

Submission by the
Commonwealth Ombudsman

**INQUIRY INTO THE MIGRATION
AMENDMENT (DETENTION REFORM AND
PROCEDURAL FAIRNESS)
BILL 2010**

Submission to the Senate legal and Constitutional Affairs Committee by the
Commonwealth Ombudsman, Mr Allan Asher

July 2011

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 would:

- end offshore processing and the excision policy;
- ensure that immigration detention is only used as a last resort;
- end indefinite or long-term immigration detention; and
- provide for judicial review of immigration detention beyond 30 days.

Good public administration requires ongoing assessment as to the efficacy of a law or policy.

Based on the observations that we have drawn from our oversight role in relation to immigration detention, the time has come to revisit the immigration detention values outlined by the former Minister for Immigration and Citizenship in his July 2008 speech, *'New Directions in Detention – Restoring Integrity to Australia's Immigration System'* and in doing so, to consider, for example, whether offshore processing or long-term or indefinite detention of any unlawful citizen, including asylum seekers, is justified, even if only from the viewpoint of good public administration.

THE ROLE OF THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

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

Handling complaints about immigration detention

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

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.

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 former Minister for Immigration and Citizenship and the former 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 undertakes the six month reviews on the basis of his own motion powers and reports the results to the Secretary of DIAC.

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.

COMMONWEALTH AND IMMIGRATION OMBUDSMAN OWN MOTION REPORT INTO DIAC'S OVERSIGHT OF IMMIGRATION PROCESSES AT CHRISTMAS ISLAND OCTOBER 2008 - SEPTEMBER 2010

In September 2008, the former Minister for Immigration and Citizenship requested, and the former Commonwealth Ombudsman agreed, to take on an oversight role of the non- statutory refugee assessment process for asylum seekers at the Christmas Island immigration detention facilities.

In February 2011, we issued a Report on Christmas Island immigration detention facilities. The Christmas Island Report was made on the basis of Ombudsman staff having made eight visits to the Christmas Island immigration detention facilities and observing all the processes conducted from the time asylum seekers are brought to the wharf at Flying Fish Cove until their refugee status is determined, and they are advised that the Minister will allow them to apply for a visa or that they are likely to be removed from Australia. When visiting the island,

Ombudsman staff had also taken the opportunity to undertake inspections of the immigration detention facilities and accept complaints from detainees. A copy of that report is published on our website at http://www.ombudsman.gov.au/files/christmas_island_immigrationdetention_facilities_report.pdf.

FUTURE HANDLING OF ASYLUM SEEKERS

Some of the immigration detention values announced by the former Minister for Immigration and Citizenship, in his July 2008 speech, *'New Directions in Detention – Restoring Integrity to Australia's Immigration System'*, dealt specifically with mandatory detention. At the time of our July 2009 submission to the Committee's Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009, we suggested that all seven values, including those specifically dealing with mandatory detention, were beacons for good public administration of immigration detention.

However, good public administration requires ongoing assessment as to the efficacy of a law or policy.

Recent key observations from our Christmas Island Report were that:

- the increase in numbers had created a difficult and challenging situation, for both DIAC and Serco who manage the detention services operations on DIAC's behalf at Christmas Island. Concerns remained about timeliness in processing refugee applications, delays in security agency clearances and various health issues—particularly those related to mental health; and
- although the solution to make use of facilities on the Australian mainland was a policy decision for Government to make, we were concerned that any attempt to manage more facilities by utilising the existing level of resources in geographically diverse areas potentially brought with it other problems not least of which was ensuring the presence of adequate infrastructure and mental health services.

Implicit in our observations set out in our Christmas Island Report and from oversight in relation to the onshore immigration detention centres, is an indication that the time has come to revisit the immigration detention values and in doing so, to consider for example, whether offshore processing or long-term or indefinite detention of any unlawful citizen, including asylum seekers, is justified, even if only from the viewpoint of good public administration.