

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 513/09

This is the eighth s 486O report by the Ombudsman on Ms X as she has remained in immigration detention since the Ombudsman's seventh report. The Ombudsman's first report (41/06) was sent to the Minister on 17 January 2006 and tabled in Parliament on 29 March 2006. The Ombudsman's combined second and third report (104/06) was sent to the Minister on 31 October 2006 and tabled in Parliament on 5 December 2006. The Ombudsman's fourth report (206/07) was sent to the Minister on 20 June 2007 and tabled in Parliament on 15 August 2007. The Ombudsman's combined fifth and sixth report (390/08) was sent to the Minister on 31 March 2008 and tabled in Parliament on 14 May 2008. The Ombudsman's seventh report (457/08) was sent to the Minister on 5 September 2008 and tabled in Parliament on 15 October 2008. This report updates the material in those reports and should be read in conjunction with them.

Principal facts

Visa applications

1. The Department (DIAC) advises that Ms X's s 417 request under the *Migration Act 1958* (October 2005) will not be progressed until all complaints to the United Nations Human Rights Committee (UNHRC) and issues relating to the Interim Measures Request (IMR) are resolved. It states that the Australian Government's response to the complaints was submitted to the UNHRC in October 2008 and it is awaiting a response.
2. DIAC advises that the extradition treaty with the People's Republic of China (PRC) Government is yet to be ratified by the Australian Government. It also advises that no progress has been made on the Australian Government's intention to seek assurances from the PRC Government that Ms X would not be subject to the death penalty or torture should she be returned to the PRC.
3. DIAC advises that Ms X's case was considered by the Minister in his review of long term detainees (October 2008) and the Minister agreed to continue community detention arrangements.

Current immigration status

4. Ms X remains an unlawful non-citizen detained in the community.

Removal details

5. DIAC advises that there are no current plans for Ms X's removal.

Ombudsman consideration

6. DIAC's further report to the Ombudsman under s 486N is dated 26 November 2008.

Key issues

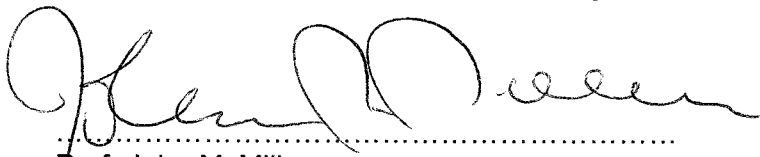
Health and welfare

7. DIAC advises that the Australian Red Cross manages Ms X's health care and continues to monitor her well-being. It reports that Ms X has declined to participate in community service and recreational activities as she states she is '*depressed and lacking in energy*'

and motivation'. Ms X has been referred to a specialist for back pain and has declined counselling support.

Ombudsman assessment/recommendation

8. Ms X has remained in detention for eight years. The complexity of her case has been noted in earlier reports, and includes the following considerations: Ms X is an unlawful non-citizen who was taken into detention when she was refused immigration clearance in January 2001; she could face serious criminal charges if she returns to the PRC; it was expected that an extradition treaty would be ratified between Australia and the PRC in 2008, but this did not occur; Ms X has refused to leave Australia voluntarily, as she fears persecution and possible execution if returned to the PRC; there has been no response by the PRC to the Australian Government request for an assurance that she would not face persecution if returned to the PRC; Ms X's case has received high level consideration within the Australian Government by the Departments of Attorney-General's, Foreign Affairs and Trade, Prime Minister and Cabinet, and Immigration and Citizenship and by successive Ministers for Immigration; Ms X has lodged a complaint with the UNHRC, which has issued an IMR that she not be removed pending the finalisation of that complaint; Ms X has been unsuccessful in numerous proceedings instituted in Australia in the Refugee Review Tribunal and the Federal and High Courts; the unresolved nature of her case and her continuing detention have adversely affected her physical health and emotional wellbeing; she is presently aged 53.
9. In the Ombudsman's first report on Ms X in January 2006, Report 41/06, the Ombudsman expressed the view that there was no substantive reason why Ms X should not be returned to Hong Kong or the PRC to face criminal charges, and that pending removal she should be placed in Community Detention. Ms X was placed in Community Detention 17 months later in June 2007. In subsequent reports, and in recognition of the complexity of her case, the Ombudsman has not made any further recommendation to alter Ms X's immigration status.
10. It is understandable that there has been no decision made to change Ms X's immigration status while options for her removal from Australia were being explored. However, in the Ombudsman's view it is now time for a different approach to Ms X's case. The present reality is that she has been in detention for over eight years. There seems little prospect that she can soon be removed from Australia. At every stage the foreshadowed development that might resolve her case has not eventuated. In a recent tabling statement on 3 February 2009 the Minister affirmed the principle that *'indefinite detention is not acceptable to this Government'*. Ms X's situation has improved since she was placed in Community Detention in June 2007, but she nevertheless remains in a form of detention. It places her in a position of uncertainty that is likely to be injurious to her wellbeing and mental health. This is unsatisfactory and contrary to the Immigration Detention Values.
11. The Ombudsman **recommends** that Ms X be released from immigration detention and granted a suitable visa to alter her immigration status


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Prof. John McMillan
Commonwealth and Immigration Ombudsman

10 March 2009
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Date