of Dyambu staff reviews all the complaints to see that action has been taken concerning all the matters raised.

*SAHRC comment: Only a few complaints regarding Dyambu staff have been recorded in the complaints register. Dyambu has paid out R1000 once for information about bribery at the facility.*

29. The DHA and SAHRC had been given full observation status at all Lindela disciplinary hearings.

30. No isolation room exists at Lindela. Witnesses for disciplinary hearings will be held for the shortest period possible, between two and six days.

31. Dyambu will report all criminal offences by fax to the local SAPS, where undocumented migrants are the affected party.

32. Dyambu will ensure that when any assault is reported, the undocumented migrant must undergo a medical examination.

33. Dyambu recommends that the SAPS places an officer at Lindela permanently.

*SAHRC comments: The SAHRC recommends that contacts are made with the local SAPS for them to visit the facility regularly for undocumented migrants to be able to file complaints directly to SAPS.*

34. Women and men are accommodated separately at all times at Lindela.

*SAHRC comments: See comments regarding Recommendation no 24.*

35. Dyambu supports the recommendation that children unaccompanied by their parents shall not be admitted into Lindela. Provision is made for children accompanied by their parents in the centre. Men under the age of 18 will be accommodated in separate rooms, if DHA provides Dyambu with necessary details.

### **Implementation of recommendations**

Dyambu fully supports the recommendation of setting up an independent judicial inspectorate. As an immediate measure, Dyambu supports the suggestion that the SAHRC monitor the facility.

*SAHRC comments: Dyambu has made one room available for the SAHRC to share with the Human Rights Committee, for a permanent presence at the facility. Discussions have been held with the SAHRC, the Human Rights Committee and the Wits Law Clinic for co-operation with inspection of the facility.*

### **6.2 SAHRC Conclusions**

The period covering the research, including the various on site visits to Lindela, the writing of this report and the engagement with Dyambu on the various matters emanating from the report, was a positive experience for the Commission and those who worked on the report, as well as, we hope, for Dyambu Holdings. Through the process we are able to bring the influence of the Commission to bear on ensuring that the detention regime at Lindela not only passed constitutional scrutiny but was consistent with South Africa's national and international obligations towards migrants. It was through this process that we were able to meaningfully demonstrate that human rights issues, even when disputed, were capable of being resolved through dialogue and interaction. Of course, much still remains to be done but the Commission is satisfied that its intervention in the manner which was possible in preparing this report was a positive one.