

**Submission by the
Commonwealth Ombudsman**

**INQUIRY INTO MIGRATION
AMENDMENT (IMMIGRATION
DETENTION REFORM) BILL 2009**

Submission to the Senate Legal and Constitutional Affairs Committee by
the Commonwealth Ombudsman, Prof. John McMillan

July 2009

Introduction and summary

The Commonwealth and Immigration Ombudsman has a statutory function under the Migration Act of reviewing immigration detention cases. This function has been expanded by agreement with the Minister for Immigration and Citizenship to include more frequent reviews and oversight of the processing of unauthorised boat arrivals on Christmas Island. The Ombudsman also inspects conditions in detention centres and investigates complaints by detainees.

The amendments to the Migration Act proposed in the Bill can be expected to improve the administration of immigration policy. It is nevertheless important that the framework of values announced by the Minister in July 2008 are not overlooked. The Minister's statement provides guidance to officials in making difficult decisions on individual cases. The detention values announced by the Minister are reflected in but not wholly subsumed in the proposed amendments.

We welcome the positive obligation imposed on officials by the Bill to ascertain the identity of a person suspected of being an unlawful non-citizen. We also welcome the greater flexibility proposed for making decisions on residence determinations.

Background

The office of the Commonwealth Ombudsman is established by the *Ombudsman Act 1976* and exists to safeguard the community in its dealings with government agencies, and to ensure that administrative action by Australian government agencies is fair and accountable. The Act also confers five specialist roles on the Ombudsman: those of Defence Force Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman, Postal Industry Ombudsman and Taxation Ombudsman.

The Commonwealth Ombudsman has long been engaged in the oversight, investigation and review of immigration detention administration. The Commonwealth Ombudsman was given an expanded role in 2005 with amendments to the *Migration Act 1958* (the Act) which gave responsibility to review the circumstances of people held in immigration detention for two years or longer (s 486O). Later in that year, amendments to the *Ombudsman Act 1976* conferred the title of Immigration Ombudsman on the Commonwealth Ombudsman (s 4(4)).

In carrying out the role of Immigration Ombudsman we conduct a range of activities as part of our review of immigration detention. These activities include assessments of the circumstances of people who have been detained for two years or more, assessments of the circumstances of people who have been detained for over six months, inspection visits of immigration detention facilities, investigation of complaints from, or on behalf of, people who are held in immigration detention and attendance at various detention related consultative forums. Each of these activities is briefly explained below.

As part of the Immigration Ombudsman function and in addition to the detention review role, we also inspect and monitor the Department of Immigration and Citizenship's (DIAC's) exercise of its compliance function. This involves oversight of the use of search and entry powers, detention decisions and DIAC's removal and airports operations. We also undertake investigations into broader systemic issues across the range of immigration administration.

Our work on complaints, inspections and detention review enables the office to undertake an integrated approach to the oversight of immigration administration. The range of functions allows for flexibility in the way we take up issues, including through own motion investigations, informal dialogue with DIAC, engagement in various DIAC client forums and sharing a systemic issues register with DIAC.

The role of the Immigration Ombudsman

Reporting on people held in immigration detention for two years or more

Under the Migration Act the Secretary of the Department of Immigration and Citizenship is required to provide the Ombudsman with a report relating to the circumstances of a person's detention (s 486N) where a person has been in detention for a period, or periods, totalling two years. A report is also made to the Ombudsman at the end of each successive period of six months detention after that time (s 486M). The Ombudsman is required to give to the Minister an assessment of the appropriateness of the arrangements of a person's detention (s 486O), even if they are no longer in detention - for example if they have since been granted a visa or removed from Australia. A version of the report that protects the privacy of people is also prepared. The Minister is required to table the de-identified report in Parliament within 15 sitting days of receipt.

The assessment may include any recommendations the Ombudsman considers appropriate. The Minister is not bound by any of the recommendations made by the Ombudsman. The Minister's response to the recommendations is also tabled in Parliament with the Ombudsman's de-identified report.

In addition to information received from DIAC, consideration is also given to other information. Officers from the Ombudsman's office conduct face-to-face interviews with people wherever possible and telephone interviews for subsequent reports. We also have regard to reports from the detention health services providers, relevant tribunal and court decisions, submissions to the Minister, and any other documentation provided by the person, their migration agent, lawyer, treating health professional or support person.

The Ombudsman's detention review reports that have been tabled in Parliament, together with the Minister's response to the reports, are published on our website at http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports

Reporting on people held in immigration detention for more than six months

In addition to the statutory review of two-year detention cases which commenced in 2005, the Minister for Immigration and Citizenship and the Ombudsman agreed in August 2008 that the Ombudsman should regularly review all cases where a person has been in detention for longer than six months. The Ombudsman has commenced the six month reviews on the basis of his own motion powers and reports the results to the Secretary of DIAC. In view of the relatively brief period covered by the reports, the Ombudsman has tended to confine his scrutiny to assessing the detainee's circumstances without making recommendations.

Immigration detention inspection and monitoring role

Our inspection and monitoring of immigration detention centres, as well as other forms of immigration detention including residential housing centres and community detention, commenced in 2006. The purpose of this function is to monitor whether detention service standards, including access to medical and other services and activities aimed at maintaining detainees' well-being, are being met. As part of this function we provide feedback to DIAC as well as to its service providers, including recommendations where standards have not been met or where they need to be further developed or adjusted.

Handling complaints about immigration detention

Ombudsman staff provide detainees at mainland immigration detention centres with a complaint-taking service on a regular monthly basis. Complaints are also taken from, or on behalf of, detainees by phone, fax and letter.

Where possible, complaints are resolved at the detention centre by discussion with the appropriate DIAC or detention service provider management. Where further investigation is required, complaints are pursued with DIAC's national office in accordance with complaint taking protocols.

Participation in immigration detention consultative forums

Ombudsman staff regularly attend various consultative forums focused on immigration detention. These include client consultative meetings and food delegates' meetings that include detainee representatives at detention centres, and community consultative group meetings held bimonthly in capital cities where key stakeholders meet with DIAC and detention service providers regarding detention issues. We also have observer status on the Detention Health Advisory Group.

These forums enable the Ombudsman's office to follow up on issues we identify through other activities. They are also important information sharing forums and enhance our understanding of contemporary and local detention matters.

Comments on the Bill

The Key Immigration Detention Values

The Minister's statement of 29 July 2008 was an important exposition of the government's approach to the treatment of unauthorised arrivals and visa overstayers who are subject to immigration detention. The statement provided guidance to DIAC in carrying out its functions.

The seven detention values should not be treated as having been replaced by the provisions of the Bill. They should continue to provide a framework for improved administration of immigration policy. The values are routinely used by the Ombudsman's office in its two year detention reports to evaluate whether a person's continuing detention complies with the values.

The Bill asks the Parliament to affirm in explicit terms two of the seven values set out in the Minister's statement, namely that children will not be detained in an immigration detention centre (No 3), and that detention in an immigration detention centre is a measure of last resort and must be for the shortest practicable time (No

5). Another of the seven values, that mandatory detention is an essential component of strong border control (No 1), is implicitly affirmed in other provisions of the Bill.

The values that are not explicitly anchored in the Bill are no less important than those that are: all seven values are beacons for good public administration in immigration detention. It is right (as the Bill states) that detention be for the shortest practicable time, but it is equally important to affirm that 'detention that is indefinite or otherwise arbitrary is not acceptable' (No 4). There is agreement with this point in the Minister's Second Reading Speech, which emphasises that the Government's primary objective is to resolve a person's immigration status in an efficient manner.

The fourth detention value notes also that there will be 'regular review' of the length of detention, conditions of detention, and the appropriateness of detention arrangements. This value deserves continuing emphasis. Periodic review by the Ombudsman is already provided for in s 486O of the Migration Act in respect of persons who have been detained for two years or more. More than 560 of the Ombudsman reports have been tabled in the Parliament. The review process has been extended this year to encompass the preparation of a report by the Ombudsman when a person has been detained for six months or more. This is not a statutory process and the reports are not tabled in the Parliament. In practical terms, however, the six month reviews are likely to become a more effective monitoring tool than the two year statutory reviews. There is a reference in the Minister's Second Reading Speech to 'greater transparency, oversight and accountability around both the decision to detain and the decision to continue detention'. This is an objective that the six month reviews are intended to achieve.

Two other detention values – that people in detention must be treated fairly and reasonably within the law (No 6), and that conditions of detention must ensure the inherent dignity of the human person (No 7) – are stated in the Second Reading Speech to be reflected in the Bill. However, while it is fair to say that the Temporary Community Access Provision (TCAP) supports the principle that conditions of detention must ensure the inherent dignity of the human person, full implementation of the principle is not completed by introduction of the TCAP.

Section 189; Detention of unlawful non-citizens

A key feature of the Bill is a proposed new s 189. The section retains the principle of mandatory detention, that is, that an immigration official has an obligation in defined circumstances to detain an unlawful non-citizen. In two respects, however, there is an important change.

The first is that the duty to detain is limited to the circumstances defined in proposed new s 189(1)(b) (for example, the unlawful non-citizen presents an unacceptable risk to the Australian community, or has been refused immigration clearance). Beyond those circumstances, there is a discretion to detain an unlawful non-citizen (s 189(1C)).

The second important change is that, where a person is subject to mandatory detention under s 189(1B), there is a corresponding obligation on Commonwealth officials to make reasonable efforts to ascertain the detained person's identity, identify whether a person is of character concern, ascertain health and security risks to the Australian community arising from the person entering or remaining in Australia, and resolve the person's immigration status. This change addresses a criticism that was made in the reports prepared by the Ombudsman's office in 2006-

07 on 247 cases of immigration detention that were referred to it for investigation. In some instances, the length of a person's detention was far greater than was warranted because of the failure of officials to make continuing inquiries or to resolve doubts or conflicts in the available information.

Two other issues raised in those reports remain important in the continuing administration of the legislative provisions on detention. The first is that the power to detain still rests upon an officer knowing or having a reasonable suspicion that a person is an unlawful non-citizen. A strong theme in the Ombudsman reports was the importance of there being objective evidence for such knowledge or reasonable suspicion. The formation of a properly based reasonable suspicion is the only protection against arbitrary detention and deprivation of liberty (*Report into Referred Immigration Cases: Children in Detention*, Report No 08/2006).

As far as the process for establishing identity is concerned we would not want to see any requirement in the regulations under the Migration Act to tie this to the production of documents. As we have previously pointed out, documentary proof of a person's identity or immigration status is not required before a person can be taken into detention. It should not be an added requirement in all cases before a person can be released from detention. At most, documentary proof may be important where there are serious and justifiable doubts about a person's identity. In other cases, if there is reliable evidence – from whatever source – that points to a person's lawful status, they should be released (*Report into Referred Immigration Cases: Mental Health and Incapacity*, Report No 07/2006).

A second concern is that both the obligation to detain, and the duty to make continuing inquiries, are imposed by the legislation upon 'an officer'. As a practical matter, the officer who made the decision to detain a person is unlikely to have a continuing role in managing the person's immigration detention. If so, the obligation to make continuing inquiries will be borne by another – unspecified – officer. Unless internal administrative arrangements within the Department make it very clear which officers shoulder this burden, there is a risk that the obligation to make continuing inquiries will not be properly discharged. The Minister's Second Reading Speech noted that a three monthly review of a person's detention is undertaken by a senior officer. This is an essential mechanism in ensuring that the duty to conduct a continuing inquiry is properly discharged.

Delegation of the Minister's power to make residence determinations

We welcome the greater administrative flexibility that will result from the delegation of the Minister's power to make residence determinations. A move from an immigration detention centre to a community detention arrangement is a change of great significance to a detainee and in many cases resolves the mental and physical deterioration that may arise from detention in an immigration detention centre. At present there is a good deal of confusion and misunderstanding about the process leading to such a move. There needs to be more transparency about the process and recognition that a move out of a detention centre has considerable individual impact notwithstanding that in terms of the Migration Act the person's detention status has not changed.