

Summary of the Submission of the Rau Family to the Inquiry into the Detention of Cornelia Rau

Introduction

This is a summary of the submission to the Inquiry into the detention of Cornelia Rau prepared on behalf of the family of Cornelia by the University of Newcastle Legal Centre ('UNLC').¹ This executive summary is based upon evidence supplied by Edgar Rau, Veronika Rau, Christine Rau, witnesses who agreed to be interviewed, media reports and documents on the public record.

It is submitted that the nature of the inquiry, its powers and terms of reference are too limited to enable the Palmer Inquiry to uncover the whole truth about Cornelia's detention and bring about necessary change. The family seeks an open judicial inquiry that identifies systemic failures and those responsible for them. The government has instead established a closed inquiry which is not equipped to ensure that all necessary information is obtained.

¹ The authors of the submission are: Associate Professor Ray Watterson, Robert Cavanagh, Barrister at Law, Jenny Finlay-Jones, James Marshall, and Shaun McCarthy, assisted by students and staff from the School of Law, University of Newcastle. Christine Rau, the sister of Cornelia, made considerable and significant input into the submission, supported by her parents Edgar and Veronika Rau. Dr John Buxton of the UNLC, Virginia Newell of the School of Law, University of Newcastle and Greg Carne, School of Law, University of Tasmania also assisted with particular sections of the submission.

The Family's Position

The expectations of the Rau family in relation to the Inquiry are that the Inquiry will ensure the:

- a. identification and proper acknowledgment of those parts of the system and people involved in the system including detainees that provided appropriate support, treatment and assistance for Cornelia;
- b. identification of individuals who failed to provide appropriate support, treatment and assistance for Cornelia;
- c. identification of any systemic failures to provide appropriate support treatment and assistance for Cornelia and identification and censure, where appropriate, of individuals responsible for such failures.

Cornelia's family also believes that fundamental inadequacies in mental health systems were an important precursor to her wrongful detention. The failure of the mental health system to adequately respond to chronic cases like Cornelia's led to her disappearance. The Rau family would like to see greater government acknowledgement of and responsiveness to the deep and widespread flaws in mental health systems.

The Scope of the Inquiry and the Terms of Reference

The Rau family and the community expect the Inquiry to uncover the truth about Cornelia's detention, identify systemic failures and make appropriate recommendations. However, it is our submission that the nature of the inquiry, its

powers and terms of reference are too limited to uncover the truth and bring about necessary change.

The terms of reference do not allow for adequate scrutiny of the policy that mandates removal of individual liberty without judicial scrutiny, the lawfulness of Cornelia's detention and the conditions of her detention. They do not require any consideration of how the constitutional and human rights of Cornelia and other detainees may be infringed by the mandatory immigration detention system.

The terms foreclose consideration of the availability and standard of medical care for detainees generally. And do not allow for identification of failures in the detention system in a way that attributes responsibility or accountability to individuals.

The Effect of Incarceration on Cornelia

During the ten month period of her detention Cornelia did not receive any proper psychiatric treatment for her mental illness. Her prolonged periods of isolation and lack of medication likely entrenched her condition. Cornelia's condition deteriorated during her detention and must be fully explained by the Inquiry.

The treatment Cornelia received in custody in Baxter seems to have gone beyond even punitive detention. The potential for abuse of a person within this unchecked detention system is very high. In Cornelia's case a full investigation should occur to determine the extent of the physical and mental abuse she may have suffered and to exclude, if possible, sexual assault.

A factor that almost certainly contributed to Cornelia's deterioration was her misdiagnosis in the Princess Alexandra Hospital. This misdiagnosis became a reference point for health professionals in Queensland and Baxter. The Inquiry should also explain this failure. Repeated requests for relevant documents from Queensland by Cornelia's guardian, UNLC and Christine Rau have been refused.

Cornelia's Treatment While in Detention in Queensland

The use of isolation during Cornelia's detention in Queensland is of great concern as are media reports that prison guards involved in Cornelia's case have refused to speak to the Inquiry.

The Queensland Premier has acknowledged publicly that Cornelia's treatment was unacceptable. It is a disappointment to the Rau family that the Premier has not translated those words into any practical provision of information to the UNLC.

It is hoped that this Inquiry will have received adequate documentation from Queensland. The Palmer Inquiry should take an unfettered approach to its analysis of the failures of the Queensland Government and its departments.

Evidence of Cornelia's Mental Ill Health and Identity Whilst in Custody in Queensland

While Cornelia was in detention in Queensland a number of witnesses whose evidence is contained in our submission observed that her behaviour was unusual. Further, witnesses noted Cornelia's confusion over her identity. The reason for the Department not acting on these concerns remains to be explained. The advice

received from third parties should have prompted department officials to make all relevant inquiries about her identity and residency status.

The absence of any record in Germany of Cornelia as ‘Anna’, and her fluent, Australian-accented English, combined with what were clear symptoms of mental illness to outsiders, should have triggered suspicions and further inquiries about her self-described status as an illegal immigrant. The Minister and her officials should be required to explain to the Inquiry why they say detention was necessary in Cornelia’s case.

Cornelia’s Treatment While in Detention in Baxter

Baxter Detention Centre can properly be described as a gaol in a harsh environment where the family or friends of inmates are excluded from visiting if for no other reason than its distance from any major population centre. The incarceration of Cornelia Rau in this alien setting would have been sufficient to be detrimental to her health.

However, in addition [there is evidence that the treatment of Cornelia whilst she was in Baxter involved abuse. The obvious abuse involved imprisonment that caused a deterioration of her mental health. The other is exposing her to potential physical and sexual assault. The abusive treatment said to have been metered out to Cornelia is described in](#) evidence [provided](#) to the legal representatives of the Rau family.

Evidence of Cornelia's Mental Ill Health and Her True Identity

Whilst in Custody in Baxter

Those witnesses who saw Cornelia while she was in custody and who observed that her behaviour was unusual include fellow detainees, refugee advocates, Baxter staff and clergy who visit Baxter. [The evidence suggests that Cornelia did not receive any assistance with her mental health problems whilst she was in Baxter. It also appears that there are insufficient resources available to provide assistance for detainees who may be mentally ill.](#) A number of witnesses who saw Cornelia also noted that her name may not have been as claimed and have provided evidence to the Rau family.

A check with the New South Wales Police Service using photographs and other information would probably have revealed her identity. The relevant federal department does not seem to have attempted to make even the most basic inquiries of missing persons units. If the federal department did make adequate inquiries of missing persons units, then there will need to be a careful analysis done of the steps undertaken by New South Wales police to find Cornelia.

It is submitted that there was sufficient evidence available very shortly after Cornelia was taken into custody to alert those vested with responsibility for detaining her that she may have needed help not detention. The fact that she was not given help reveals systemic failures in both state and federal custody systems.

Access to Missing Persons Information

Cornelia was notified as a missing person by her parents to the New South Wales Police on 11 August 2004 It remains to be determined whether Manly Hospital

reported Cornelia missing when she disappeared on 17 March 2004. Because she was under treatment, the protocol would have been that the hospital report her as missing to the police.

The New South Wales police also have a case management system and are required to make relevant inquiries and enter details in the Computerised Operational Policing System (COPS) that is accessible to other police within the state. There are also procedures for notifying and obtaining the assistance of the media. There does not appear to be any system for notifying police in other states, or the national unit unless the person is missing overseas.

The Inquiry should publish in its report full details of the steps taken to utilise federal and state missing persons systems. The Inquiry should also make recommendations for the improvement of the systems.

Law and Procedure

In the preparation of this section of the summary the writers have drawn heavily upon Peter Prince, *The detention of Cornelia Rau: legal issues*, Parliament of Australia, Parliamentary Library, Research Brief, 31 March 2005, no 14, 2004 – 2005.

The Law: Sections 189 and 196 of the *Migration Act 1958*

Cornelia and the *Migration Act 1958*

The High Court has dealt with the general issue of immigration detention in a number of recent cases. However, the Court has not yet determined the question that may arise in the kind of circumstances that might be found in Cornelia's matter of whether the *Migration Act 1958* authorises the Commonwealth to detain or deport a citizen or lawful non-citizen under the *Migration Act*.

The issue of the limits of the Commonwealth's detention powers under the *Migration Act* has arisen in *Ruddock & Ors v Taylor* [2005] HCA Trans 65 (2 March 2005), a case heard by the Court on 2 March 2005 and in which judgment has been reserved. The case, involving an appeal against damages for false imprisonment under the *Migration Act*, may resolve the legal basis of immigration detention under the Act.

The Migration Act, in particular Division 7, contains provisions dealing with detention of unlawful non-citizens. Section 189, dealing with detention of unlawful non-citizens, places a legal obligation on authorities, including immigration officials and State police, to detain anyone 'reasonably suspected' of being unlawfully in the country. Section 196 deals with 'the duration of detention' and operates upon and after the original detention required by s.189. Section 196(1) requires an 'unlawful non-citizen' to be kept in detention until he or she is removed, deported or granted a visa.

Cornelia's Original Detention

Under s. 189 of the *Migration Act*, an 'officer', including immigration officials or State police, who 'knows or reasonably suspects' that a person is an unlawful non-citizen, must detain that person.

A fundamental issue in the matter before the Inquiry is whether or not it was "reasonable" to suspect that Cornelia, a lawful Australian resident, was an unlawful non-citizen. As a matter of law, Cornelia's detention must comply with the requirements for lawful detention contained in the *Migration Act*, as interpreted by the courts. The High Court has considered the requirements for lawful detention in and has reserved judgment.

One artificial and improbable interpretation of the *Migration Act* is that so long as one officer held a reasonable suspicion under s.189 on the first day of a person's detention, then that person's continuing detention will continue to be lawful. However, this interpretation overlooks the operation of s.196 and defies both common sense and the common law which requires legislation depriving individuals of their freedom to be construed narrowly.

The contrary interpretation of the Act has the result that if new facts come to light which render the original suspicion false or unsustainable then that suspicion is no longer 'reasonable' and the detention becomes unlawful. The Federal Government has argued before the courts that the *Migration Act* requires that a person originally suspected of being an unlawful non-citizen be kept in immigration detention until that

suspicion is shown to be wrong. Its argument has consistently, unequivocally and unanimously been rejected by the courts.

Government Immigration Detention Policy and Practices

An important question for the Inquiry is whether or not DIMIA's official guidelines relating to detention were followed in Cornelia's case.

DIMIA's *Migration Series Instruction (MSI) 321: Detention of Unlawful Non-Citizens*, states that when detaining a person the officer must ensure that knowledge or reasonable suspicion about that person's status as an unlawful non-citizen is based on objective evidence

The DIMIA's *Migration Series Instruction (MSI) 234: General Detention Procedures* state that "officers should regularly review the need for continued detention, and for maintaining the form of detention".

What is squarely an issue for this inquiry is whether officers regularly reviewed the need for Cornelia's detention and the form that detention should take. The standards fail to mention the obligation of officials to make 'due inquiry' by reasonable efforts of search and investigation to obtain material relating to the person's citizenship. The standards also fail to provide adequate guidance for officials on the various procedures for original and continuing detention.

Detention Centre Standards

Detention centres are established and maintained under the *Migration Act s. 273*.

DIMIA is responsible for the operation of Australia's immigration detention centres. During the period of Cornelia's detention, GSL (Australia) Pty Limited (GSL) was contracted by DIMIA to deliver services at Baxter. Immigration Detention Standards (IDS), developed by DIMIA, set out the quality of services expected in the centres.

An important question for the Inquiry is whether or not DIMIA, its officers and agents complied with all applicable IDS in relation to Cornelia's detention. DIMIA's records will, of course, assist the Inquiry to answer this question. We have been denied access by the Inquiry to those records.

Privatised Immigration Detention

The fact that Baxter was a privately operated facility, as opposed to a public facility, may have contributed to the significant failure to identify and treat Cornelia.

The lines of communication between GSL and DIMIA may have been impeded by the private nature of GSL. For example, it has been suggested that Psychologist Micallef, who was employed by GSL at Baxter, was hindered by GSL in his attempts to have an urgent psychological assessment of Ms Rau undertaken by South Australia's mental health authorities. Furthermore, after Mr Micallef resigned the lines of communication between the South Australian mental health authorities and Baxter broke down and further delayed Cornelia's ability to access appropriate medical treatment.

We have been denied access by the Inquiry to the records relating to Cornelia's detention kept by DIMIA and its agents and presumably obtained by the Inquiry. Consequently, our ability to assist the Inquiry to answer the question of whether or not DIMIA, its officers and agents complied with applicable guidelines and standards has been effectively nullified.

Cornelia and DIMIA Culture

Cornelia's treatment at the hands of DIMIA appears to stem from a bureaucratic culture. This culture sees people caught by the system, denied their freedom without any fair and impartial hearing. In Baxter, "non-citizens" are called to the phone by number, not by name. DIMIA appears to be ignoring simple humanity in favour of an inflexible, arbitrary system of bureaucracy based on a narrow interpretation of the *Migration Act*.

During our investigation of Cornelia's case we received abundant anecdotal evidence to suggest that DIMIA fails to provide adequate medical, and especially psychiatric care, to detainees. One reason much of the evidence about immigration detention has remained anecdotal is a culture of fear where both employees and detainees fear to speak out. Another factor in DIMIA's inertia in providing adequate psychiatric care would appear to be the complex structure of arrangements between the department's contractor GSL and its subcontractors DTC, PSS, IHMS, and Carlton Medical Practice.

It is not explained how DIMIA interpreted the *Migration Act* 1958 to mean Baxter staff were entitled to place Cornelia in punitive isolation in Red 1 for 94 days instead of providing her with psychiatric help. Nor is it explained how the *Migration Act* provided for her to be kept in a Queensland gaol for six months with little DIMIA activity on her case.

The repeated failure of DIMIA officials to respond promptly or at all to people concerned about ‘Anna’s’ welfare also point at best to communication problems within the department and at worst a willful inertia in responding to detainee issues.

DIMIA’s treatment of Cornelia has opened a very bleak window onto mandatory detention for many Australians.

It is our contention that DIMIA needs outside, independent scrutiny on refugee issues. A judicial inquiry may need to consider removing the responsibility for refugee issues from DIMIA entirely. A judicial inquiry should consider removing all detention functions from DIMIA.

We recommend that the *Migration Act* 1958 be carefully and fundamentally reviewed.

Recommendations

We submit that the Palmer Inquiry make the following recommendations in its report and take the following actions:

Recommendations regarding Cornelia

1. That the Palmer Inquiry recommend that government provide for the medical and other necessary support and treatment to enable Cornelia to regain her mental and physical health;
2. That the Palmer Inquiry recommend that government provide appropriate assistance with Cornelia's living conditions and necessary incidentals which will optimize Cornelia's recovery from the effects upon her of detention.
3. That the Palmer Inquiry recommend that government recognize and respond appropriately to the humiliation, indignity and distress suffered by Cornelia as a consequence of her detention.
4. That the Palmer Inquiry identify the failures to provide appropriate care, treatment and assistance for Cornelia during the period of her detention.
5. That the Palmer Inquiry report on the reasons why Cornelia's mental health problems were not properly diagnosed and treated in Princess Alexandra Hospital, and the basis for the diagnosis be clearly provided in the report.
6. That the Palmer Inquiry report on the reasons why Cornelia's mental health problems were not properly diagnosed and treated in the Baxter Detention Centre and the basis for the diagnosis be clearly provided in the report.

Recommendations relating to a Judicial Inquiry

7. That an open judicial inquiry be established by the Commonwealth into mandatory detention under the *Migration Act 1958*, including the treatment and care of persons detained under the Act.
8. That the terms of reference of the judicial inquiry include the circumstances surrounding the detention of Cornelia Rau.

9. That the judicial inquiry, as part of its terms of reference, identify those persons who have been wrongfully or improperly detained under the *Migration Act 1958*.
10. That the Commonwealth approach the governments of the States and Territories to join the inquiry.
11. That the responsible government ministers consult with relevant community and advocacy groups and detainees and their legal representatives to determine the terms of reference for the judicial inquiry.
12. That the judicial inquiry report on the effects of mandatory detention on detainees.
13. That the judicial inquiry considers and recommends changes to mandatory detention to uphold human rights and protect human dignity.
14. That the inquiry consider and recommend to government that where there is no evidence that an unlawful non-citizen is a criminal or otherwise a threat to the community, that they be issued with an appropriate visa until their status is finally determined.
15. That the inquiry consider and recommend to government that legislation be introduced requiring any person detained under the *Migration Act 1958* be brought before a Federal Court Magistrate within 48 hours of arrest, to initially determine if the arrest and detention is reasonable and that legal representation be made available to any such person.
16. That the inquiry consider and recommend to government that legislation be introduced requiring detainees to be brought before a Federal Court Magistrate on a fortnightly basis, to determine the reasonableness of their ongoing detention and that legal representation be made available to detainees for such purposes.
17. That the inquiry consider and recommend to government that state and territorial police and other state and territorial officials not be involved in the investigation and detention of persons under the *Migration Act 1958*.
18. That the inquiry consider and recommend to government that state and territorial gaol systems no longer be used to detain persons under the *Migration Act 1958*.

Recommendations relating to Action to be taken by the Palmer Inquiry

19. That the Palmer Inquiry provide all materials obtained or produced by it during the course of its investigations into the Cornelia Rau matter to any judicial inquiry established following Recommendation 7.
20. That the Palmer Inquiry identify any individuals who provided or failed to provide appropriate care, treatment and assistance for Cornelia during the period of her detention and refer any such individuals and agencies to the appropriate federal or state Minister for appropriate acknowledgment or corrective or disciplinary action.
21. That the Palmer Inquiry identify any individuals and agencies who may have engaged in criminal activity in relation to Cornelia during the period of her detention and make appropriate recommendations.
22. That the Palmer Inquiry identify the systemic failures in the detention, mental health and missing persons systems arising from the circumstances of Cornelia's detention and provide an explanation for all such failures.
23. That the Palmer Inquiry obtain and make public, subject to Cornelia's medical privacy, all relevant documentation relevant to the reasons for Cornelia's detention in Queensland.
24. That the Palmer Inquiry include an audio recording of Cornelia's interview with the Queensland ethical standards investigation unit with each copy of its report to the Minister and recommend to the Minister that the recording be included with any public report of the Palmer Inquiry into the Cornelia Rau matter.
25. That the Palmer Inquiry obtain and make public, subject to Cornelia's medical privacy, all documentation relevant to the reasons for Cornelia's detention in South Australia.
- 26. CONFIDENTIAL**
27. That the Palmer Inquiry make appropriate recommendations in respect of the above.

Recommendations relating to Detention, Mental Health and Missing Persons

Reforms

28. That the Palmer Inquiry recommend improvements in relation to:
 - a. the services available to and the treatment of persons with mental illness or disorders,
 - b. the detention of persons under the *Migration Act 1958*; and
 - c. the handling of missing persons,especially in areas highlighted by the findings of the Inquiry relating to Cornelia's detention and her treatment and care during the period of her detention.
29. That the Palmer Inquiry recommend that legislation be introduced requiring any person detained under the *Migration Act 1958* be brought before a Federal Court Magistrate within 48 hours of arrest, to initially determine if the arrest and detention is reasonable and that legal representation be made available to any such person.
30. That the Palmer Inquiry recommend that legislation be introduced requiring detainees to be brought before a Federal Court Magistrate on a fortnightly basis, to determine the reasonableness of their ongoing detention and that legal representation be made available to detainees for such purposes.
31. That the Palmer Inquiry recommend that state and territorial police and other state and territorial officials not be involved in determining whether persons are to be detained under the *Migration Act 1958*.
32. That the Palmer Inquiry recommend that state and territorial gaol systems no longer be used to detain persons under the *Migration Act 1958*.
33. That the Palmer Inquiry recommend that the behavioural management principles of GSL in detaining inmates be reviewed, in particular the use of solitary confinement as a punitive measure. If a detainee's behaviour is criminal and warrants punishment, this should be done through the local police with complaints mechanisms available through the State Ombudsman.
34. That the Palmer Inquiry recommend that standards be formulated by the Minister in consultation with the Royal College of Australian and New Zealand Psychiatrists to

avoid the wrongful detention under the *Migration Act 1958* of any person suffering a mental illness or otherwise vulnerable.

35. That the Palmer Inquiry recommend that detainees be provided with adequate assessment and treatment of their mental health needs, including transfer to public mental health facilities if appropriate.
36. That the Palmer Inquiry recommend that DIMIA consult with the Royal College of Australian and New Zealand Psychiatrists and follow its recommendations regarding the treatment of detainees who are mentally ill.
37. That the Palmer Inquiry recommend that detainees suffering from mental health problems not be placed in isolation.
38. That the Palmer Inquiry recommend that controls be established to ensure that the privacy and dignity of detainees should not be violated. In particular, to ensure that it is impossible for any officer of the opposite gender to view detainees while showering or going to the toilet.
39. That the Palmer Inquiry recommend that persons detained under the *Migration Act 1958* currently in force be detained in or near major population centres.
40. That the Palmer Inquiry recommend that the Immigration Detention Advisory Group be disbanded and replaced with an independent statutory body having oversight of the immigration detention centres. The body to be properly established in law, and regularly review the operations and costs of detention centres. The body to have the authority to inspect detention centres at random. Members of the statutory body to be able to order changes made to existing procedures if operational flaws are discovered during inspections. Visits to be followed up within a specified time to ensure compliance with any changes ordered after a visit.
41. That the Palmer Inquiry recommend to government that a copy of its report to the Minister in relation to the Cornelia Rau matter be made public, subject to Cornelia's medical privacy and that Cornelia's guardian, the Rau family and its legal representatives be provided with a copy of that report and have access to all documents and materials obtained by the Inquiry or produced by it during the course of the Inquiry, subject to Cornelia's medical privacy.

42. That the Palmer Inquiry recommend that the attention of governments be drawn to the need to provide secure long stay hospitals for the mentally ill to ensure their stabilization and proper treatment.
43. That the Palmer Inquiry recommend that involuntary mental health patients who abscond from hospital or other mental health facilities are automatically registered as missing persons on a national missing persons register.
44. That the Palmer Inquiry recommend that detailed guidelines be formulated by the responsible federal, state and territorial Ministers for the use of missing persons units at all levels to assist with the identification of people who are subject to the *Migration Act 1958*.

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