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Ground Floor, 1 Farrell Place \* Canberra  
GPO Box 442 \* Canberra ACT 2601  
Phone 1300 382 072 \* Fax 02 6249 7829  
ombudsman@ombudsman.gov.au  
www.ombudsman.gov.au

30 September 2008

Ms Anna Engwerda-Smith  
Secretary  
Joint Standing Committee on Migration  
Parliament House  
CANBERRA ACT 2600

Dear Ms Engwerda-Smith

**FOLLOW UP RESPONSE FOLLOWING APPEARANCE BEFORE  
JOINT STANDING COMMITTEE ON MIGRATION**

I am writing to provide the Committee with some points of clarification to our recent submission and appearance before the Committee in relation to its current Inquiry and to provide some commentary in relation to other evidence taken by the Committee.

**Debt waiver**

In our submission, we stated that DIAC should review its policy and practices to ensure debt waiver is considered where a person is or was released from detention as not unlawful.

The underlying basis for this recommendation is that it is inherently unfair that a person should incur a detention debt for a period when they should not have been detained. Accordingly, every time a person is released as 'not unlawful', their case should be individually reviewed to determine whether some or all of the period of detention should not have occurred.

**Appropriateness of the role of the Commonwealth Ombudsman in overseeing  
immigration decision making**

It has been suggested to the Committee that the role of the Commonwealth and Immigration Ombudsman (the Ombudsman) is not an appropriate one to oversee all immigration decision making on the basis that the scrutiny undertaken by my office is of administrative decisions and not legal decisions.

The Committee has sought the views of this office as to whether our administrative focus is restrictive in some cases where there are legal determinations in doubt and whether the immigration detention system also needs independent legal oversight, by, for example, access to judicial review or another independent officer.

As we see it, the Commonwealth Ombudsman is one element of a comprehensive system of independent review and scrutiny that currently applies to DIAC decision making. Other elements of the system include the courts, tribunals, the Australian Human Rights Commission and the Immigration Detention Advisory Group.

We see no need for the creation of any additional scrutiny bodies or processes.

We accept that the role of the Ombudsman is to focus on administrative matters rather than the legality of decisions. Legal issues are already covered adequately by the courts and tribunals.

That said, the Ombudsman frequently comments on or raises legal issues, as a number of published reports indicate. Furthermore, this office can consider legal issues when investigating complaints. An example of this may be when we have investigated a complaint and a conclusion has been reached that there was deficient administration on the basis of legal error because there has been a failure to adhere to procedural fairness principles. The focus of our consideration of legal issues is not statutory interpretation but broader process issues such as procedural fairness and whether relevant or irrelevant factors have been taken into account by decision makers.

#### **Distinction between unlawful and wrongful detention**

Essentially, the view of this office is that unlawful detention means that the detention of a person could be set aside by a court undertaking judicial review on the basis that there was a jurisdictional error. Wrongful detention, however, refers to an administrative lapse, falling short of jurisdictional error, that casts doubt on the merits of the decision to detain a person, either initially or on a continuing basis, for example, a failure to act promptly on information that is at odds with other information on which a detention decision is based.


#### **Treatment of Ombudsman recommendations**

Following a discussion during our recent appearance before the Committee, Mr Georgiou MP sought our views as to how both we and your Committee might be satisfied about the treatment of recommendations that we might make.

Our assessment is that there have already been some positive developments in the consideration of our recommendations. First, senior DIAC officers have increasingly participated in discussions with my office about recommendations made in reports. Secondly, the Minister's most recent Tabling Statement is significantly more comprehensive.

We consider that these positive developments and public accountability could be further enhanced by providing for future Minister Tabling Statements to set out for each recommendation made by the Ombudsman, whether the recommendation has been accepted, rejected or is no longer applicable. There should be accompanying commentary.

Yours sincerely



Prof. John McMillan  
Commonwealth Ombudsman