

**COVERING STATEMENT BY THE COMMONWEALTH OMBUDSMAN TO THE MINISTER FOR
IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
CONCERNING REPORTS UNDER S 486O OF THE *MIGRATION ACT 1958***

12 OCTOBER 2005

1. Section 486O of the *Migration Act 1958* requires the Commonwealth Ombudsman, upon receipt of a report from the Minister's Department (DIMIA), to provide the Minister with an assessment of the appropriateness of the arrangements for the detention of a person who has been in detention for two years or more. My first reports accompany this Statement. The purpose of this Statement is to provide some explanation as to how I have gone about discharging this function. This may assist both the Minister and those reading my reports, which are to be tabled in the Parliament.
2. The Ombudsman's report to the Minister is to be provided 'as soon as practicable' after the Ombudsman receives the Department's report (s 486O). The operation of that requirement is affected by many considerations. I have decided that each person on whom a report is being prepared should be given an opportunity to be interviewed and to provide other information to my staff. The process of arranging an interview can itself be difficult and lengthy. For example, the person may have been released from detention and their whereabouts are unknown; an interpreter may be needed for the interview; or it may be necessary to schedule the interview at a time when other interviews are being held at the same detention facility or hospital. The interviews sometimes highlight other issues that need to be explored – for example, to arrange a further medical assessment, or to consult a friend or advocate nominated by the person interviewed.
3. Weighing against those considerations is the importance of completing the Ombudsman's assessment in the shortest timeframe possible, both in the interests of the person being assessed and in light of the statutory timetable. Reports are to be prepared at six monthly intervals on those who remain in detention after two years. This requirement will only be meaningful if each report has been submitted to the Minister and tabled in the Parliament before the next reporting period commences. In principle, the Ombudsman's assessment and report to the Minister should, if practicable, be submitted within two months of receipt of the DIMIA report. This timetable may be difficult to meet in all cases in the first six-monthly reporting period. As at 29 June 2005 when this function commenced, there were 149 people who had been in detention for more than two years on whom reports were to be prepared by DIMIA for the Ombudsman no later than 29 December 2005 (s 486N(1)). During the first six months as many as 50 other people in detention will become subject to this reporting obligation. It is hoped that by 2006 an orderly and predictable reporting schedule will be in place.
4. In the early phase of this function it may not be possible to adhere to the projected timetable if every aspect of a person's detention is explored in great depth before a report is completed. Instead, the key issues will be highlighted, at least in the

first report on a person. If the need exists for a second or subsequent report to be prepared, there may be scope for focussing on other issues or for collecting more information about a person's detention.

5. The first report on each person in detention has drawn heavily from the information provided to the Ombudsman by DIMIA. We could verify some but not all of that information, either independently or at an interview with the person in detention. It is possible that there will be disagreement with some of the facts and opinions stated in my reports. Not every misstatement will be material to my assessment and recommendation, but if such is the case the issue can be taken up by my office, either separately or in another report. At any rate, a virtue of this process of assessment and reporting is that it will enable differences of fact and opinion to be aired and clarified.

6. The preceding points are relevant in another way. At least in the preparation of the first round of reports, and perhaps thereafter, the Ombudsman will not be in a position to undertake what is commonly referred to as full merit review of the decision to refuse a person a visa of a particular class or to place them in detention. Full merit review of a decision is ordinarily a process of assembling and testing all relevant evidence, including by cross examination. Bearing that limitation in mind, my initial reports have been styled as recommendations on matters that warrant further or closer consideration by the Minister. My objective has been to highlight what to my mind are the key issues concerning the wellbeing of those in detention, the alternatives to detention, and ongoing care issues arising both in detention and in the months following a person's release from detention.

7. While a report is being prepared there can be a material change in the circumstances of a person's detention. In some cases currently being reviewed the person has been released from detention during the reporting process, or other incidents have occurred that bear upon their health or welfare. This is a further reason for early completion of the reporting process, and for framing recommendations that highlight issues without being overly prescriptive. Least of all this process should not forestall a decision being made by the Minister or DIMIA that is favourable to a person, prior to my assessment being completed.

8. The statutory requirement is for the Ombudsman to prepare 'an assessment of the appropriateness of the arrangements for [a] person's detention' (s 486O(1)). As that implies, a report is to be contemporaneous in its focus, and not an historical assessment of a person's detention. The reports will have little to say, other than by way of background, about the circumstances that led to a person's detention, or about court or tribunal proceedings initiated by the person. Equally, if a person has been released from detention by the time a report is completed, incidents that occurred during detention will only be taken up if they have an ongoing or future relevance.

9. The Ombudsman's report to the Minister is to include a statement that can be tabled in the Parliament in a form that does not adversely affect the privacy of any person (s 486O(5)). In some initial reports I have deleted only the name of the person, but left in much other personal information about their nationality and experience in detention. I have done so in order that those who take an interest in this process can properly understand the style of my reports to the Minister. When this process of assessment and reporting has become more familiar, it may be suitable to prepare briefer statements or summaries for tabling in the Parliament.

10. Disclosure of a report to the person to whom it relates is another important issue. An unabridged copy will be provided to the person, but at the time that the Minister has

made a decision and the report is to be tabled in the Parliament. The Ombudsman's role in preparing a report is to supplement the normal processes otherwise occurring within the DIMIA and in courts and tribunals to decide whether a person should be in detention and the care and assistance they should receive. There is a risk, if the Ombudsman's report is released prior to its consideration by the Minister, that those other processes will merge with and unnecessarily complicate this new process of independent assessment and reporting.