COMMONWEALTH OMBUDSMAN

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7 July 2020

Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email to: legcon.sen@aph.gov.au

Dear Chair

Senate Legal and Constitutional Affairs Committee – Consideration of the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

Thank you for the opportunity to provide a submission to the Committee's review of the above Bill.

My Office provides oversight of the Department of Home Affairs' administration of immigration detention in a number of ways:

- handling complaints, under the *Ombudsman Act 1976* (the Ombudsman Act), about the Department's administrative actions and decisions
- conducting proactive inspections, and preparing reports into the operations of immigration detention facilities under the Ombudsman Act, including in my capacity as the National Preventive Mechanism for places of detention under the control of the Commonwealth, under the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), and
- preparing assessments of the circumstances of individuals' immigration detention, under s 486O of the *Migration Act 1958*, which are tabled in the Parliament.

Through these activities, my Office has closely observed the Department's approach to search and seizure in immigration detention. In fact some of the activities the Bill proposes to authorise are already conducted within immigration detention facilities on an administrative basis. For example, it is not uncommon for detainee's property to be searched for drugs or weapons and for any such items to be seized.

The use of search and seizure powers has the potential to impact, both positively and negatively, on the safety, wellbeing and human rights of detainees, visitors and detention staff. Against this background, I support the introduction of a legislative framework to provide greater clarity about the circumstances in which Parliament agrees that searches and seizures may occur. In my Office's public report about its immigration detention monitoring activities, which was released in February 2020, I recommended that the Department take steps to implement a legislative framework for the

administration and operation of its detention facilities. That report is available on my Office's website[1] and I have enclosed a copy with this letter.

Consistent with the provisions of the Ombudsman Act, I typically refrain from commenting on matters of policy that are more appropriately the purview of elected governments and parliament. Rather, my Office is focused on the administration of policy. That said, I am of the view that the principles of good administrative practice and respect for people's human rights – such as fairness, transparency, proportionality, rights to seek review or to complain and the availability of independent oversight – should guide the operations of immigration detention facilities.

This is particularly important given the nature of immigration detention in Australia. Detention is administrative in nature; it is centrally concerned with determining a person's immigration status, and it is not intended to be punitive. There is a risk, however, that its administration could take on a punitive character if the principles mentioned above are not upheld. For example, with respect to the matter of mobile telephones, upon which many detainees rely for maintaining regular contact with family and friends, a decision to seize telephones from detainees who are using them to facilitate criminal activity may be appropriate. However, a decision to ban telephones from a facility when only a cohort of detainees are using them for such purposes would lack proportionality and fairness.

These principles can be reflected in primary legislation, instruments, regulations or in the policies and procedures that guide staff on how the legislation is to be applied. In this case, the Bill, if passed, would need to be accompanied by clear, concise procedural guidance to ensure the Department's practical application of the powers is fair, reasonable and consistent with the Parliament's intentions. In particular, we would expect the Department to maintain policies and procedures to ensure vulnerable detainees are managed appropriately and not unduly subject to invasive searches.

We would also expect to see:

- regular training for all staff authorised to use the search and seizure powers to ensure they understand when and how they may be used
- clear information for detainees and visitors about their rights in respect of the search and seizure powers, including the right to complain internally and to our Office if they believe the powers have been used unreasonably or inappropriately, and
- procedural fairness so that visitors or detainees can dispute or appeal the decision to seize property, to have complaints reasonably addressed and to be provided with reasons for decisions.

Building on the existing role that my Office plays in immigration detention, we are well placed to provide oversight of the activities of the Department and its officers to assess compliance with whatever legislative framework is put in place, and with any procedural guidance the Department provides to its staff. This oversight will occur through complaints from individuals as well as through our proactive inspection activities which are already undertaken under the Ombudsman Act. We would be happy to discuss options for more specific assurance if that were of interest to the Committee.

[1] https://www.ombudsman.gov.au/__data/assets/pdf_file/0017/109700/Immigration-Detention-Oversight-Report_January-to-June-2019.pdf.

I trust this information is of assistance to the Committee's deliberations. I look forward to meeting with the Committee on 3 July 2020 to discuss the Bill further.

Yours sincerely

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Commonwealth Ombudsman

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