



Australian  
Human Rights  
Commission

Immigration detention  
following visa refusal  
or cancellation under  
section 501 of the  
*Migration Act 1958 (Cth)*

[2021] AusHRC 141

© Australian Human Rights Commission 2021.

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication.



All material presented in this publication is licensed under the Creative Commons Attribution 4.0 International Licence, with the exception of:

- photographs and images;
- the Commission's logo, any branding or trademarks;
- content or material provided by third parties; and
- where otherwise indicated.

To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/legalcode>.

In essence, you are free to copy, communicate and adapt the publication, as long as you attribute the Australian Human Rights Commission and abide by the other licence terms.

**Please give attribution to:** © Australian Human Rights Commission 2021.

**ISSN 1837-1183**

#### **Further information**

For further information about the Australian Human Rights Commission or copyright in this publication, please contact:

Communications Unit  
Australian Human Rights Commission  
GPO Box 5218  
SYDNEY NSW 2001  
Telephone: (02) 9284 9600  
Email: [communications@humanrights.gov.au](mailto:communications@humanrights.gov.au)

**Design and layout** Dancingirl Designs

**Printing** Masterprint Pty Limited

Immigration detention  
following visa refusal or  
cancellation under section  
501 of the *Migration Act*  
1958 (Cth)

[2021] AusHRC 141

*Report into arbitrary detention and  
arbitrary interference with family*

**Australian Human Rights Commission 2021**



**Australian  
Human Rights  
Commission**

# Contents

<b>1</b>	<b>Introduction to this inquiry</b>	<b>12</b>
<b>2</b>	<b>Background</b>	<b>15</b>
<b>3</b>	<b>Conciliation</b>	<b>18</b>
<b>4</b>	<b>Legislative framework</b>	<b>18</b>
4.1	Functions of the Commission	18
4.2	What is an 'act' or 'practice'?	18
4.3	What is a human right?	18
<b>5</b>	<b>Arbitrary detention</b>	<b>19</b>
5.1	Law on article 9 of the ICCPR	19
5.2	Alternatives to closed immigration detention	21
(a)	Community detention	21
(b)	Bridging visas	23
(c)	Parole and other conditional release options	24
(d)	Control orders	27
5.3	Comparative models for risk management of immigration detainees	28
(a)	United Kingdom	29
(b)	New Zealand	31
(c)	Canada	32
(d)	Conclusion on alternatives to immigration detention	33
5.4	Act or practice of the Commonwealth	34
5.5	Group 1: complainants remaining in immigration detention facilities	35
(a)	The delay of the Department in referring the case to the Minister in order for the Minister to assess whether to exercise the discretionary powers under s 195A or s 197AB.	36
(b)	The failure of the Minister to consider exercising his discretionary powers under s 195A and s 197AB of the Migration Act	40
5.6	Group 2: complainants who have been released or removed from immigration detention facilities	43
(a)	The failure of the Minister to consider exercising his discretionary powers under s 195A and s 197AB of the Migration Act	58
5.7	Detention in State prison	61

<b>6</b>	<b>Arbitrary interference with family</b>	<b>66</b>
6.1	Articles 17(1) and 23(1)	66
6.2	Family separation as a result of immigration detention	67
	(a) 'Family'	67
	(b) 'Interference'	75
	(c) 'Arbitrary'	76
6.3	Family separation as a result of refusal of visa	77
	(a) Article 17(1)	77
	(b) Article 23	80
<b>7</b>	<b>Specific complaints about article 10 of the ICCPR</b>	<b>81</b>
7.1	Right of detainees to be treated with humanity and dignity	81
7.2	November 2015 Christmas Island riots	83
	(a) Complaints	83
	(b) Consideration of complaints	84
7.3	Treatment during transfers between detention centres	86
	(a) Mr RA	86
	(b) Mr SI	89
7.4	Safe place of detention	90
7.5	Other complaints	91
<b>8</b>	<b>Recommendations</b>	<b>92</b>
8.1	Detention review framework	92
8.2	Recommendations for Individual complainants	100
	(a) Mr RA and Mr RB	100
	(b) Mr SI	101
<b>9</b>	<b>The Department's response to my findings and recommendations</b>	<b>102</b>





The Hon Christian Porter MP  
Attorney-General  
Parliament House  
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f) of the Australian Human Rights Commission Act 1986 (Cth) into complaints by a group of individuals in immigration detention, alleging a breach of their human rights by the Department of Home Affairs (Department).

This is a thematic inquiry based on 11 specific complaints, which has highlighted the prolonged and potentially indefinite periods individuals are spending in immigration detention. The aim is to provide a foundation for systemic and practical outcomes for individuals with character concerns who are facing prolonged—and in some cases indefinite—immigration detention. On the basis of this inquiry, I have made the following findings:

*Arbitrary detention*

- The decision by the Department not to refer four complainants to the Minister to consider exercising his discretionary powers under s 195A and s 197AB of the Migration Act resulted in their detention being arbitrary contrary to article 9(1) of the ICCPR.
- The lack of assessment by the Department of whether the individual circumstances of four complainants indicated that they could be placed in less restrictive forms of detention was inconsistent with article 9(1) of the ICCPR.
- The decision of the Minister not to consider exercising his discretionary powers under s 195A and s 197AB of the Migration Act in relation to two complainants may have resulted in their detention being arbitrary contrary to article 9(1) of the ICCPR.
- The transfer and detention of one complainant to a state prison was arbitrary contrary to article 9(1) of the ICCPR.

---

**Australian Human Rights Commission**

Level 3, 175 Pitt Street, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: [www.humanrights.gov.au](http://www.humanrights.gov.au)

### *Arbitrary interference with family*

- The detention of nine complainants interfered with the family and family life of those complainants, contrary to articles 17(1) and 23(1) of the ICCPR.
- The decision of the Minister not to consider exercising his discretionary powers to grant one complainant a visa did not constitute a breach of articles 17(1) and 23(1) of the ICCPR.

### *Treatment in detention*

- In relation to complaints regarding treatment during the November 2015 Christmas Island Riots, in my view there is insufficient material before me to find a breach of article 10(1) of the ICCPR.
- The treatment of one complainant during his transfer to Christmas Island on 28 August 2015 does not constitute a breach of article 10(1) of the ICCPR.
- The use of handcuffs on one complainant to transfer him to Christmas Island on 28 August 2015 when he was assessed as being low risk in aviation settings was contrary to article 10(1) of the ICCPR.
- One complainant's allegations that his personal safety was not adequately protected do not appear to constitute a breach of article 10(1) of the ICCPR.
- The decision not to allow one complainant to visit his daughter when she was having a surgical procedure on 21 August 2015 does not constitute a breach of article 10(1) of the ICCPR.

Pursuant to s 29(2)(b) of the AHRC Act, I have included recommendations in the report for a detention review framework and for individual complainants. In summary, these recommendations are that:

### **Detention review framework**

- The Minister's s 197B and s 195A guidelines should be amended to provide:
  - That all people in immigration detention are eligible for referral under s 197AB and s 195A, whether or not they have had a visa cancelled or refused under s 501 of the Migration Act.
  - In the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility (whether for reasons relevant to the 'character test' in the Migration Act or otherwise), the Department include in any submission to the Minister under s 197AB or s 195A:
    - i. a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment



- ii. an assessment of whether any identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the department in forming its assessment.
  - In the event that the Minister decides not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every six months and re-refer the case to the Minister to ensure that detention does not become indefinite.
- When conducting an individual risk assessment under the Community Protection Assessment Tool (CPAT), the following factors be considered:
  - the circumstances of the offence, how much time has passed since the criminal conduct, sentencing remarks, the sentence imposed by the criminal court and any mitigating or aggravating factors at the time of the offence or since that time
  - the Parole Board's evaluation of the risk posed by the person
  - any steps taken by the person to rehabilitate, including participation in programs offered in detention
  - whether there is ongoing danger to the public, especially for persons who have been in detention for a long time
  - the risk or likelihood of re-offending and the seriousness of the harm if the person re-offends
  - whether the offences were violent, sexual or drug-related
  - the risk of absconding, including any evidence of previous absconding
  - the risk of non-compliance, including any evidence of a previous failure to comply with visa conditions
  - the individual's ties with the Australian community
  - conduct or behaviour since the offence.
- 1. The CPAT be amended to not automatically recommend Tier 3 – Held Detention for individuals who have had their visa refused or cancelled under s 501 of the Migration Act.
- 2. The CPAT be amended to include an assessment of whether any risks to the community identified can be mitigated by conditions including but not limited to:
  - adhere to a curfew
  - reside at a specified place
  - report to a specified place at specified periods or times in a specified manner

- provide a guarantor who is responsible for the person's compliance with any agreed requirements and for reporting any failure by the person to comply with the requirements
  - not violate any law
  - be of good behaviour
  - not associate or contact a specified person or organisation
  - not possess or use a firearm or other weapon
  - wear an electronic monitoring tag.
- Monthly case reviews be amended to require the departmental case manager to review the necessity for an individual's continued detention and whether any risk factors could be mitigated in the community.
  - The Commonwealth appoint an independent reviewer to examine materials the Department and Minister relied upon to reach a decision to detain the individual, and conduct an assessment and provide a written opinion of the risk to the community posed by the individual, in relation to people who:
    - have been in immigration detention for more than two years
    - have been found by the Department and/or the Minister not to be suitable for alternatives to closed detention.

### **Recommendations for individual complainants**

- The Minister indicate to the department that he will consider a further submission about the exercise of his powers under s 195A and/or s 197AB in relation to two complainants, whose continued detention I have found to be arbitrary as a result of this inquiry.

In the event that the Minister is concerned that either complainant may pose some real risk if allowed to reside in the community, he direct the Department to prepare a detailed submission including a personalised assessment of the existence and/or extent of any such risk, a description of what measures might be implemented to ameliorate any risk in the community, and whether they could be satisfactorily addressed by the identified measures.

The Department prepare a fresh submission to the Minister about the exercise of his discretionary powers, on any matters referred to in the paragraph above.

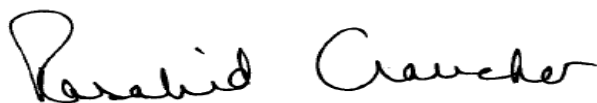
The Minister consider the exercise of his discretionary powers in light of the fresh Departmental submission.

- The Commonwealth pay to one complainant an appropriate amount of compensation to reflect the distress he suffered as a result of being placed in restraints for 16 hours.

On 9 November 2020, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 23 December 2020. That response can be found in Part 9 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM  
**President**  
Australian Human Rights Commission

February 2021

# 1 Introduction to this inquiry

1. This is a report setting out the findings and recommendations of the Australian Human Rights Commission following an inquiry into the issue of detention of non-citizens who have had their visas cancelled or refused under s 501 of the *Migration Act 1958* (Cth) (Migration Act). Over the past three years, the Commission has received an increasing number of complaints from individuals in immigration detention as a result of having their visa cancelled or refused on character grounds.
2. This is a thematic inquiry based on 11 specific complaints. The aim is to provide a foundation for systemic and practical outcomes for individuals with character concerns who are facing prolonged—and in some cases indefinite—immigration detention.
3. This inquiry has highlighted the prolonged and potentially indefinite periods individuals are spending in immigration detention. One of the key recommendations made is that an independent review process for long term detainees be established.
4. Each complaint was made prior to the 2017 amendments to the Australian Human Rights Commission Act 1986 (Cth) (AHRC Act) meaning the Commission must report to the Attorney-General if it is of the opinion that there has been a breach of human rights. In relation to the complainants who have been removed from Australia, they have requested that the Commission continue to inquire into their complaints.
5. There is a broad spectrum in terms of seriousness of the offences committed by the complainants. Some have a long history of serious criminal convictions, others committed low-level offences, while one complainant never served any time in prison.
6. For the complainants that remain in detention, it is concerning that they spent more time in immigration detention than in prison serving the criminal sentence that triggered their visa cancellation or refusal. This fact illustrates the gravity of the problem faced by the Commonwealth in continuing to administratively detain individuals who have criminal convictions.
7. This inquiry does not consider the decision to cancel or refuse a visa. Neither do I come to a view on whether any of the complainants should be released into the community. Rather, this inquiry focuses on whether the Commonwealth's decision to continue to detain the complainants is or was consistent with their human rights and in what ways the decision could be made that would be more compatible with human rights standards in such difficult contexts.
8. I have made a direction pursuant to s 14(2) of the AHRC Act that the identity of all the complainants above not be disclosed.

9. In recent years, there has been a significant increase in visa cancellations on character grounds.<sup>1</sup> Consequently, while the total number of people in immigration detention has decreased, the number of people in immigration detention as a result of a visa cancellation has increased.
10. At the end of 2014, there were 140 people in immigration detention (comprising around 5% of the detention population) as a result of having their visas cancelled on any grounds, including under s 501.<sup>2</sup> As at 31 August 2020, there were 711 people in immigration detention (almost half of the detention population) as a result of having their visas cancelled under s 501.<sup>3</sup> Those who have had their visas cancelled under s 501 currently form the second largest cohort of people in immigration detention.
11. As at 31 August 2020, the average period of detention for people held in closed facilities was 564 days; and 25% of people held in closed facilities had been detained for more than two years.<sup>4</sup>
12. People who have had their visas cancelled or refused under s 501 are at risk of prolonged detention while their status is resolved—for example, while they seek review of the decision to refuse or cancel their visa, while travel documents are arranged, or while a claim for a Protection Visa is assessed. It is therefore critical that the detention review practices and policies of the Department of Home Affairs (the Department) protect the Australian community while also safeguarding the human rights of detainees—in particular the right to be free from arbitrary detention.
13. Lawful detention under Australian law does not prevent it being considered arbitrary under international human rights law. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary and proportionate on the basis of the individual's particular circumstances. Furthermore, there is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than detention to achieve the ends of the immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'.
14. To comply with these obligations, the Department would need to conduct an individualised risk assessment to determine whether any risks an individual may pose to the community could be mitigated, and ongoing reviews to determine whether closed detention continues to be necessary.
15. Currently, the Department's decision-making framework does not appear to incorporate mandatory individual risk assessments that consider whether any particular risks posed by an individual could be satisfactorily mitigated if the person were allowed to reside in the community. The parole system in Australia provides a good model of how potential risks posed by convicted criminals can be managed.

16. The Department conducts monthly case reviews that consider if a person's placement in closed detention is justified. However, these reviews tend to focus on whether there is any need for an individual to be released from detention, rather than whether it is necessary to continue to detain the individual.
17. In approaching this report, I have taken into account decision-making models used by comparative jurisdictions. The United Kingdom, Canada and New Zealand similarly grapple with how to deal with unlawful non-citizens who have committed crimes and are waiting to be deported or who have outstanding legal proceedings. These countries adopt policies and practices that may reduce the risk of arbitrary detention. In particular, in the UK and Canada there is a presumption that individuals will be released from detention with the provision to impose conditions to manage any risk to the community.
18. I have also considered parole and counter-terrorism measures, in particular control orders. It is important to recognise that there are pre-existing systems in place to manage individuals who may pose a risk to the community without remaining in closed detention.
19. This report is based on an inquiry into 11 separate complaints. The findings and recommendations are based on the Commission's inquiry into these particular complaints. However, there are also commonalities between some of the complaints which give rise to findings and recommendations about cases falling within a particular type.
20. The key allegations raised by the complainants are that they have been subject to arbitrary detention contrary to article 9 of the International Covenant on Civil and Political Rights (ICCPR), and arbitrary interference with the family contrary to articles 17 and 23 of the ICCPR.
21. A number of the complaints also raise allegations of inhumane and degrading treatment in detention contrary to articles 10 and 7 of the ICCPR.
22. On the basis of this inquiry, I have made the following findings.

#### *Arbitrary detention*

23. The decision by the Department not to refer Mr SH, Mr SG, Mr RB and Mr SI to the Minister to consider exercising his discretionary powers under s 195A and s 197AB of the Migration Act resulted in their detention being arbitrary contrary to article 9(1) of the ICCPR.
24. The lack of assessment by the Department of whether the individual circumstances of Mr SM, Mr SJ, Mr SK and Mr SL indicated that they could be placed in less restrictive forms of detention was inconsistent with article 9(1) of the ICCPR.

25. The decision of the Minister not to consider exercising his discretionary powers under s 195A and s 197AB of the Migration Act in relation to Mr RA and Mr SF may have resulted in their detention being arbitrary contrary to article 9(1) of the ICCPR.
26. The transfer and detention of Mr RB to a state prison was arbitrary contrary to article 9(1) of the ICCPR.

#### *Arbitrary interference with family*

27. The detention of Mr RA, Mr RB, Mr SG, Mr SH, Mr SI, Mr SJ, Mr SK, Mr SL and Mr SM interfered with the family and family life of those complainants, contrary to articles 17(1) and 23(1) of the ICCPR.
28. The decision of the Minister not to consider exercising his discretionary powers to grant Mr SF a visa did not constitute a breach of articles 17(1) and 23(1) of the ICCPR.

#### *Treatment in detention*

29. In relation to complaints regarding treatment during the November 2015 Christmas Island Riots, in my view there is insufficient material before me to find a breach of article 10(1) of the ICCPR.
30. The treatment of Mr RA during his transfer to Christmas Island on 28 August 2015 does not constitute a breach of article 10(1) of the ICCPR.
31. The use of handcuffs on Mr SI to transfer him to Christmas Island on 28 August 2015 when he was assessed as being low risk in aviation settings was contrary to article 10(1) of the ICCPR.
32. Mr SL's allegations that his personal safety was not adequately protected do not appear to constitute a breach of article 10(1) of the ICCPR.
33. The decision not to allow Mr SI to visit his daughter when she was having a surgical procedure on 21 August 2015 does not constitute a breach of article 10(1) of the ICCPR.

## 2 Background

34. The individuals identified below have made complaints or had complaints made on their behalf in writing to the Commission.
35. All of the complainants were detained under s 189(1) of the Migration Act after having their visas either cancelled or refused on character grounds under s 501 of the Migration Act.

36. Table 1 sets out, for the complainants currently in closed detention, the date of arrival in Australia, the date detained, the number of days in detention and the current location of detention.

**Table 1**

<b>Complainant</b>	<b>Date of Arrival in Australia</b>	<b>Date of detention</b>	<b>Time in closed detention</b>	<b>Location of detention</b>
Mr RA	22 May 1981	16 Feb 2012	8 years 8 months	Maribyrnong IDC
Mr RB	4 Jun 2000	15 Feb 2013	7 years 8 months	Perth IDC

37. Table 2 sets out, for the complainants who are no longer in closed detention, the date of arrival in Australia, the date detained, the number of days in closed detention, the date of their release or removal and their current location.

**Table 2**

<b>Complainant</b>	<b>Date of Arrival in Australia</b>	<b>Date of detention</b>	<b>Time in closed detention</b>	<b>Date of release/ removal</b>	<b>Location</b>
Mr SF	17 Apr 1987	17 Apr 2012	6 years 14 days	1 May 2018	Samoa
Mr SG	18 Nov 2004	20 Aug 2014	5 years 17 days	6 Sep 2019	Australia
Mr SH	12 Mar 2011	23 Mar 2015	3 years 11 months	6 Mar 2019	Australia



<b>Complainant</b>	<b>Date of Arrival in Australia</b>	<b>Date of detention</b>	<b>Time in closed detention</b>	<b>Date of release/removal</b>	<b>Location</b>
Mr SI	6 Feb 1972	5 Jun 2015	3 years 8 months	28 Feb 2019	Australia
Mr SJ	25 Jan 1969	14 Sep 2015	2 years 8 months	18 May 2018	United Kingdom
Mr SK	27 Dec 1986	28 Sep 2015	2 years 5 months	16 Mar 2018	Bosnia and Herzegovina
Mr SN	18 Jun 2006	10 Jul 2015	1.5 years	6 Dec 2016	New Zealand
Mr SL	25 Jun 1969	19 Oct 2014	1 year 10 months	25 Feb 2016	United Kingdom
Mr SM	25 Sep 1967	16 Jul 2015	1 year 4 months	10 Nov 2016	Australia

38. Mr RA and Mr RB remain detained in immigration detention facilities.
39. Mr SH, Mr SG and Mr SI were released from detention, into the Australian community in 2019.
40. Mr SM was released into the Australian community after his visa cancellation was revoked.
41. Mr SL, Mr SJ, Mr SK, Mr SF, and Mr SN were removed from Australia.

## 3 Conciliation

42. The Commonwealth indicated that it did not want to participate in conciliation of the matter.

## 4 Legislative framework

### 4.1 Functions of the Commission

43. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with, or contrary to, any human right.
44. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.
45. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

### 4.2 What is an 'act' or 'practice'?

46. The terms 'act' and 'practice' are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
47. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
48. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.<sup>5</sup>

### 4.3 What is a human right?

49. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.

50. Article 9(1) of the ICCPR relevantly provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

51. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

52. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

53. Article 10(1) of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

## 5 Arbitrary detention

### 5.1 Law on article 9 of the ICCPR

54. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:

(a) 'detention' includes immigration detention<sup>6</sup>

(b) lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances<sup>7</sup>

(c) 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability<sup>8</sup>

(d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>9</sup>

55. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two months to be 'arbitrary' because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.<sup>10</sup>

56. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'.<sup>11</sup>
57. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in General Comment No. 35 on article 9 of the ICCPR. The UN HR Committee makes the following comments about immigration detention in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.<sup>12</sup>

58. Under international law, the guiding standard for restricting rights is proportionality, which means that deprivation of liberty—in this case, continuing immigration detention in closed environments—must be necessary and proportionate to a legitimate aim of the State Party—in this case, the Commonwealth of Australia—in order to avoid being 'arbitrary'.<sup>13</sup>
59. It is therefore necessary to consider whether the detention of the complainants in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. If their detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

## 5.2 Alternatives to closed immigration detention

60. Under s 197AB of the Migration Act, the Minister has the power to allow an unlawful non-citizen to live in the community while their immigration status is resolved—a ‘residence determination’, allowing a person to reside in a specified place, instead of being detained in closed immigration detention. A ‘specified place’ may be a place in the community. This is commonly referred to as ‘community detention’. The Minister may also grant unlawful non-citizens bridging visas.

61. People whose visas have been refused or cancelled under s 501 are not precluded from community detention or being granted bridging visas. In the Statement of Compatibility accompanying the *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, the Commonwealth acknowledged that there were alternatives to closed immigration detention for this cohort:

The Government has processes in place to mitigate any risk of a person’s detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman Own Motion enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister’s personal intervention powers to grant a visa or residence determination where it is considered in the public interest.<sup>14</sup>

62. Failing the character test under s 501 of the Migration Act should not lead necessarily to continued and prolonged immigration detention. Alternatives to detention should be routinely considered for all people who have had their visa refused or cancelled under s 501, with conditions applied to mitigate risks as appropriate. Closed detention should only be used in exceptional circumstances where identified risks cannot be managed through less restrictive means.

63. In this section we discuss conditions that can be imposed to manage any risk, real or perceived, that a person poses to the community and models of decision-making processes to avoid detention being arbitrary.

### (a) Community detention

64. In making a ‘residence determination’ under s 197AB of the Migration Act, the Minister must specify conditions to be complied with by the person who is the subject of the residence determination.<sup>15</sup>

65. Generally speaking, conditions that attach to a residence determination can include a requirement that the person:
  - a. be of good behaviour, including by abiding by all Commonwealth, State or Territory laws that apply and following all reasonable and lawful directions of the Department of Home Affairs
  - b. not engage in any paid work or receive a salary while in detention
  - c. attend school or participate in other educational activities.
66. However, other than a requirement that the person reside at a specified place, there are no other prescribed conditions that attach to a residence determination. As the Explanatory Memorandum to the Migration Amendment (Detention Arrangements) Bill 2005 (Cth) makes clear, conditions should be imposed on a residence determination that are suited to the person's individual circumstances.<sup>16</sup>
67. The Minister has the power to grant a residence determination to a person who has had their visa cancelled or refused under s 501 of the Migration Act and attach any conditions the Minister considers appropriate to manage any risk, real or perceived, that the person poses to the community.
68. There are a number of conditions that can be imposed on various visas grantable under immigration legislation in Australia. For example, the Migration Regulations 1994 (Cth)<sup>17</sup> prescribe a number of conditions applicable to particular visas granted under the Migration Act. There is not always a hard-and-fast rule as to what conditions must be imposed on which visa. The type and number of conditions can be tailored to the particular visa recipient, although in some cases there are compulsory conditions attaching to a particular visa. As there is no grant of a visa to a person in respect of which a residence determination is made, there are no visa conditions prescribed for such purposes. However, the Commission considers that certain conditions applicable to visas granted under the Migration Act could be imposed on a residence determination made by the Minister in relation to a person who has had their visa cancelled pursuant to s 501 of the Migration Act.
69. Such conditions should not be seen as exhaustive, rather only instructive as to what types of conditions the Minister can impose on a residence determination to manage any risk, real or perceived, to the community posed by a person who has had his or her visa cancelled pursuant to s 501 of the Migration Act.
70. Other conditions that can be imposed on other visas granted under the Migration Act include the requirements that the person:
  - a. be limited to a prescribed type and amount of work (conditions 8102-8110)
  - b. obtain approval from the Department to take up specified employment (condition 8551)

- c. does not work (conditions 8116-8118)
- d. be of good behaviour (condition 8303) and not engage in criminal conduct (condition 8564)
- e. not associate or communicate with certain entities or prescribed organisations (condition 8556)
- f. report within a specified time and place (conditions 8401-8402)
- g. notify the Department of the person's residential address (condition 8513) or any change in that address (condition 8565)
- h. be required to leave Australia by a specified date (condition 8512).

71. In the Commission's view, there are a number of existing conditions prescribed for the purposes of visas granted under the Migration Act that could appropriately be applied to a person in respect of whom a residence determination has been made. Such conditions can be imposed to manage the risk such a person may pose to the community when in community detention. At the very least, these could include a requirement that the person be of good behaviour, report to immigration authorities on a regular basis, notify immigration authorities of the person's movements such as interstate travel, and not to associate with certain persons or organisations.

**(b) Bridging visas**

72. Section 195A of the Migration Act permits the Minister, where the Minister thinks that it is in the public interest to do so, to grant a visa to a person detained under s 189 of the Migration Act.
73. It is useful to set out what conditions can be imposed on a bridging visa granted under Subdivision AF of Division 3 of Part 2 of the Migration Act to give some context to how persons in the community on a bridging visa are managed.
74. The conditions that can be imposed on a bridging visa granted under s 73 of the Migration Act are varied,<sup>18</sup> but can include a requirement that the person:
- a. not undertake any paid work (condition 8103)
  - b. be limited to a prescribed type and amount of work (condition 8104)
  - c. not work for the same employer for more than three months without Departmental approval (condition 8108)
  - d. not perform work that an Australian citizen or permanent resident could do (condition 8112)
  - e. maintain adequate arrangements for health insurance (condition 8501)
  - f. live, study and work only in a designated area of Australia (condition 8549).

75. As the Minister is not bound by the Migration Regulations in granting a visa under s 195A of the Migration Act, the Minister is at liberty to apply any condition the Minister sees fit.
76. Again, notwithstanding the Minister's discretion, a number of other conditions imposable on visas other than bridging visas granted under s 73 are also instructive. As set out above at paragraph 69, there are a range of conditions that can be imposed on visas.
77. In a similar manner to residence determinations, the Commission considers that existing visa conditions could be applied to manage potential risks to the community posed by a person who has had their visa refused or cancelled under s 501 and is subsequently released from detention onto a bridging visa.

**(c) Parole and other conditional release options**

78. The purposes of parole or conditional release from prison differ, at least in part, from those that govern the grant of bridging visas or residence determinations made in respect of a person who has had their visa cancelled pursuant to s 501 of the Migration Act.
79. Section 19AKA of the *Crimes Act 1914* (Cth), for example, provides that the purposes of parole in relation to Commonwealth offenders are for the protection of the community, the rehabilitation of the offender and the reintegration of the offender into the community. When released on parole, an individual is still serving their criminal sentence; whereas an individual who is detained following a visa cancellation under s 501 of the Migration Act has completed their sentence.
80. However, the parole decision-making framework and the conditions imposed as part of parole may be instructive when considering how to manage any risk, real or perceived, that an immigration detainee may pose to the community.
81. Parole or the conditional release from prison is intended to balance the priorities of rehabilitating and reintegrating an offender with the safety of the community. In making a decision on whether to grant release on parole, or conditionally release an offender from prison, the various Commonwealth, State and Territory decision-makers responsible generally consider the following:
  - a. the risk posed by the offender to the community, including the risk of reoffending<sup>19</sup>
  - b. the circumstances of the offending that gave rise to the imposition of a sentence<sup>20</sup>
  - c. the sentencing remarks in relation to the offender<sup>21</sup>



- d. the offender's behaviour while in custody<sup>22</sup>
  - e. the offender's criminal record/history (and its seriousness)<sup>23</sup>
  - f. previous behaviour of the offender while on release to parole<sup>24</sup>
  - g. consideration of any victims of the offending<sup>25</sup>
  - h. any reports in relation to the offender prepared for the purposes of imprisonment, including psychological or psychiatric assessments<sup>26</sup>
  - i. evidence of support for the offender in the community<sup>27</sup>
  - j. the offender's cooperation with authorities.<sup>28</sup>
82. This provides a good example of a decision-making framework. The Minister could have regard to the above factors in their consideration of whether to grant a visa or make a residence determination.
83. The offending conduct that gave rise to the sentence is clearly relevant, but it is not the only relevant consideration. The circumstances surrounding the offending are also relevant, as are the risks of re-offending, the offender's behaviour while in custody and evidence of support within the community.
84. As discussed, in granting a bridging visa under s 195A or making a residence determination under s 197AB, the Minister can mitigate any risks, real or perceived, posed by a person who has had his or her visa cancelled pursuant to s 501 of the Migration Act by imposing conditions specifically designed to address such risks.
85. Some of the reasons that conditions are imposed on persons released on parole are to manage such risks that the person may pose to the community. Some of the conditions imposed on release on parole of a post-custodial offender could therefore be appropriately imposed on a person who has had their visa cancelled under s 501 of the Migration Act.
86. Instructive are some of the conditions applicable to release on parole for persons sentenced for Commonwealth, State or Territory offences. While the regime in each State and Territory, and for Commonwealth offences, is different, there are a number of common characteristics. These include that the person, the subject of the parole order:
- a. not violate any law<sup>29</sup>
  - b. be of good behaviour<sup>30</sup>
  - c. report to a specified person at a specified time and place<sup>31</sup>
  - d. not associate or contact a specified person or organisation<sup>32</sup>
  - e. not possess or use a firearm or other weapon.<sup>33</sup>

87. The grant of a bridging visa or the making of a residence determination should not be viewed as a means by which the Minister supplants the role of parole authorities. The imposition of post-custodial conditions on liberty and the imposition of conditions on the grant of a residence determination pending a person's removal from Australia due to the cancellation of that person's visa on character grounds under s 501 of the Migration Act are different exercises of power and discretion.
88. However, the Commission acknowledges that conditions on the post-custodial release of a prisoner as part of release on parole are intended to manage any risks, real or perceived, posed by that person to the community, as reflected in the purposes of parole set out in the *Crimes Act 1914* (Cth). Insofar as such a condition is imposed to achieve this end, it can inform the Minister as to what, if any, conditions are imposed on a person who has had their visa cancelled under s 501 of the Migration Act to manage any risks that person may pose to the community.
89. In addition to parole orders, there are also a number of other State and Territory non-custodial options in sentencing offenders that are intended to manage any risks to the community posed by the person's release through the imposition of conditions.
90. In New South Wales, for example, under Parts 7 and 8 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) a court can, instead of a custodial sentence, impose a community correction order or a conditional release order on an offender. In addition to the 'standard' conditions applicable to such orders, the sentencing court can impose any number of the following conditions that require the offender to:
  - a. adhere to a curfew
  - b. participate in a rehabilitation program or to receive treatment
  - c. abstain from alcohol or drugs
  - d. not associate with particular persons
  - e. not frequent or visit a particular place or area
  - f. submit to supervision by a specified person.<sup>34</sup>
91. The Minister can impose any number of other tailored conditions on the visa or residence determination in relation to a person who was convicted of particular offences. For example, for a person convicted of a sexual offence against a child, conditions suited to the protection of a child or children in the community generally could be imposed. In South Australia, for example, s 68(1a) of the *Correctional Services Act 1982* (SA) obliges a parole board to consider certain conditions for release on parole of an offender convicted of prescribed child sex offences, which include a condition:

- a. preventing the person from loitering at or in the vicinity of a school, public toilet or place which children frequent
  - b. preventing the person from working with children or at a place used for the education, care or recreation of children
  - c. preventing the person from providing accommodation to a child who is not related to the person or whom he or she has lawful custody
  - d. requiring the person to be monitored electronically.
92. There are ample number and types of conditions that can be imposed by State and Territory authorities on persons released on parole after having served the minimum custodial sentence imposed by a court. Parole authorities have available a number of conditions that can be imposed on an offender as part of their release on parole that are designed to manage any risk they pose to the community, and to assist in the offender's rehabilitation and reintegration into the community.
93. Similarly, the Minister can impose conditions on a bridging visa or residence determination given to a person who has had their visa cancelled under s 501 of the Migration Act. The Minister can impose such conditions that go to managing any risk that a person may pose to the community in the same way that parole authorities can impose conditions on post-release offenders to manage any risks, specific or general, that person may pose to the community.

**(d) Control orders**

94. The control order regime under Australian counter-terrorism legislation is an example of how individuals who pose a risk to the community can be managed while continuing to reside in the community.
95. The control order regime is found under Division 104 of the *Criminal Code Act 1995* (Cth). Control orders allow obligations, prohibitions and restrictions to be imposed on a person in order to:
- a. protect the public from a terrorist act
  - b. prevent the provision of support for or the facilitation of a terrorist act
  - c. prevent the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.<sup>35</sup>
96. The kinds of obligations, prohibitions and restrictions that can be imposed pursuant to a control order relate to:<sup>36</sup>
- a. the areas where a person can go
  - b. not travelling overseas
  - c. curfews

- d. wearing a tracking device
  - e. communicating or associating with particular people
  - f. accessing certain telecommunications or technology (including the internet)
  - g. possessing or using certain articles or substances
  - h. carrying out specified activities (including working in particular jobs)
  - i. regular reporting
  - j. being photographed
  - k. having fingerprints taken
  - l. participating in counselling or education.
97. Interim control orders are granted by certain federal courts and may be issued on behalf of the Commonwealth without the other party present. A control order is confirmed by a court following a civil hearing.
98. It is acknowledged that for many years the Commission has raised concerns about the human rights implications of the current control order regime. However, the Commission has submitted that if the current control order regime is retained, it should be more tightly targeted to people demonstrated to be a risk to the community. It should be limited to people who have been convicted of a terrorist offence and who would still present unacceptable risks to the community at the end of their sentence if they were free of all restraint upon release from imprisonment.<sup>37</sup>
99. Similarly, it is foreseeable that the control order regime or similar measures could be applied to individuals who have had their visas cancelled or refused under s 501 and present a risk to the community after completing their criminal sentence.

### 5.3 Comparative models for risk management of immigration detainees

100. There are a number of comparative schemes around the world in which authorities use conditions analogous to those attached to parole or other conditional release schemes for the purpose of releasing immigration detainees into the community pending the determination of a particular application or to facilitate their removal from the country.

**(a) United Kingdom**

101. Schedule 10 to the *Immigration Act 2016* (UK) (the UK Act) establishes a scheme of 'immigration bail' in the UK. Generally speaking, the scheme is designed to facilitate the release of persons in immigration detention awaiting the outcome of an application or their removal from the UK.
102. Similar to the Minister's power to make a residence determination under s 197AB of the Migration Act, the UK Secretary of State may grant a person 'immigration bail' if the person is liable to detention under the UK's immigration legislation.<sup>38</sup>
103. Item 2(1) of Schedule 10 of the UK Act provides that immigration bail must be granted with at least one or more of the following conditions:
  - a. requiring the person to appear before the Secretary of State or specified court at a specified time and place
  - b. restricting the person's work, occupation or studies in the United Kingdom
  - c. requiring the person to reside at a specified address
  - d. wearing an electronic monitoring tag
  - e. other conditions as the person granting immigration bail thinks fit.
104. In deciding whether to grant immigration bail and in deciding the condition or conditions to impose on such bail, the decision-maker is to have regard to the following:
  - a. the likelihood of the person failing to comply with a bail condition
  - b. whether the person has been convicted of an offence
  - c. the likelihood of a person committing an offence while on immigration bail
  - d. the likelihood of the person's presence in the United Kingdom, while on immigration bail, causing a danger to public health or being a threat to the maintenance of public order
  - e. whether the person's detention is necessary in that person's interests or for the protection of any other person.<sup>39</sup>
105. The Home Office's guidance on immigration bail expressly provides that any conditions imposed on immigration bail must:
  - a. enable the Home Office to maintain appropriate levels of contact with the individual
  - b. reduce the risk of non-compliance, including absconding.

106. For an immigration detainee who has had their visa cancelled as a result of a conviction for certain criminal offences—including homicide, sexual offences, violent crime or other serious crimes such as terrorist offence, kidnapping, armed robbery or an offence where the victim is a child—the UK Home Office’s guidance provides that immigration bail must include a condition imposing a curfew as well as electronic monitoring.
107. Further, section 55.1.1, Chapter 55 of the Home Office’s *Enforcement Instructions and Guidance* (the Instructions and Guidance) provides for a presumption in favour of immigration bail. This is no different in cases where the immigration detainee has committed a criminal offence. However, the Instructions and Guidance note that ‘the nature of these cases means that special attention must be paid to their individual circumstances’. This includes consideration of:
  - a. the protection of the public from harm indicated by the immigration detainee’s criminality
  - b. the risk or likelihood of re-offending and the seriousness of the harm if the person re-offends
  - c. whether the offences were violent, sexual or drug-related
  - d. the risk of absconding, including any evidence of previous absconding
  - e. the risk of non-compliance, including any evidence of a previous failure to comply with conditions of immigration bail or other temporary admission or release from detention
  - f. previous evidence of compliance with the requirements of immigration control (e.g., by applying for a visa or further leave to remain in the United Kingdom)
  - g. the immigration detainee’s ties with the United Kingdom, including any close relatives or dependants resident in the United Kingdom and settled address and employment.
108. The UK model has a decision-making framework that suggests it is less likely to result in arbitrary outcomes: in using the term ‘immigration bail’, and also through the imposition of conditions on immigration bail that are similar to, or taken from, bail and parole conditions, or conditional release from custody, applied under UK law.
109. The UK model also reveals an overriding principle of protecting the community from harm in granting a person release from immigration detention on immigration bail, which is analogous to community detention made pursuant to a residence determination.

**(b) New Zealand**

110. In New Zealand, the *Immigration Act 2009* (NZ) (the NZ Act) establishes a regime for the residence placement of a person otherwise liable to be detained under s 309 of that Act. This includes persons who are liable for deportation.
111. Although the NZ regime is different in material respects from the operation of s 501 of the Migration Act, there are similarities. Section 161 of the NZ Act provides that a person who holds a particular visa and who is convicted of a criminal offence that carries with it certain terms of imprisonment is liable to deportation. Once a person is liable for deportation, they are also liable to arrest and detention under the NZ Act.<sup>40</sup>
112. However, not all persons *liable* to be detained, because they have committed a criminal offence carrying with it a prescribed term of imprisonment, *must* be detained. Section 315 of the NZ Act provides that, instead of being placed in closed detention, or continuing to be held in detention, the person may agree with an immigration officer to:
- a. reside at a specified place
  - b. report to a specified place at specified periods or times in a specified manner
  - c. provide a guarantor who is responsible for the person's compliance with any agreed requirements and for reporting any failure by the person to comply with the requirements
  - d. attend any required interview or hearing if they have made an application for a protection visa
  - e. undertake any other action to facilitate the person's deportation or departure from New Zealand.<sup>41</sup>
113. The immigration officer is at liberty to vary the residence or reporting requirements at any time at the request or with the agreement of the person liable to be detained.<sup>42</sup> Further, failure to comply with the conditions of the residence placement may result in the resumption of that person's detention<sup>43</sup> and the immigration officer can end any such agreement at any time.<sup>44</sup>
114. The residence and reporting requirements set out in the NZ Act can be made in respect of a person who is rendered liable to be deported as a result of the commission of a criminal offence that carried with it a prescribed penalty.
115. The New Zealand model proposes alternatives to closed detention through the use of reporting and residence requirements. It provides a process to consider the least invasive and restrictive measures available and provides for detention when other measures are insufficient. The New Zealand framework reflects the principle that detention is only justified when it is reasonable, necessary and proportionate.

**(c) Canada**

116. In Canada, the *Immigration and Refugee Protection Act 2001* (the Canadian Act) also contemplates the conditional release of a person otherwise liable to detention under that Act as a result of a criminal conviction. Like Australia, Canada prescribes certain offences as a basis for rendering a foreign national in Canada lawfully liable to be deported.
117. Section 36 of the Canadian Act prescribes a number of periods of imprisonment as a basis for rendering a foreign national 'inadmissible' on grounds of serious criminality or criminality. This includes, for example, a foreign national who has been convicted of an offence punishable by a maximum term of imprisonment for 10 years.<sup>45</sup>
118. Once deemed inadmissible on grounds of criminality, the person is liable to be deported or detained under the Canadian Act, provided the arresting immigration officer also has reasonable grounds to believe that the person is a danger to the public.<sup>46</sup>
119. Section 56 of the Canadian Act relates to the detention and release of a foreign national in Canada. Section 56(1) provides that, if an immigration officer 'is of the opinion that the reasons for the [person's] detention no longer exist ... [t]he officer may impose conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer considers necessary'.<sup>47</sup> Immigration authorities must release a foreign national from immigration detention unless it is satisfied that the person is, among other things, a danger to the public.<sup>48</sup> The relevant policy guidelines<sup>49</sup> provide that, when assessing danger to the public, the decision-maker should consider, inter alia:
  - a. present and future danger to the public
  - b. the more serious the past criminal offending and the number of offences weigh in favour of a finding of danger to the public
  - c. the circumstances of the offence, how much time has passed since the criminal conduct, the sentence imposed by the criminal court and any mitigating or aggravating factors at the time of the offence or since that time
  - d. the Parole Board's evaluation of the risk posed by the person
  - e. whether there is ongoing danger to the public, especially for persons who have been in detention for a long time
  - f. the circumstances that led to the original determination of danger to the public; for example, whether those circumstances involved a heightened level of vulnerability due to addiction or mental health issues, among others, and whether those vulnerabilities have been mitigated, e.g., through treatment or rehabilitation.



120. The Canadian Act permits the immigration authorities to ‘impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions’<sup>50</sup> when releasing a person from immigration detention pending their removal from Canada.
121. While prescribed only in cases of a foreign national who is inadmissible on grounds of security (for example, because the person has engaged in an act of espionage or terrorism),<sup>51</sup> the Canadian Act requires the imposition of certain conditions.<sup>52</sup> These include that the person:
- a. inform authorities of their address and any change in that address
  - b. inform authorities of their employer and any change in that information
  - c. present themselves at a specified time and place to immigration authorities
  - d. produce certain documents to immigration authorities, such as a passport or other travel document, as requested
  - e. inform immigration authorities if they are charged with and/or convicted of a criminal offence
  - f. inform immigration authorities of their intention to leave Canada.<sup>53</sup>
122. These are conditions that could properly inform immigration authorities in imposing conditions on the release of a person otherwise liable to be detained on grounds of criminality.

**(d) Conclusion on alternatives to immigration detention**

123. The regimes in the United Kingdom, New Zealand and Canada provide for the release from immigration detention of persons otherwise liable to be detained under the respective regimes’ legislation as a result of criminal behaviour. The existence of such regimes contemplates release into the community, subject to prescribed conditions. Moreover, in Canada, the authorities *must* release, unless a danger to the public is shown.
124. Immigration authorities in each country are given considerable discretion in managing the person’s release and the conditions imposed on it. Each regime permits the person to be detained where they fail to comply with conditions imposed on the release.

125. In the Commission's view, these regimes demonstrate decision-making processes and conditions attached to release from detention that can protect the community while also avoiding detention from being considered arbitrary under international human rights law. Broadly speaking, each regime reveals a practical way in which persons detained in immigration detention as a result of prior criminal offending can be released into the community and any risk managed through the imposition of conditions on their release together with a broad discretion of authorities to detain the person in the event of a breach of such conditions.

## 5.4 Act or practice of the Commonwealth

126. Ten out of the 11 complainants allege that their detention in an immigration detention facility is, or was, arbitrary.
127. As at the time of making their complaints, the complainants were 'unlawful non citizens', meaning that the Migration Act required that they be detained.
128. However, there are a number of powers that the Minister could have exercised either to grant a visa, or to allow detention in a less restrictive manner than in a closed immigration detention centre.
129. In addition to the power to make a residence determination under s 197AB, the Minister also has a discretionary non-compellable power under s 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
130. As noted above the Commission has jurisdiction to inquire into an act done, including a refusal or failure to do an act, by or on behalf of the Commonwealth.
131. I consider the following 'acts' of the Commonwealth as relevant to this inquiry:
- a. The decision of the Department not to refer the case to the Minister in order for the Minister to assess whether to exercise the discretionary powers under s 195A or s 197AB.
  - b. The lack of assessment by the Department of whether the individual circumstances of the complainants indicated that they could be placed in less restrictive forms of detention.
  - c. The decision of the Minister not to consider exercising the discretionary powers under s 195A and s 197AB of the Migration Act.
132. In relation to the third act, the Department does not accept that the decision of the Minister not to exercise or consider exercising a non-delegable power is a failure to act:

The Department notes the Minister's powers under sections 195A, 197AB and 417 are non-compellable. The Minister is not required to consider exercising, or to exercise their power in any case. The Department refutes the AHRC's view that the Minister 'failed to consider exercising' his power in Mr RA and Mr SF's case, as deciding not to exercise or consider exercising a non-delegable power is not a failure.

133. In each case, in response to a submission from his Department, the Minister made a decision not to consider exercising his discretionary powers under ss 195A or 197AB of the Migration Act. Whether this amounts to a 'decision' not to consider the exercise of the powers, or a 'failure' to make a substantive decision about whether to exercise those powers is immaterial to the Commission's jurisdiction to inquire. The Commission may inquire into both discretionary acts and failures to act. Similarly, the fact that the powers are 'non-compellable' (i.e., that the Minister has no legal duty under the Migration Act to consider whether to exercise his discretion) does not mean that a failure to exercise the powers in the complainant's favour, when this was open to the Minister, cannot be inconsistent with human rights.

## 5.5 Group 1: complainants remaining in immigration detention facilities

134. The following complainants remain detained in immigration detention facilities. The time in brackets indicates the length of time they have been held in detention at the time of writing:
- a. Mr RA (eight years, eight months)
  - b. Mr RB (seven years, eight months)
135. Each complainant has committed criminal offences, of varying degrees of severity, and has completed their sentences. It is concerning that each complainant has spent more time in immigration detention than in prison serving the criminal sentence that triggered their visa cancellation or refusal.
136. In relation to Mr RB, the Department made an assessment that he did not meet the s 195A and/or s 197AB guidelines for referral to the Minister until 2019 (six years after he was detained) when he was referred to the Assistant Minister.
137. The Department referred Mr RA to the Minister pursuant to s 195A on multiple occasions; however, respective Ministers declined to consider exercising their discretionary powers.
138. I have considered the complainants cases individually and provide my findings below.

**(a) The delay of the Department in referring the case to the Minister in order for the Minister to assess whether to exercise the discretionary powers under s 195A or s 197AB.**

139. The complainants were taken into immigration detention between 2013 and 2015.
140. On 30 May 2013, the Hon Brendan O'Connor MP, then Minister for Immigration and Citizenship, published guidelines to explain the circumstances in which he may wish to consider exercising his residence determination power under s 197AB of the Migration Act.
141. New guidelines were issued on 18 February 2014 by the Hon Scott Morrison MP, then Minister for Immigration and Border Protection (the 2014 guidelines).<sup>54</sup> On 29 March 2015, the Hon Peter Dutton MP, Minister for Home Affairs, issued replacement guidelines (the 2015 guidelines).<sup>55</sup> On 21 October 2017, Minister Dutton again re-issued these guidelines which are currently in use by the Department.<sup>56</sup>
142. Each of these guidelines provides that the Minister would not expect referral of cases where a person did not meet the character test under s 501 of the Migration Act, unless there were exceptional circumstances.
143. The guidelines also state that the Minister will consider cases where there are 'unique or exceptional circumstances'.
144. The phrase 'unique or exceptional circumstances' is not defined in any of the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.<sup>57</sup> In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
- circumstances that may bring Australia's obligations as a party to the ICCPR into consideration
  - circumstances that may bring Australia's obligations as a party to the Convention on the Rights of the Child (CRC) into consideration
  - the length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community
  - compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person
  - where the department has determined that the person, through circumstances outside their control, is unable to be returned to their country/ countries of citizenship or usual residence.

145. Similarly, guidelines have been published in relation to the exercise of the power under s 195A of the Migration Act to grant a visa to a person in immigration detention. The Hon Chris Bowen MP, then Minister for Immigration and Citizenship, published guidelines on s 195A in March 2012. These guidelines did not explicitly exclude for referral individuals who did not meet the character test under s 501 of the Migration Act and also provided for the referral of cases where ‘unique and exceptional circumstances’ arise.
146. In April 2016, Minister Dutton re-issued s 195A guidelines, which are the current guidelines in use by the Department. These guidelines provide that the Minister would not expect referral of cases where a person did not meet the character test under s 501 of the Migration Act. Although there is no exception for unique and compelling circumstances—unlike the other ministerial intervention guidelines referred to above—under these guidelines the Minister will consider cases where there are compelling or compassionate circumstances.
  - (i) *Mr RB*
147. Mr RB is a 52-year-old male citizen of Egypt. He arrived in Australia on 4 June 2000 on a Tourist (subclass 676) visa.
148. On 8 October 2003, Mr RB was granted a permanent Partner (subclass 801) visa.
149. Mr RB has an extensive criminal history comprising of 49 offences predominantly relating to fraud.
150. On 4 February 2011, he was sentenced to 20 months imprisonment on six counts of engaging in conduct with the intention of dishonestly obtaining a gain from a Commonwealth entity.
151. On 17 June 2011, he was sentenced to 18 months imprisonment for fraud-related offences.
152. On 20 March 2012, Mr RB’s Partner visa was cancelled by a delegate of the Minister under s 501(2) of the Migration Act, on the basis that he did not pass the character test due to his criminal history.
153. On 15 February 2013, Mr RB was released from Acacia Prison in Western Australia and detained under s 189(1) of the Migration Act at Perth IDC.
154. On 12 March 2013, Mr RB applied for a Protection visa. The application was refused on 26 June 2013 and has been the subject of a number of decisions and appeals.
155. The Department has advised that Mr RB does not have ongoing immigration matters.
156. Mr RB remains in immigration detention and is currently held at Perth IDC.

157. On 17 May 2016, the Department referred Mr RB's case to the then Minister for consideration under s 197AB of the Migration Act. On 30 May 2016, the Minister declined to consider intervening.
158. On 6 January 2017, a Department officer assessed Mr RB as not meeting the s 195A guidelines. The Department officer took into consideration the following factors:
- a. Mr RB has been in detention for over three and a half years
  - b. He has an extensive criminal history in Australia and has spent more than three years in prison for fraud-related offences
  - c. Mr RB has two minor Australian citizen children
  - d. The Federal Court has remitted to the Refugee Review Tribunal the refusal decision of Mr RB's Protection visa application.
  - e. Mr RB has been assessed by the Department through the Community Protection Assessment Tool (CPAT) to be high risk of harm to the community, due to his criminal history and behaviour in detention.
159. In determining that Mr RB did not meet the guidelines, the Department officer concluded:
- Notwithstanding Mr RB's Australian family links, the length of time he has remained in detention, and the likely protracted nature of his case, given his substantial criminal history and risk to the Australian community, it is not appropriate to refer this case to the Minister.
160. The assessment document also contains a handwritten note stating, 'based upon his assessment in the CPAT as high Mr RB's case does not meet the guidelines for referral to the Minister'.
161. While I have not seen Mr RB's CPAT assessment that found him to be a high risk of harm to the community, I have several concerns regarding the Department's s 195A assessment.
162. The Department officer answered 'no' to the question on the s 195A guidelines assessment document which stated, 'is there evidence that the person has individual needs that cannot be properly cared for in a secured immigration detention facility'.
163. This answer appears to be at odds with information the Department officer referred to from an International Health and Medical Services (IHMS) report dated 13 October 2016. The report states that Mr RB has engaged in several episodes of self-harming behaviour, and is currently being monitored by the IHMS mental health team. IHMS recommended in their report that Mr RB be transferred to community detention as 'this would diffuse issues and allow him to have more contact with his family' as he continues to display signs of 'detention fatigue'.

164. The Department officer also answered 'no' to the question, 'are there strong compassionate circumstances that would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit'. Mr RB has two young Australian citizen sons. According to the Department officer, Mr RB's sons visited him weekly and they communicated in daily telephone calls. In my view, this suggests Mr RB has a close bond with his sons.
165. The Department officer considered the impact on Mr RB's sons if he is removed from Australia:
- There is no evidence currently before the Department to indicate that Mr RB's children would receive inadequate care as a result of his departure from Australia, noting that his children reside with their mother, and Mr RB is not the primary caregiver.
166. However, the Department officer did not consider the impact Mr RB's continuing detention will have on his children, which is the relevant question for this particular assessment. It is unclear how Mr RB's ongoing detention could not cause continuing hardship to his children.
167. It was my preliminary view, that in light of the significant length of time Mr RB had been in detention, the protracted nature of his case, the recommendation from IHMS that he be transferred to community detention, and his relationship with his Australian citizen sons, there was scope to bring his case within the guidelines for referral to the Minister. In light of the Department's concerns about Mr RB's criminal history and behaviour in detention, the referral should have contained a risk assessment of whether any risks of harm to the community could have been mitigated by conditions placed on a community detention placement.
168. In response to my preliminary view, the Department advised that in February 2019, Mr RB's case was referred on a group submission to the then Assistant Minister to brief the Assistant Minister on a number of long-term detention cases. The Assistant Minister did not wish to consider Mr RB's case:
- The submission provided the then Assistant Minister an opportunity to indicate whether she was willing to consider the cases on an individual basis. On 26 February 2019, the then Assistant Minister indicated that Mr RB's case should not be referred for consideration under sections 195A and 197AB of the Act.
169. The Assistant Minister was not required to give reasons for her decision not to consider the exercise of her discretions under s 195A or s 197AB.
170. I accept that Mr RB has an extensive criminal history of offences relating to fraud. However, he has served the criminal sentence imposed by the Australian courts. The issue before me is whether his ongoing detention in an immigration detention facility is arbitrary.

It is my view that the following factors weigh in favour of Mr RB's case being considered by the Assistant Minister:

- a. Mr RB has been in closed immigration detention for over six years
- b. Mr RB has two minor Australian citizen children
- c. IHMS recommended that Mr RB be transferred to community detention

171. In light of the above, it is my view that the Assistant Minister's decision not to *consider* exercising her discretionary powers under s 195A and s 197AB may have resulted in the prolonged and continued closed detention of Mr RB.
172. If the Assistant Minister considered the matter and had concerns about Mr RB posing a present risk to the community, she could have asked the Department to conduct a risk assessment to consider whether any risks could be mitigated.
173. It is my view, that Mr RB's continuing detention in closed facilities may be considered arbitrary for the purposes of article 9(1) of the ICCPR.
174. It is also my view that the Department's decision not to refer Mr RB's case to the Minister under s 195A and s 197AB until February 2019, may have resulted in his prolonged and continuing detention (over seven years), after the conclusion of his criminal sentence, being arbitrary, contrary to article 9 of the ICCPR.

**(b) The failure of the Minister to consider exercising his discretionary powers under s 195A and s 197AB of the Migration Act**

*(i) Mr RA*

175. Mr RA is a 43-year-old male citizen of Malta. He arrived in Australia in 1981 at the age of four years old with his family.
176. In September 1994, Mr RA was taken to be a permanent resident as the holder of a Transitional Permanent (Class BF) visa, through the Migration Reform (Transitional Provisions) Regulations (Cth).
177. On 10 December 2004, Mr RA was convicted of sexual offences against his former de-facto partner and her daughter, for which he served a prison sentence of five years and six months.
178. On 20 May 2010, as a result of his criminal offences, his permanent visa was cancelled under s 501 of the Migration Act. He had resided in Australia for 30 years at the time his visa was cancelled.
179. On 5 July 2010, Mr RA was released on parole and was detained under s 189(1) of the Migration Act at Maribyrnong IDC.
180. Mr RA successfully appealed the decision to cancel his visa in the AAT, and, on 17 August 2010, he was released into the community.



181. On 14 February 2012, the Minister personally cancelled Mr RA's visa under s 501A(2) of the Migration Act and he was re-detained at Maribyrnong IDC.
182. Mr RA is currently detained at the Melbourne Immigration Transit Accommodation. At the time of writing he has been in immigration detention for eight years and eight months.
183. The Department referred Mr RA to the Minister to consider exercising his discretionary powers on three occasions.
184. On 2 July 2012, the Department forwarded a submission to the Minister, asking whether he wished to consider exercising his powers under s 195A of the Migration Act.
185. On 13 July 2012, the Hon Chris Bowen, then Minister for Immigration and Citizenship, indicated to the Department that he would consider intervening under s 195A of the Migration Act in two years' time.
186. On 1 April 2014, the Department forwarded a submission to the Minister asking if he wished to consider exercising his power under s 195A and s 197AB of the Migration Act.
187. On 20 May 2014, Minister Dutton declined to consider exercising his power under s 195A and s 197AB of the Migration Act.
188. On 30 March 2015, the Department again forwarded a submission to the Minister asking if he wished to consider exercising his power under s 195A of the Migration Act.
189. On 27 April 2015, Minister Dutton declined to consider intervening under s 195A to grant Mr RA a Removal Pending Bridging Visa or Bridging visa E.
190. On each occasion, the Department prepared written submissions for the consideration of the Minister. The primary reasons for the Department referring Mr RA to the Minister included the protracted nature of his removal, his Australian citizen family and the length of time he had spent in immigration detention.
191. Mr RA is married to an Australian citizen and has an Australian citizen son from another relationship. He is also in the role of father to an Australian citizen stepson.
192. The Department has been involved in discussions with the Maltese authorities since 2012 to facilitate Mr RA's removal. The Maltese Government has been unwilling to issue travel documents citing concerns regarding the length of time he has been in Australia, the nature of his criminal history and potential media interest in Malta if he is removed.

193. In its submission to the Minister dated 30 March 2015, the Department noted that Mr RA had been involved in 'numerous behavioural incidents' in detention including abusive and aggressive behaviour towards officers.
194. The Department identified a Removal Pending Bridging visa and a Bridging visa E as options for future management. It was noted that, on either visa, Mr RA would be required to abide by mandatory conditions, which covered reporting requirements and behaviour in the community and that if the conditions were breached his visa could be cancelled.
195. The Minister was not required to give reasons for his decision not to consider the exercise of the discretions under s 195A or s 197AB. The Minister's decisions in each case were recorded by his endorsement of the departmental submission by circling the words 'not consider'.
196. I accept that Mr RA was convicted of serious criminal offences. However, he has served the criminal sentence imposed by the Australian courts and was released on parole. The issue before me is whether his ongoing detention in a closed immigration detention facility is arbitrary. I also acknowledge Mr RA has been involved in many behavioural incidents in detention. However, it is my view that the following factors weigh in favour of Mr RA's case being considered by the Minister:
- Mr RA had lived in Australia for more than 34 years prior to his visa being cancelled
  - he has an Australian citizen wife, son and stepson
  - as noted by the AAT he 'was deemed by the relevant authorities as worthy of release on parole'<sup>58</sup>
  - during the 2004 plea hearing, a psychologist's report was submitted to the County Court, which led the judge to conclude that 'it would appear unlikely that you would re-offend in this manner again'<sup>59</sup>
  - his removal is protracted, given the reticence of the Maltese authorities to issue travel documents
  - given the ongoing difficulty since 2012 in obtaining travel documents his detention can be considered indefinite.
197. In light of the above, I find that the Ministers' decisions not to *consider* exercising their discretionary powers under s 195A and s 197AB may have resulted in the prolonged and continued detention of Mr RA. I note that I do not express any view as to what the outcome of any such consideration would be.
198. If the Minister considered the matter and had concerns about Mr RA posing a present risk to the community, the Minister could have asked the Department to conduct a risk assessment to consider whether any risks could be mitigated.

199. It is my view, that Mr RA's continuing detention in closed facilities may be considered arbitrary for the purposes of article 9(1) of the ICCPR.

## 5.6 Group 2: complainants who have been released or removed from immigration detention facilities

200. The following complainants have been released or removed from closed immigration detention facilities. The time in brackets indicates the length of time they were held in detention:

- Mr SF (six years)
- Mr SG (five years, seventeen days)
- Mr SH (three years, eleven months)
- Mr SI (three years, eight months)
- Mr SJ (two years, eight months)
- Mr SK (two years, five months)
- Mr SL (one year, four months)
- Mr SM (one year, ten months)

201. Each complainant, except Mr SH, was a long-term resident of Australia at the time his visa was cancelled or refused, each having resided in Australia for over 30 years.

202. In relation to Mr SM, Mr SI, Mr SJ and Mr SK, it appears that the Department did not consider whether their individual circumstances indicated that they could be held in less restrictive forms of detention.

203. Mr SH was assessed by the Department as not meeting the s 195A/197AB guidelines.

204. Sixteen days before Mr SL was removed from Australia, the Department assessed Mr SL as not meeting the s 195A guidelines.

205. The Department referred Mr SF to the Minister under s 195A, however, the Minister declined to consider exercising the discretionary powers.

206. I have considered the complainants' cases individually and provide my findings below.

207. Mr SM's visa cancellation decision was ultimately revoked. His case illustrates the need to consider less restrictive detention measures as soon as possible.

(i) *Mr SM*

208. Mr SM is a 57-year-old male citizen of the United Kingdom. He arrived in Australia, aged four, on 25 September 1967. He arrived under the Assisted Passage Migration Scheme.

209. On 23 August 1987, Mr SM held a transitional (permanent) visa by operation of law, under the Migration Reform (Transitional Provisions) Regulations (Cth).
210. Mr SM has an extensive criminal history, commencing in 1982, resulting in prison sentences and fines. His crimes include break and enter, theft, possession of stolen property, possession of drugs, obstructing police, common assault and breaches of bond conditions.
211. On 2 December 2013, Mr SM was convicted of entering premises with the intent to commit an indictable offence and sentenced to three years imprisonment.
212. On 25 May 2015, Mr SM's visa was mandatorily cancelled under s 501(3A) of the Migration Act. He had been resident in Australia for 48 years at the time of his visa cancellation.
213. On 16 July 2015, Mr SM was released from criminal custody and detained under s 189(1) of the Migration Act at Brisbane Immigration Transit Accommodation.
214. On 19 June 2015, Mr SM lodged a request for revocation of the mandatory visa cancellation decision.
215. On 21 July 2015, Mr SM was transferred to Perth IDC.
216. On 10 September 2015, he was transferred to Christmas Island at North West Point IDC.
217. On 10 November 2016, Mr SM's visa cancellation decision was revoked and his visa reinstated. He was released from immigration detention.
218. The Commonwealth detained Mr SM in an immigration detention centre for almost 16 months from his release from prison on 16 July 2015 until the revocation of his visa cancellation on 10 November 2016.
219. In the Department's response dated 23 September 2016, it stated that alternatives to detention had not been considered for Mr SM:

No alternative, less restrictive forms of detention have been considered as Mr SM does not meet the requirements for submission to the Minister and there have been no vulnerabilities identified which warrant a submission to the Minister.
220. In the Department's response to my preliminary view dated 6 March 2020, it confirmed that Mr SM was not referred for community detention:

From the time Mr SM was detained on 16 July 2015, his case was reviewed 15 times. In each review, the Department took into account Mr SM's circumstances, including his health and welfare needs. The reviews determined his health and welfare needs were provided for in detention. No circumstances were identified indicating a less restrictive detention placement under residence determination arrangements was required or appropriate in Mr SM's circumstances. As such, he was not referred for assessment under the section 197AB guidelines.

221. The s 197AB guidelines permit cases to be referred to the Minister where there are 'unique or exceptional circumstances'. In my view, the following factors are relevant to an assessment as to whether Mr SM's case presented 'unique or exceptional circumstances':
- Mr SM was unlikely to pose a risk to the Australian community. The Department in its submission to the Minister regarding revocation of the visa cancellation decision noted:<sup>60</sup>

His prior offending was predominately theft related, used as a means to support his drug addiction and does not include crimes of a sexual or violent nature.

As Mr SM is no longer drug dependent, he is no longer at risk of reoffending.
  - He was resident in Australia for 48 years before his permanent visa was cancelled.
  - He has strong family ties in Australia including his mother, father, sister, nephew, niece, great-niece, uncle, aunt and two cousins.
222. There is no evidence before the Commission to justify why it was necessary to detain Mr SM in an immigration detention facility while his request to have his visa cancellation revoked was being considered.
223. The fact that his visa cancellation was ultimately revoked indeed supports a finding that Mr SM did not pose an unacceptable risk to the Australian community.
224. I find that the Department's lack of consideration of Mr SM's individual circumstances and, if appropriate, referral of his case to the Minister for consideration of the discretionary powers resulted in his prolonged detention being arbitrary, contrary to article 9 of the ICCPR.
- (ii) *Mr SG*
225. Mr SG is a 41-year-old male citizen of Albania. He arrived in Australia on 18 November 2004 on a Visitor visa. He subsequently applied for a Protection visa and was granted an associated Bridging visa.
226. On 1 March 2005, Mr SG's application for a Protection visa was refused and his subsequent appeals were unsuccessful.
227. On 29 January 2010, Mr SG was convicted of offences relating to trafficking cannabis, criminal damage and the use of false documents. He was sentenced to two years imprisonment—a sentence which was suspended—and fined.
228. Mr SG did not serve any time in prison.

229. On 2 September 2011, a Protection visa application was lodged of behalf of Mr SG's first born son.
230. On 18 January 2013, his son was granted a Protection visa on review by the Refugee Review Tribunal.
231. The Tribunal found that his son faces a real risk of being subjected to significant harm, in furtherance of a 'blood feud' involving his parents and extended family in Albania, and was therefore owed protection obligations under the complementary protection provisions in the Migration Act.
232. Despite his son being found to be owed protection obligations, Mr SG's application for protection on the same grounds continued to be refused. Once his initial application for a Protection visa was refused in 2005, Mr SG was barred under s 48A of the Migration Act from making a further application unless the 'bar' was lifted by the Minister under s 48B. Mr SG and the Department have made numerous unsuccessful requests for Ministerial intervention under s 48B or s 417 on the basis that he is owed protection obligations on the same basis as his son.
233. In terms of his immigration status, between 2010 and 2014, he was granted a series of Bridging visas on departure grounds.
234. On 20 August 2014, Mr SG attended an appointment with the Department for a grant of a further Bridging visa. On the same day, he was detained and transferred to Maribyrnong IDC, pending an assessment against s 501 of the Migration Act.
235. On 12 November 2014, the then Assistant Minister for Immigration and Border Protection refused to grant Mr SG a Bridging visa under s 501(1) of the Migration Act.
236. Mr SG successfully sought judicial review of the decision to refuse him a Bridging visa. On 25 October 2016, the Federal Court remitted the matter to the Minister for reconsideration.
237. The Federal Court held that the failure of the then Assistant Minister to consider or take into account the fact that, if a Bridging visa were refused, Mr SG would face the prospect of indefinite detention, constituted a jurisdictional error.<sup>61</sup>
238. Mr SG was released from immigration detention on 6 September 2019.
239. Mr SG has a wife, who is also an Albanian citizen, and two young sons who were born in Australia.
240. On 28 July 2015 and 7 April 2016, Mr SG was found not to meet the s 195A guidelines for referral.

241. In the 2015 assessment, the Department officer considered there to be strong and compassionate circumstances that would result in irreparable harm and continuing hardship to his wife and their two minor sons who reside in the community. In particular, one of his sons has autism and the following advice from his paediatrician was noted:

Currently [redacted]'s father has been placed back in immigration detention. [Redacted] visits his father on a daily basis. Paternal separation is having a major impact on [redacted]... Separation of a child from his birth father is an extraordinary action, and will have long-lasting consequences for [redacted] and his younger brother. [Redacted] is currently being denied the basic parental support of a father, despite being in a situation that extra care is clearly needed. This has meant he has been unable to participate fully in the early intervention activities that are essential for children with Autism'.

242. The Department officer also considered there to be unique and exceptional circumstances because Mr SG's son has been found to be owed protection obligations and has been granted a Protection visa. As noted above, his son was granted protection based on his parent's claims relating to their involvement in a blood feud in Albania.

243. The Department officer considered that removal was not reasonably practicable given the difficulties in obtaining the requisite Albanian travel documents.

244. Despite the existence of unique and exceptional circumstances and that removal was not reasonably practicable, the case was not referred to the Minister because the then Assistant Minister had previously considered the case. The Department officer provided the following reasons for the decision not to refer:

The circumstances of this case have been considered by the Assistant Minister on two occasions in the last eight months, firstly in November 2014, when the Minister exercised her discretion under s 501 of the Act and refused to grant Mr SG a visa, and again in May 2015, when the Minister declined to intervene under s 417 to substitute a more favourable decision. Both submissions considered the issues relating to the family including, the children's circumstances, [the minor's] status as a permanent resident and his special needs. However, on both occasions the Minister declined to intervene and in May 2015 agreed that she did not wish to see further cases for this family, unless further requests raised new and substantive issues.

This assessment again considered the family's circumstances against the s 195A guidelines but as no new information has been raised since the s 501 and s 417 decisions, and the case has recently had Ministerial consideration, with a negative outcome, this case is therefore assessed as not meeting the s 195A guidelines for referral to Minister Dutton.

245. While the Assistant Minister considered Mr SG and his family's circumstances in the context of the decisions to refuse him a visa under s 501 and s 417, his ongoing immigration detention was not a relevant consideration in these decisions.
246. Those decisions did not consider the necessity of Mr SG's detention in an immigration detention facility, the impact of that detention, or whether less restrictive options were available. Accordingly, in my view it was not appropriate for the Department officer to rely on the then Assistant Minister's previous decisions under s 501 and s 417 in deciding not to refer Mr SG's case.
247. Section 195A of the Migration Act is used by the Department to facilitate the management of complex cases. This includes long-term detention cases where removal pathways are becoming protracted and where there is evidence that the detention placement is causing significant harm and continuing hardship to an Australian citizen or Australian family unit.
248. I note that the then Assistant Minister said that she did not want to see further cases involving Mr SG unless new and substantive issues were raised. It is my view that the Department should have referred Mr SG's case to the Minister based on the following new and substantive issues:
- a. Mr SG's ongoing detention in circumstances where removal was not reasonably practicable
  - b. paediatric evidence of the significant harm Mr SG's detention is having on his Australian resident son.
249. In the 2016 assessment, the Department officer again considered there to be strong and compassionate circumstances that would result in irreparable harm and continuing hardship to his wife and their two minor sons who reside in the community. The Department officer stated that Mr SG's son has autism and requires treatment that he would not be able to access in Albania. Furthermore, pursuant to the CRC it was noted that it is in the child's best interests to remain in Australia.
250. The Department officer also considered there to be unique and exceptional circumstances given his son's serious health condition.
251. However, once again, the Department officer decided not to refer the case to the Minister, concluding:
- Notwithstanding Mr SG's time spent in detention and possible protracted nature of his case, based on the advice from IHMS and the ongoing judicial review of his BVA refusal under s 501 of the Act, Mr SG does not meet the s 195A guidelines for referral to the Minister, at this time.



252. The IHMS advice contained in the 2016 assessment is as follows:

On 12 September 2014, Mr SG was informed of his Hepatitis B status by an IHMS GP from his induction blood test results. He advised the GP that he was diagnosed prior to his arrival in Australia. The IHMS doctor performed liver function tests to investigate further and the results were reported as normal. No further management is necessary at this time, however his community GP can continue to monitor his liver function and refer him to a liver specialist if required in the future.

253. IHMS also advised that 'Mr SG does not have any mental health concerns at this time'.

254. At the time of the decision, Mr SG had been detained for over 19 months. I note that Mr SG's sentence for his criminal conviction was wholly suspended and he spent no time in prison. Furthermore, the Department officer noted that there were 'significant barriers' to his removal because of his son's refugee status and ongoing judicial review matters. These barriers meant that there was a significant risk that his continued detention would be protracted.

255. In my preliminary view, I questioned why the above advice from IHMS and the fact Mr SG had ongoing litigation outweighed the protracted nature of his detention and the acknowledged unique and exceptional circumstances.

256. In response to my preliminary view, the Department said:

From the time Mr SG was detained on 20 August 2014, his case was reviewed 50 times. In each review, the Department took into account Mr SG's circumstances, including his health and welfare needs. The reviews determined his health and welfare needs were provided for in detention. Given Mr SG's time in detention, family links, and protected nature of the case were outweighed by his section 501 visa refusal, the absence of evidence that his health could not be managed in a detention centre environment, and his ongoing judicial review, it was considered that there was no need to refer his case for assessment under section 195A guidelines.

257. I do not accept as reasonable that Mr SG's unique and exceptional circumstances were outweighed by factors including his s 501 visa refusal. Mr SG's offending was on the lower end of severity. Reflecting this is the fact that he was only sentenced to two years imprisonment—a sentence which was suspended—and fined. Mr SG did not spend any time in prison.

258. As noted above, Mr SG was released from immigration detention on 6 September 2019. However, I do not have information about the date on which Mr SG was referred to the Minister.

259. For the above reasons, it is my view that there was scope for Mr SG's case to fall within the relevant guidelines, and the delay in referring him to the Minister under s 195A in 2015 and 2016 resulted in his prolonged detention being arbitrary, contrary to article 9 of the ICCPR.
260. For completeness I note that, on 28 October 2016 and 19 July 2017, CPAT assessments were completed for Mr SG that recommended 'BV [bridging visa] with conditions'. Mr SG's case manager repeatedly notes in the monthly case reviews that his placement was 'inconsistent with current CPAT recommendation'.
- (iii) *Mr SH*
261. Mr SH is a 36-year-old Lebanese citizen. He arrived in Australia, on 12 March 2011 on a Prospective Marriage visa (subclass 300 visa). He was subsequently granted a temporary Partner visa (subclass 820).
262. In April 2013, he was convicted of recklessly causing serious injury and sentenced to four years and six months imprisonment. Mr SH had no prior convictions.
263. On 6 February 2015, his Partner visa was mandatorily cancelled under s 501(3A) of the Migration Act.
264. On 23 March 2015, Mr SH was granted parole, after serving approximately two years of his original sentence. On the same day, he was detained under s 189(1) of the Migration Act at Maribyrnong Immigration Detention Centre (IDC).
265. On 7 September 2015, the Assistant Minister decided not to revoke the visa cancellation under s 501CA(4) of the Act.
266. On 13 June 2017, the Full Federal Court set aside the Assistant Minister's decision not to revoke Mr SH's visa cancellation and remitted the matter for determination according to law.<sup>62</sup>
267. On 6 September 2016, he lodged an application for a Protection visa which was refused on 17 August 2017.
268. On 6 September 2017, he appealed the decision in the Administrative Appeals Tribunal (AAT).
269. On 26 June 2018, the AAT set aside the delegate's decision to refuse Mr SH a Protection visa and remitted the matter to the Department with a direction that he is not a danger to the Australian community.
270. Mr SH was released from immigration detention on 6 March 2019.
271. Mr SH has an Australian citizen wife and five-year-old daughter.

272. On 14 September 2016, almost 18 months since he was detained, the Department stated that it had not considered whether Mr SH could be detained in a less restrictive manner:

No alternative, less restrictive forms of detention have been considered as Mr SH does not meet the requirements for submission to the Minister and there have been no vulnerabilities identified which warrant a submission to the Minister.

273. On 25 January 2017, the Department assessed Mr SH as not meeting the s 195A and s 197AB guidelines. In making this assessment, the Department officer listed a range of factors including:

- a. his criminal history
- b. his Australian citizen wife and minor daughter in the community
- c. the sentencing judge noting that Mr SH has good prospects of rehabilitation and was unlikely to offend in this manner again
- d. time in detention is likely to be protracted as Mr SH has an ongoing Protection visa application, and the Federal Circuit Court has reserved judgment in relation to the Partner visa cancellation.
- e. the then Assistant Minister for Immigration and Border Protection noting in the revocation decision that Mr SH represents an unacceptable risk of harm to the Australian community
- f. the community placement assessment tool recommendation is 'held detention' due to the serious nature of his criminality in the Australian community.

274. The Department officer considered that there were strong and compassionate circumstances that would result in irreparable harm and continuing hardship to his wife and daughter:

Consideration in relation to the best interests of the child was taken into account in the revocation decision; however per above, the then Assistant Minister decided not to revoke the cancellation. Reports from IHMS note the detrimental effect that the separation of the family is having on Mr SH, his wife and child.

275. I have reviewed the decision of the then Assistant Minister for Immigration and Border Protection not to revoke Mr SH's visa cancellation. While the Minister concluded that Mr SH 'represents an unacceptable risk of harm to the Australia community', she also found that he posed a low likelihood of re-offending given his lack of prior offences and his good prospects for rehabilitation.

276. I acknowledge Mr SH committed a serious crime and has served his sentence for it. However, it is my view that given the strong and compassionate circumstances, the significant length of closed detention, the protracted nature of the case and favourable sentencing remarks that Mr SH was unlikely to re-offend in this manner again, and the finding of the AAT that he is not a danger to the community, there was scope for Mr SH's case to fall within the guidelines for referral to the Minister to consider exercising his powers under s 195A and s 197AB of the Migration Act.
277. As noted above, Mr SH was released from immigration detention on 6 March 2019. However, I do not have information about the date on which Mr SH was referred to the Minister.
278. I find that the Department's delay in referring Mr SH to the Minister resulted in his prolonged and continuing detention being arbitrary, contrary to article 9 of the ICCPR.
- (iv) *Mr SI*
279. Mr SI, a citizen of the United Kingdom, arrived in Australia aged nine with his family on 6 February 1972. On 8 January 1992, Mr SI was granted a Transitional Permanent (Class BF) visa.
280. Mr SI has an extensive criminal history, commencing in 1980 when he was aged 17. His criminal record includes multiple driving offences, theft, weapons offences and offences involving violence, family violence and dishonesty.
281. In 2011, Mr SI was convicted of contravening a family violence safety notice; making a threat to kill and unlawful assault. He received an aggregate sentence of six months imprisonment.
282. In 2013, he was convicted of intentionally causing injury, false imprisonment and theft. He was sentenced to 20 months imprisonment. This is the longest sentence of imprisonment Mr SI has received to date.
283. On 2 June 2015, Mr SI's visa was mandatorily cancelled under s 501(3A) of the Migration Act and on 5 June 2015 he was detained at Maribyrnong IDC. He had been resident in Australia for 43 years at the time of his visa cancellation.
284. On 9 June 2015, Mr SI submitted an application for revocation of the s 501 cancellation decision.
285. On 18 January 2017, the then Assistant Minister made a decision not to revoke Mr SI's visa cancellation.
286. On 23 August 2017, Mr SI successfully appealed this decision in the Federal Court. The matter was remitted to the Minister to be re-considered according to law.

287. On 16 April 2018, the Assistant Minister for Home Affairs decided not to revoke the cancellation of Mr SI's visa under s 501CA(4) of the Migration Act.
288. On 17 May 2018, Mr SI commenced judicial review proceedings against the Assistant Minister's decision.
289. Mr SI was released from immigration detention into the community on 28 February 2019.
290. The Department's response to the Commission, dated 21 September 2016, stated that it had not considered alternative, less restrictive detention options for Mr SI:

No alternative, less restrictive forms of detention have been considered as Mr SI does not meet the requirements for submission to the Minister and there have been no vulnerabilities identified which warrant a submission to the Minister.

291. The Department also advised that it had not considered the specific risks Mr SI might pose if he was allowed to reside in the community:

Mr SI's case has not been considered for placement in the community and as such, no steps have been taken to identify any specific risks that Mr SI might pose if allowed to reside in the community.

292. Since the Department's response in 2016, there is no evidence before me to suggest that it has considered whether Mr SI could be placed in community detention or granted a visa pending the outcome of his judicial review proceedings.
293. In response to my preliminary view, on 6 March 2020, the Department advised:
- From the time Mr SI was detained on 5 June 2015, his case was reviewed 39 times. In each review, the Department took into account Mr SI's circumstances, including his health and welfare needs. The reviews determined his health and welfare needs were provided for in detention. No circumstances were identified indicating a visa grant or a less restrictive detention placement under residence determination arrangements were required or appropriate in Mr SI's circumstances. As such, he was not referred for assessment against the sections 195A or 197AB guidelines. The Department notes Mr SI was released from immigration detention on 28 February 2019.
294. Mr SI was detained for over three years and eight months in immigration detention facilities on the Australian mainland and Christmas Island. Given the significant length of time Mr SI had been in closed detention, it is unclear why the Department did not refer him for community detention.

295. The s 197AB guidelines permit cases to be referred to the Minister where there are 'unique or exceptional circumstances'. In my view, the following factors are relevant to an assessment as to whether Mr SI's case presents 'unique or exceptional circumstances':
- a. he was detained for a prolonged period of time
  - b. the protracted nature of his case in light of ongoing litigation
  - c. he was resident in Australia for 43 years before his permanent visa was cancelled
  - d. he has strong family ties in Australia including three biological children, a stepdaughter, his parents, six brothers, 12 half and step-siblings and over 30 nieces and nephews.
296. I acknowledge that he has an extensive criminal history and some of the offences committed were sufficiently serious to attract sentences of imprisonment. However, while Mr SI has a criminal record, this does not appear to be evidence of itself that he posed a danger to the community such that he could not be detained in a less restrictive way than held in detention. There are other relevant considerations including the circumstances surrounding the offending, his likelihood of re-offending, his behaviour in detention and any support he has in the community.
297. The Department was aware since at least 23 August 2017 (when the Federal Court remitted his case to the Minister) that his immigration status would take some time to resolve. As a result, there was a significant risk that his continued detention would be protracted and could become arbitrary.
298. It is my view that the Department's decision not to refer Mr SI's case to the Minister under s 195A and s 197AB, may have resulted in his prolonged detention being arbitrary, contrary to article 9 of the ICCPR.
- (v) *Mr SJ, Mr SK and Mr SL*
299. Mr SJ, Mr SK and Mr SL were all long-term residents in Australia at the time their permanent visas were cancelled under s 501 of the Migration Act. Following their release from prison, they were immediately detained in immigration detention facilities and remained detained until their eventual removal from Australia. In light of the similarities between the cases, I have combined my findings.
- Mr SJ*
300. Mr SJ is a 63-year-old citizen of the United Kingdom. He arrived in Australia on 25 January 1969, aged 12. He was granted permanent residence on arrival.

301. On 12 August 2005, Mr SJ was convicted of offences relating to the sexual abuse of a minor and sentenced to seven years imprisonment, with a non-parole period of four and a half years.
302. On 15 May 2015, he was convicted of possessing child abuse material and failing to comply with reporting obligations. He was sentenced to 15 months imprisonment with a non-parole period of four months.
303. On 31 August 2015, Mr SJ's visa was mandatorily cancelled under s 501(3A) of the Migration Act. He had been resident in Australia for 47 years at the time of his visa cancellation.
304. On 14 September 2015, Mr SJ was released from Long Bay Correctional Complex and detained under s 189(1) of the Migration Act at Villawood IDC.
305. On 16 May 2018, Mr SJ was removed from Australia to the United Kingdom.
306. Mr SJ was detained for two years and eight months.

*Mr SK*

307. Mr SK is a 48-year-old citizen of Bosnia and Herzegovina. He arrived in Australia on 27 December 1986. He was 16 years old and was the holder of a Migrant Child visa, sponsored by his father.
308. Mr SK has an extensive criminal history commencing in 1989, predominantly consisting of drug offences.
309. On 11 October 2000, Mr SK's child migrant visa was cancelled under s 501 of the Migration Act due to his criminal record.
310. On 14 March 2002, Mr SK was granted a Protection visa.
311. On 5 March 2010, he was convicted of drug trafficking offences and sentenced to two years and five months imprisonment.
312. On 28 January 2014, Mr SK was convicted of cultivating a controlled plant and sentenced to two years imprisonment.
313. On 26 August 2015, Mr SK's Protection visa was mandatorily cancelled under s 501(3A) of the Migration Act. He had been resident in Australia for 28 years at the time his visa was cancelled.
314. On 28 September 2015, he was released from criminal custody and detained under s 189(1) of the Migration Act at Adelaide Immigration Transit Accommodation.
315. On 12 March 2018, Mr SK was removed from Australia to Bosnia and Herzegovina.

316. Mr SK was detained in Australia for two years and five months.

*Mr SL*

317. Mr SL arrived in Australia on 25 June 1969, aged 11 with his family. He was granted a Transition (Permanent) (class BF-C) visa on arrival.

318. On 25 October 2011, Mr SL was convicted of three counts of indecent assault of a child and sentenced to six years imprisonment.

319. Mr SL has a history of sexually based offences against minors. On 15 April 2014, Mr SL's permanent visa was cancelled under s 501 of the Migration Act. On the same day he was released from criminal custody and detained under s 189(1) of the Migration Act at Perth IDC.

320. At the time his visa was cancelled, he had resided in Australia for 45 years.

321. On 25 February 2016, Mr SL was removed from Australia.

322. Mr SL was detained for one year and ten months.

*Findings*

323. The Department did not consider less restrictive forms of detention for Mr SJ and Mr SK.

324. In relation to Mr SJ, in the Department's response dated 29 March 2016, it stated:

Case management service and stakeholders have not identified any vulnerability that would warrant a referral for alternative placement options, including for Ministerial Intervention for residence determination (community detention) under s 197AB of the Act or under s 195A of the Act for a Bridging Visa E (BE).

Mr SJ's current situation does not meet ministerial guidelines for less restrictive detention options to be referred to the Minister for his further consideration.

325. The Department further stated that '[g]iven Mr SJ's immigration history and his criminal convictions, at this time he is considered to pose an unacceptable risk to the Australian community'. However, there is no evidence that the Department considered whether the risk Mr SJ posed to the community could have been mitigated, for example by the imposition of conditions.

326. There is no material before the Commission that between the date of the Department's response on 29 March 2016 and when Mr SJ was removed on 16 May 2018, that less restrictive detention options were considered.



327. In relation to Mr SK, the Department's response dated 13 October 2016 stated:

No alternative, less restrictive forms of detention have been considered as Mr SK does not meet the requirements for submission to the Minister and there have been no vulnerabilities identified which warrant a submission to the Minister.

Mr SK's case has not been considered for placement in the community and as such, no steps have been taken to identify any specific risks that Mr SK might pose if allowed to reside in the community.

328. There is no material before the Commission that between the date of the Department's response on 13 October 2016 and when Mr SK was removed on 12 March 2018, less restrictive detention options were considered.

329. In relation to Mr SL, the Department advised that he was not referred for community detention, as he did not meet the guidelines under s 197AB. On 9 February 2016, 16 days before Mr SL was removed from Australia, the Department assessed his circumstances as not meeting the guidelines for referral under s 195A.

330. This assessment occurred 21 months after Mr SL was detained. At this point, Mr SL had no pending matters with the Department or Courts and was on a removal pathway. The Department officer considered there to be no unique and exceptional circumstances present and that removal was reasonably practicable.

331. I acknowledge the severity of Mr SJ and Mr SL's criminal offences and Mr SK's repeated offending for a prolonged period. However, each complainant had served criminal sentences for their crimes under Australian criminal laws. The issue before me is whether their administrative detention in an immigration detention facility was arbitrary.

332. While the complainants have criminal records, the Department needed to consider their individual circumstances to assess whether they could be detained in a less restrictive way than in a closed immigration detention facility.

333. In relation to Mr SJ, Mr SK and Mr SL, the Department stated that no circumstances were identified indicating a less restrictive detention placement under residence determination arrangements was required.

334. Detention may become arbitrary in cases where closed detention is disproportionate or not justified in a person's particular circumstances, such as where a person does not pose a risk to the community, or an identified risk could be managed in a less restrictive way.

335. In relation to these complainants, given the severity of some of the crimes committed, the Department likely considered that they posed a risk to the Australian community. However, there is no evidence that the Department considered the complainants' individual circumstances surrounding their offending, their risk of re-offending, their behaviour while in detention, or their support in the community, to assess whether any risk to the Australian community could be mitigated.
336. It is my view that the failure by the Department to assess, on an individual basis, whether Mr SJ, Mr SK and Mr SL's circumstances indicated whether any risk to the community could be managed in a less restrictive way may have resulted in their prolonged detention being arbitrary, contrary to article 9 of the ICCPR.
- (a) The failure of the Minister to consider exercising his discretionary powers under s 195A and s 197AB of the Migration Act**
- (i) Mr SF*
337. Mr SF is a 38-year-old male citizen of Samoa. His family moved from Samoa to New Zealand when he was aged two.
338. His parents separated after moving to New Zealand. On 17 April 1987, he arrived in Australia, aged four, with his father.
339. Within several months of arriving in Australia, his father abandoned him and returned to New Zealand. Mr SF was left to be raised by an uncle and aunt until he was 13 when he started to live on the streets.
340. He did not attend primary or secondary school and states that he is barely literate.
341. Mr SF has had no contact with his mother since leaving New Zealand.
342. He initially arrived in Australia on a one month visitor visa, which expired on 17 May 1987. He remained unlawfully in the community until 20 December 2007, when he was located by the Department, while serving a criminal sentence.
343. Mr SF has an extensive criminal history spanning a period of 14 years. He started offending aged 16 years—when he was convicted of larceny after stealing a school bag from a bench while homeless. Since then he continued to regularly offend and has been in criminal custody for various periods between 13 September 2002 and 17 April 2012.

344. The AAT described his offences as:
- ranging from repeatedly driving while disqualified, to crimes of violence including robbery, assault with a weapon, and assaulting police officers. He has been found guilty of two assaults on police, escaping from custody, and three counts of resisting arrest. He has been sentenced to two terms of 12 months' imprisonment, and on six occasions to lesser terms. Between 1997 and 2011, he committed more than 30 offences with, on average, one or two years between offences.<sup>63</sup>
345. Between 20 December 2007 and 7 February 2012, he was granted five Bridging visa E's, while in prison, to regularise his status.
346. On 17 April 2012, Mr SF was released from Long Bay Correctional Complex. On the same day, he was detained under s 189 of the Migration Act due to his status as an unlawful non-citizen.
347. On 15 July 2013, he applied for a Bridging visa E. On 11 September 2013, his application was refused under s 501 of the Migration Act.
348. On 17 September 2013, Mr SF appealed the refusal decision at the AAT.
349. On 19 November 2013, the AAT affirmed the Department's decision to refuse a Bridging visa under s 501 of the Migration Act.
350. Mr SF also unsuccessfully applied for a Partner visa and a Protection visa.
351. On 6 April 2018, Mr SF signed a request for removal from Australia under s 198(1) of the Migration Act.
352. On 1 May 2018, Mr SF was removed from Australia to Samoa.
353. The Commonwealth detained Mr SF in immigration detention facilities for six years from his release from prison on 12 April 2012 until his removal from Australia on 1 May 2018.
354. On 18 December 2015, the Department forwarded a submission to the Minister asking if he wished to consider exercising his power under s 417 or s 195A of the Migration Act.
355. The Department's submission referred to the decision of the AAT affirming the refusal of Mr SF's application for a Bridging visa E.
356. I acknowledge the findings of the AAT that Mr SF posed an unacceptable risk of future harm to the Australian community if granted a Bridging visa E:
- There is no expert assessment before us of the probability of future offending by the Applicant, but the regular repetition of offences, the lack of alternative law-abiding structure life and the apparent inability to be deterred by penalties must point to a high likelihood that the Australian public would be at risk of further harm of the same kind if he were free in the community.<sup>64</sup>

357. The AAT accepted that it was in the best interest of his infant daughter that he remained in Australia. However, it was not satisfied that her best interests outweighed the real risk that he would commit further serious offences and serious harm to the Australian community.<sup>65</sup>
358. The Department's submission noted that his International Treaties Obligation Assessment was affected by a Federal Court decision. At the time, the Commonwealth had filed a special leave application in the High Court appealing that decision which was outstanding.
359. The Department submitted to the Minister that he might be inclined to consider the grant of a Removal Pending Bridging Visa under s 195A, given that Mr SF has an Australian citizen wife and child.
360. On 6 January 2016, Minister Dutton declined to consider intervening under s 417 or s 195A. As previously noted, the Minister is not required to provide reasons for his decision.
361. Notwithstanding, the findings of risk by the AAT, given the significant period Mr SF was detained (three years and eight months) and the protracted nature of his case, the Minister could have requested the Department to conduct an assessment of whether any risk he might pose to the community could be satisfactorily mitigated by the imposition of certain conditions.
362. In relation to the types of conditions that could be imposed where a risk to the community has been identified, I refer to the Commission's Report of an inquiry into complaints by Sri Lankan refugees in immigration detention with adverse security assessments.<sup>66</sup> In this report, former President Catherine Branson QC considered the possibility of less restrictive detention options for refugees who had received adverse security assessments by the Australian Security Intelligence Organisation (ASIO):
- It may well be that there are alternative options to prolonged detention in secure facilities which can be appropriately provided to the complainants despite their having received adverse security assessments. These alternative options may include less restrictive places of detention than immigration detention centres as well as community detention, if necessary with conditions to mitigate any identified risks. Conditions could include a requirement to reside at a specified location, curfews, travel restrictions, regular reporting and possibly even electronic monitoring.
363. As noted above, at the time the Department referred Mr SF's case to the Minister he had been detained for a significant period of time—three years and eight months. His case was also protracted because his International Treaties Obligation Assessment was affected by a Federal Court decision, which the Commonwealth was appealing.

364. In light of the above, I find that the failure of the Minister to consider exercising his discretionary powers in Mr SF's case may have resulted in his prolonged detention. I note that I do not express any view as to what the outcome of any such consideration would be.
365. If the Minister considered the matter and had concerns about Mr SF posing a risk to the community, he could have asked the Department to conduct a risk assessment to consider whether any risks could be mitigated.
366. It is my view, that Mr SF's detention in closed detention facilities was arbitrary for the purposes of article 9(1) of the ICCPR without such a risk assessment.

## 5.7 Detention in State prison

367. Mr RB was detained at Casuarina Prison in Western Australia from 20 March 2015 to 3 June 2015. He was transferred to the prison following a disturbance at Yongah Hill IDC during the period 19–20 March 2015.
368. Mr RB alleges that his detention in prison was arbitrary, in breach of article 9(1) of the ICCPR. He alleges that during his transfer he was shackled from the waist and ankles, handcuffed and strip-searched. He alleges that while in prison he was beaten and verbally assaulted in breach of articles 7 and 10 of the ICCPR.

### *Transfer of Mr RB to Casuarina Prison*

369. The Department states that Mr RB was transferred to Casuarina Prison because he posed a risk to the good order, security and running of Yongah Hill IDC during a major disturbance. The Department says that Mr RB was implicated in the disturbance on 20 March 2015 as threatening to incite riotous behaviour. However, no charges were laid against Mr RB.
370. Mr RB states that on 20 March 2015, at about 11:10pm, he went for his nightly walk around the oval. He claims that a Serco officer told him to go back to the compound as they lock the gate at midnight. Mr RB alleges that he made his way back to the compound when a Serco officer pushed him hard into the steel gate and swore at him aggressively. He says other detainees heard the abusive language and started to become agitated. He claims a Serco officer hit him on the head, in front of about 100 detainees, and he was unconscious for 20 minutes.
371. The Department provided Incident Detail Reports and CCTV footage that record the events occurring during the disturbance. The incident reports describe the events as follows:
- On 20 March 2015, at about 12:07am, Mr RB was observed walking laps in the Greenheart compound at Yongah Hill IDC.

- Two Serco officers were attempting to clear the compounds for the evening lock down.
- Serco officers advised Mr RB to return to the compound as the centre was to be locked down.
- Mr RB refused to comply and began shouting and swearing loudly.
- One of the Serco officers attempted to speak with Mr RB requesting him to calm down and return to his compound.
- Mr RB continued to shout and swear and then an officer physically turned him around towards the breezeway turnstile.
- Mr RB then continued to shout and swear shouting 'Fuck you I told you I'm going to cause a riot here tonight'.
- Other detainees were becoming incited by this behaviour lining the compound fence shouting and swearing at officers.
- Mr RB ran past one of the officers towards the closed breezeway gates.
- Fearing that he would cause harm to himself, one of the officers ran after him, taking hold of the back of his jumper and pulled him backwards immediately placing both his arms around him and began to walk him towards the Eagle Compound.
- At the Eagle Compound Mr RB dropped to the floor complaining that he was not well.
- An ambulance arrived but he refused treatment and returned to his room.
- Once Mr RB was in his room, other detainees gathered around Eagle Compound and engaged in aggressive and abusive behaviour which led to a 'major disturbance'.
- Multiple detainees caused a high level of violence, including serious damage to the officer's station and multiple broken windows.
- Some detainees removed their shirts and armed themselves with razor blades, all detainees self-harmed by causing multiple lacerations to their upper middle and lower, chest and abdominal area.
- Three trained negotiators were onsite and attended the location.
- Detainees raised multiple issues including freedom, proper medical assistance and some detainees felt that Serco mistreated Mr RB.

372. I have viewed the CCTV footage provided which captures Mr RB being escorted to Eagle compound until the point at which he collapses. I note there is no audio in the video recordings. The events in the footage are broadly consistent with the Incident Detail Reports.

373. Mr RB appears highly agitated, waving his arms around, and arguing aggressively, when being escorted by two Serco officers. The footage does not show Serco officers either pushing or hitting Mr RB on the head as alleged.
374. As described in the incident reports, Mr RB ran fast towards the closed breezeway gate, an officer did grab him from behind, and pulled him away from the gate. I note that the force used by the Serco officer to ensure Mr RB did not hit the gate appears to have been reasonable. When nearing the Eagle Compound gate Mr RB did collapse to the ground. From the footage, it appears that he collapsed on the ground. A Serco officer did not appear to hit Mr RB on the head as he alleges.
375. The Department states that Mr RB was transferred to Casuarina Prison by WA Corrective Services staff and they were accordingly responsible for the type of restraints used. The Department denies Serco conducted a strip search.
376. The Department has no evidence of allegations made by Mr RB that he was beaten by staff and verbally and mentally assaulted. Case managers visited Mr RB on 25 March 2015 and 30 April 2015 and Mr RB did not raise concerns about his treatment.

#### *Consideration of claims*

377. Under the Migration Act an unlawful non-citizen may be held in a designated 'alternative place of detention' (APOD). At the time of transfer, Casuarina Prison was designated an APOD. The Migration Act also explicitly provides that unlawful non-citizens may be held in State prisons.
378. A decision to transfer a detainee from an immigration detention facility to a State prison and the decision to maintain a person's detention in the State prison are policy decisions, which involve the exercise of discretion by the Department and its officers. Such decisions are therefore 'acts' done by the Commonwealth as defined in s 3 of the AHRC Act.
379. The Migration Act is silent on the circumstances under which a detainee can be held in a prison rather than an immigration detention facility. Guidance can be found in Departmental policy guidelines. The Detention Services Manual (DSM) operational at the time of transfer outlines the conditions under which a transfer from an immigration detention centre to a correctional facility may occur.

380. Paragraph 7.6 of the DSM provided that a temporary transfer from an immigration detention facility to a correctional facility may occur where the detainee poses a significant threat to the good order and security of the facility and should only occur as a 'last resort':

Transfers to correctional facilities may be triggered as a result of a detainee being taken into custody by police or after they have been sentenced to a term of imprisonment by a court. In addition, a temporary transfer to a correctional facility may occur in circumstances where the detainee's presence is considered to pose a significant risk to the good order and security of the facility. The reasons for transfer should be clearly noted in the client's records. In this latter case, the transfer should only occur:

- for purposes of maintaining the safety and good order of the detention facility
- as a last resort and
- for the shortest, time practicable.

381. The Commission has previously considered the detention of immigration detainees in State prisons. In HREOC Report No 21, former President, Professor Alice Erh-Soon Tay found that, in the circumstances of that complaint, the detention of the detainees in State prisons amounted to arbitrary detention contrary to article 9(1) of the ICCPR.<sup>67</sup>
382. President Tay concluded that article 9(1) of the ICCPR applied to the transfer and detention of immigration detainees in State prisons:

I am of the view that these transfers, and the continued detention of the detainees in State prisons, subjected the detainees to a further 'detention' within the meaning of article 9(1) of the ICCPR. As discussed in my Preliminary Report, the transfer of the detainees to State prisons involved a further and serious deprivation of their liberty. Prisons are correctional facilities with an environment that is very different from that in an IDC [immigration detention centre]. Detention in a State prison entails a substantial reduction in personal privacy, freedom of movement and other rights and privileges.

383. Based on the incident reports and CCTV footage provided, I accept that Mr RB was involved in a disturbance on 20 March 2015. I accept that his aggressive behaviour and verbal threats were serious in nature. However, it is questionable whether his behaviour during the disturbance threatened the safety and good order of the facility once all the detainees returned to their rooms. The Incident Report of the Operations Manager on duty noted that:

after further negotiations with detainees, a sense of calm was felt and all detainees returned back to their place of accommodation and into their rooms.

384. Furthermore, I note that Mr RB was not charged with any criminal offences following the disturbance. This would suggest that the conduct was not sufficiently serious to warrant a report to the police and the laying of criminal charges against him.



385. Even if Mr RB continued to pose a risk following the disturbance, there is no evidence to suggest that consideration was given to other behaviour management strategies, or transferring Mr RB to a different area within Yongah Hill IDC or transferring him to another immigration detention facility. Accordingly, on the material before me, it does not appear that the decision to transfer Mr RB was made 'as a last resort' in accordance with Departmental policy.
386. Department officers conducted case reviews twice while Mr RB was in prison. On 25 March 2015, a Department officer reviewed Mr RB's case and found his detention placement to be appropriate. He noted that, 'until deemed appropriate by the WA police he will remain in prison whereby his health and welfare will be managed by the prison'. However, it is the Department, not the Western Australia police, who had the authority to make the decision to transfer Mr RB back to an immigration detention facility. Accordingly, on this occasion it appears the Department failed to adequately review Mr RB's detention.
387. On 30 April 2015, a second case review was conducted. This time the Department officer recommended that Mr RB be transferred from prison as soon as practicable and placed in an immigration detention centre where he would be able to keep in contact with his family who lived in Perth. The Department officer noted:
- When interviewed [sic] by [Case Manager] CM Mr RB was very emotional. He stated he was very concerned for his two Australian citizen children. Mr RB said it was much harder to keep in regular contact with his family while he is in Casuarina Prison. He said that it was affecting his mental and physical health.
388. The Department officer also noted that, during the interview, Mr RB was agitated and his demeanour reflected his stated anxiety levels. It is concerning that, despite this recommendation on 30 April 2015, Mr RB was kept in prison for another month. He was transferred to Perth IDC on 3 June 2015.
389. For the above reasons, I am of the view that the transfer of Mr RB to a State prison was not reasonable or necessary in all of the circumstances. It has not been demonstrated that Mr RB's behaviour could not have been managed in a way that was less restrictive of his rights. I consider the continued detention of Mr RB for 75 days in prison was not proportionate to any risk he may have posed following the disturbance on 20 March 2015. Accordingly, I find that the transfer and detention of Mr RB in Casuarina prison may have been arbitrary in breach of article 9(1) of the ICCPR.
390. In relation to Mr RB's claims that he was shackled from the waist and ankles, handcuffed, strip-searched, beaten, and verbally assaulted in prison, there is insufficient material for me to find that there was a breach of articles 7 or 10 of the ICCPR.

## 6 Arbitrary interference with family

391. Each complainant who raises a complaint of arbitrary detention also alleges arbitrary interference with their family in breach of articles 17(1) and 23(1) of the ICCPR. The complaints can be separated into two categories:
- Family separation arising out of immigration detention
  - Family separation arising out of removal from Australia.

### 6.1 Articles 17(1) and 23(1)

392. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

393. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

394. Professor Manfred Nowak has noted that:

[T]he significance of Art. 23(1) lies in the protected existence of the institution “family”, whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.<sup>68</sup>

395. For the reasons set out in the Australian Human Rights Commission report, *Nguyen and Okoye v Commonwealth* [2007] AusHRC 39 at [80]–[88], the Commission is of the view that in cases alleging a State’s arbitrary interference with a person’s family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person’s family, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).

## 6.2 Family separation as a result of immigration detention

396. Mr RA, Mr RB, Mr SG, Mr SH, Mr SI, Mr SJ, Mr SK, Mr SL and Mr SM allege that their detention has arbitrarily interfered with their respective families.

### (a) 'Family'

397. The UN HR Committee has confirmed on a number of occasions that 'family' is to be interpreted broadly.<sup>69</sup> Where a nation's laws and practice recognise a group of persons as a family, they are entitled to the protections in articles 17 and 23.<sup>70</sup> However, more than a formal familial relationship is required to demonstrate a family for the purposes of article 17(1). Some degree of effective family life or family connection must also be shown to exist.<sup>71</sup> For example, in *Balaguer Santacana v Spain*,<sup>72</sup> after acknowledging that the term 'family' must be interpreted broadly, the UN HR Committee went on to say:

Some minimal requirements for the existence of a family are, however, necessary, such as life together, economic ties, a regular and intense relationships, etc.<sup>73</sup>

398. I am of the view that the relationship between the complainants and their respective families falls within the class of relationship protected by that term for the purposes of articles 17(1) and 23(1).

#### *Mr SM*

399. Mr SM has been in Australia since 25 September 1967. He was released from detention on 10 November 2016, meaning that at the time of his release he had been in Australia for almost 50 years.

400. Mr SM's parents and children appear to reside in Australia. In relation to Mr SM's ongoing contact with his parents and children, Serco documents note: 'His parents and children live in Queensland. He maintains regular contact, often receiving phone calls'.

401. The complaint to the Commission was made on Mr SM's behalf by his sister, Ms [REDACTED], and she continues to act on his behalf for the purposes of the complaint. Ms [REDACTED] has engaged in extensive correspondence with the Department and the Commission in relation to Mr SM's complaint and treatment in detention in which she demonstrates ongoing serious concern for the welfare and wellbeing of her brother in detention. She appears to maintain a strong bond and relationship with her brother. While her concern stemmed from his detention, I consider that this is indicative of their relationship in general. In this regard, I also note that Serco documents note: 'His [sic] sister is very supportive and often sends him parcels'.

402. I am satisfied on the basis of the above that Mr SM maintains a close relationship with members of his immediate family, including his sister. Therefore, I am satisfied that his sister has a close connection with Mr SM and their relationship is sufficient to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

*Mr SH*

403. Mr SH met his spouse, ██████, in Lebanon. They married on 1 May 2011 in Australia following the grant to Mr SH of a Prospective Marriage (Temporary) (Class TO) visa on 17 February 2011. Mr SH has a minor child, ██████ (born 17 December 2012), with his spouse, both of whom reside in Australia and are Australian citizens.
404. On 12 April 2014, Mr SH was sentenced to 4 years and 3 months imprisonment and served a non-parole period of 2 years in prison. On 6 February 2015, his Partner visa was cancelled and in March 2015 he was transferred to immigration detention.
405. Prior to his imprisonment and subsequent immigration detention, Mr SH resided with his spouse in Australia and with their young daughter following her birth. There is nothing to suggest that this close connection has been affected other than as a result of his separation stemming from his imprisonment and detention. In fact, Mr SH has reported a deterioration in his mental health due to this separation indicating to me the closeness of the family unit.
406. Further, Mr SH was, at various times, detained in a different state from his wife and child. After initially being detained at Maribyrnong IDC, he was transferred to Christmas Island on 28 May 2015, and later transferred to Yongah Hill IDC on 28 October 2015. During this period, Departmental records indicate that he made multiple requests to be transferred back to Maribyrnong IDC so that he could be closer to his spouse and child. This is indicative of a close and continuing relationship between Mr SH, his spouse and daughter.
407. I am satisfied on the basis of the above, that Mr SH maintains a close relationship with his spouse and young daughter. Therefore, I am satisfied that ██████ and their daughter have a close connection with Mr SH and their relationship is sufficient to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

*Mr SI*

408. Mr SI and his family migrated to Australia on 6 February 1972, when he was nine years of age. Mr SI has four adult Australian citizen children who were born to his former spouse, as well as seven grandchildren. Mr SI and his former spouse divorced in 2011.

409. While in detention, Mr SI twice requested a Special Purpose Visit so that he could see one of his daughters in hospital, on 17 August 2015 and on or about 21 August 2015, when she was due to undergo surgery. Both requests were refused on the basis of the risk Mr SI presented to the community, rather than in relation to any objection by his daughter. There is nothing before me to indicate that these two requests were not genuine, and I consider the two requests to visit his daughter are indicative of a close connection between himself and at least one of his children.
410. Additionally, Serco reported that: '[o]ne of [Mr SI's] granddaughters misses him terribly and one of his grandsons is playing up as he thinks if he is naughty he will get sent to Christmas Island'. Again, this information is indicative of a close relationship that Mr SI maintains with one or more of his grandchildren.
411. For completeness, I note that Mr SI has four brothers and six step-siblings. His mother is deceased, and his father is 'not a person with whom [Mr SI has] anything other than occasional contact'.
412. In light of all of the above, I am satisfied that Mr SI maintains a close relationship with at least one of his children as well as one or more of his grandchildren. Therefore, I am satisfied that Mr SI's daughter and one or more of his grandchildren all have a close connection with Mr SI and these respective relationships are sufficient in and of themselves to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

*Mr SJ*

413. Mr SJ was the primary carer of both of his parents. In the transcript of the sentencing remarks of Judge Freeman of the District Court of New South Wales on 12 August 2005 for the offences that resulted in the cancellation of his visa, the judge observed:
- ... stress has been laid upon the extent to which his aged parents are dependent upon him. His father gave evidence that he is now seventy-eight, suffering from macular degeneration, blind in one eye and with a poor prognosis in respect of the other. He also said that his wife, the mother of the prisoner, is, because of a series of medical problems involving her hips and knees, virtually disabled, unable to drive.
414. Judge Freeman also noted:
- ... attempts have been made by [Mr SJ], therefore, to establish himself in Coff's Harbour for the purpose of bringing his parents down from the reasonably remote township of Walcha... to put them in a situation where they can at least get about on foot.

415. Mr SJ maintains that he is responsible for the full-time care of both of his parents and that he has not been able to fulfil these responsibilities while in detention. He has expressed serious concerns with the Commission about the deterioration in the health of his parents and his inability to care for them while he is in detention.
416. In my view, Mr SJ has a close, continuing connection with his parents, namely in the provision of care prior to his incarceration and detention. Mr SJ's concern and commitment to his parents' care, including in correspondence with the Commission and that noted in the remarks of Judge Freeman above, demonstrates a close and continuing relationship between himself and his parents. Therefore, I am satisfied that Mr SJ has a close connection with his parents and their relationship is sufficient to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

*Mr SK*

417. On 27 December 1986, Mr SK arrived in Australia aged 16 years. In his complaint to the Commission, Mr SK indicated that prior to his detention, he was residing in Adelaide with his family, 'including [his] de facto partner, [REDACTED], and [their] three boys who are 17, 15 and 10 years old.' Even with the lapse of time, at least two of his children are still of dependent age.
418. Further, according to Serco, Mr SK's 'partner, children, family and friends [are] all living in Adelaide. He is in regular contact with them via telephone and social media'. Serco records also note that '[Mr SK] has a lot of family support and receives regular letters, postcards & parcels to keep him going'.
419. Departmental case reviews confirm that in detention, '[h]e is in regular contact with family and friends in Adelaide.' Additionally, according to Departmental case reviews, his de facto partner also served as his 'authorised contact' while he was in immigration detention.
420. I am satisfied on the basis of the above, that Mr SK maintains a close relationship with members of his immediate family, including his de facto partner and their three sons. Therefore, I am satisfied that Mr SK's de facto partner and their children have a close connection with Mr SK and their relationship is sufficient to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

*Mr SG*

421. Mr SG arrived in Australia on 18 November 2004. His spouse, Ms [REDACTED], holds a Bridging E (Class WE) visa. They have two young sons, [REDACTED] (born 16 May 2009) and [REDACTED] (born 21 December 2011), both of whom were born in Australia and all of whom live in the community in Victoria. Prior to his detention, he resided with his spouse and two sons.
422. Further, Mr SG was initially detained at Maribynong IDC on 20 August 2014. However, on 7 August 2015, he was transferred to Wickham Point APOD in Darwin and on 7 July 2016, transferred to Yongah Hill IDC in Western Australia. Several months later, on 20 October 2016, he was transferred to Christmas Island before being transferred back to Yongah Hill IDC on 9 August 2017. It was not until July 2018 that Mr SG was transferred to MITA. Mr SG has, while in immigration detention, made numerous requests to be transferred to a Melbourne facility so that he could be placed closer to his wife and two sons. I consider these requests are indicative of a close and personal relationship with his wife and two sons, reflective of his desire to be geographically close to them.
423. Mr SG's spouse, Ms [REDACTED], is also acting on Mr SG's behalf for the purpose of this complaint. Her communications with the Department and the Commission demonstrate that she has been in routine contact with Mr SG while he has been in immigration detention. She has also visited Mr SG during his detention, including with their two children.
424. Mr SG and Ms [REDACTED] have also previously filed several applications for Australian visas as a family unit.
425. I am satisfied on the basis of all of the above that Mr SG maintains a close relationship with members of his immediate family, including his spouse and their two children. Therefore, I am satisfied that Ms Papadhami and their sons have a close connection with Mr SG and their relationship is sufficient to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

*Mr RA*

426. Mr RA is married to an Australian citizen, [REDACTED]. Mrs [REDACTED] said, in a statutory declaration signed 7 March 2014, that since Mr RA's detention she was the 'primary carer' for the son of Mr RA, [REDACTED]. [REDACTED] was born on 23 June 2012 to Mr RA's former *de facto* partner. On 26 August 2013, an Interim Accommodation Order was made, releasing Mr RA's son into the care of Mrs [REDACTED].
427. Mr RA has a biological daughter, from whom he became estranged.

428. Mr RA also has a stepson, [REDACTED], who is now over 18 years of age. He is the biological son of Mrs [REDACTED]. [REDACTED] has cerebral palsy, attention deficit hyperactivity disorder and asthma, and there is no indication that he does not still cohabit with Mrs [REDACTED] and [REDACTED]. In her statutory declaration, Mrs [REDACTED] claims that she, [REDACTED] and Mr RA's son reside together as a family. She attested that at that time, being March 2014, she visited Mr RA, with their son, at the Maribyrnong IDC 'at least six days per week' since his detention.
429. Mrs [REDACTED] also attested that she was affected by medical issues and had hoped that Mr RA would be released from immigration detention to assist with caring for her, [REDACTED] and Mr RA's son.
430. In August 2015, Mr RA was transferred from Maribyrnong IDC to Christmas Island. Medical notes accompanying Mr RA's arrival at Christmas Island from Maribyrnong IDC in August 2015 reveal that he was 'understandably upset and angry' about 'the separation from his family'. The notes also indicate that he was in contact with his spouse, Mrs [REDACTED], upon his arrival.
431. Further, notes from a registered nurse consultation with Mr RA on 1 September 2015 at Christmas Island cite as 'his main stressor' the 'separation from his [then] 3 year old son', [REDACTED]. He reported that his son and Mrs [REDACTED] 'had been visiting almost daily' when he was in Maribyrnong IDC.
432. I consider that Mr RA's reporting to health professionals at Christmas Island upon his transfer and in medical consultations since, as well as attestations in Mrs [REDACTED]'s statutory declaration, are strongly indicative of a close and personal relationship with his wife and biological son. Mrs [REDACTED] also attests to an ongoing dependency that Mr RA's stepson, [REDACTED], has on his step-father.
433. I am satisfied on the basis of all of the above, that Mr RA maintains a close and personal relationship with the members of his immediate family, particularly his spouse, Mrs [REDACTED], and his biological son, [REDACTED]. I am also satisfied that together with Mr and Mrs [REDACTED] and [REDACTED], [REDACTED] is also a member of this family unit, particularly given his cohabitation at least during his childhood with Mrs [REDACTED] and his attested relationship with Mr RA. Therefore, I am satisfied that Mrs [REDACTED] and her son and step-son, Mr RA's son, have a close connection with Mr RA and their relationship is sufficient to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

*Mr RB*

434. On 4 June 2000, Mr RB first arrived in Australia. Mr RB is married, though Departmental records and the sentencing remarks of both Sleight DCJ of the District Court of Western Australia on 22 January 2008 and Magistrate Randazzo of the Perth Magistrates Court on 4 February 2011 indicate that they are now separated. There is nothing on the records that suggest they have reconciled, nor that they have divorced.



435. Mr RB has two children, ██████████ (born 25 May 2005) and ██████████ (born 6 March 2001), who are both Australian citizens. The youngest child is reported by the Department's case reviews as 'severely autistic'. Mr RB's partner, from whom he has separated, cares for both children.
436. Department case reviews indicate that Mr RB 'was very concerned for the welfare of his two children' and complained that the periodic lack of access to telephones and computers in various IDCs has meant he has not had consistent contact with his family that he enjoyed at Yongah Hill IDC.
437. Mr RB was subsequently transferred from Yongah Hill IDC to Casuarina Prison. Mr RB told immigration authorities that he was 'very concerned for his two children' and that 'it was much harder to keep in regular contact with his family while he [was] in Casuarina Prison [which was] affecting his mental & physical health'. The advice of the case reviewer was that Mr RB should be removed from this facility to 'an IDC where he is better able to keep in contact with his family who are located in Perth'.
438. Mr RB was subsequently moved to Perth IDC. Following this move, Mr RB told his case manager that he was 'very pleased', as his family could visit him at Perth IDC. Department records indicate that his wife, with whom he has separated, and two children have visited him 'on a few occasions' at Perth IDC.
439. In the sentencing remarks of Magistrate Randazzo of the Perth Magistrates Court, cited by the AAT in its decision of 20 June 2012 on review of the Minister's decision to cancel Mr RB's visa under section 501(2) of the Migration Act, Magistrate Randazzo observed:
- You were married but you were separated from the boys' mother... You have a good relationship with the boys
- ...
- [y]our estranged wife advises me that you are a loving and caring father to your sons. I accept that you have a bond with them and that you have been involved and assisted your children, particularly your son ... who has what ... was described as an autistic-type condition'.
440. What is apparent from these observations is that Mr RB had a very close familial relationship with his two sons, who are cared for by his wife from whom he has separated while he was imprisoned and in immigration detention.
441. Departmental records also indicate that this close relationship between Mr RB and his children, who both remain under 18 years of age, has continued. Mr RB has consistently sought to be placed close to them while in immigration detention. He has indicated satisfaction when he was moved closer to them at Perth IDC.

442. I am satisfied on the basis of all of the above, that Mr RB maintains a close relationship with his two children. Therefore, I am satisfied that Mr RB's two sons have a close connection with their father and their relationship is sufficient to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

*Mr SL*

443. On 25 June 1969, Mr SL arrived in Australia.

444. Departmental case reviews indicate that Mr SL has two sisters and one brother in Australia, and 'family links in Perth'. One of his sisters is based in Perth, the other in Northam, WA. The same records consistently indicate that they are 'in regular contact' with Mr SL.

445. Departmental case reviews also indicate that Mr SL is divorced, and has two daughters and three sons, all in Australia. However, it notes that they are all adults and Mr SL 'does not keep in contact with them'.

446. On 13 November 2015, Mr SL complained to the Commission by telephone that he was unable to contact his family while in immigration detention because he did not have access to their numbers following the confiscation of his telephone.

447. He had also, on a number of occasions, expressed a wish to be taken to Perth IDC so that he can be in closer contact with his family. He indicated to the Commission that he was dissatisfied with his inability to contact his family while he was held in Christmas Island due to the confiscation of his telephone and no other means to contact his family members.

448. The Department's response of 6 January 2016 to the Commission's further inquiries in relation to Mr SL's complaint notes that, while in immigration detention at Perth IDC, Mr SL received three visits from a member or members of his family over an eight-week period.

449. Although Mr SL had, at various times, maintained a desire to be voluntarily removed from Australia, and that, according to Department records, he no longer maintains contact with his children, he is nonetheless in regular contact with at least two of his siblings. This may not necessarily be regular contact in person, that is, through visits by his family members to the Perth IDC, however I am satisfied that he maintained regular contact with one or more family members in Perth.

450. I am satisfied on the basis of all of the above that Mr SL maintains a close relationship with at least two members of his immediate family, being his two sisters. Therefore, I am satisfied that at least one or more of Mr SL's sisters has a close connection with Mr SL and their relationship is sufficient to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

**(b) 'Interference'**

451. There is no clear guidance in the jurisprudence of the UN HR Committee as to whether a particular threshold is required in establishing that an act or practice constitutes an 'interference' with a person's family. However, in relation to one communication, the UN HR Committee appeared to accept that a 'considerable inconvenience' could suffice.<sup>74</sup>
452. Interpreting the word 'interference' using its ordinary meaning, as explained in the Commission report [2008] AusHRC 39,<sup>75</sup> I am satisfied that interference with the family unit is demonstrated by the simple fact that the members of each family were physically separated by the placement of the complainants in closed immigration detention.
453. In many cases, the complainants were detained for lengthy periods in facilities that were in a different state from their families. I note with concern that the decision-making does not appear to take into account the location of close family members, particularly, in some cases where complainants have been detained in different states from where their young children reside. The following two cases are relevant examples.
454. Mr SH has an Australian citizen wife and five-year-old daughter who reside in Melbourne. He was initially detained at Maribyrnong IDC on 23 March 2015 until he was transferred to Christmas Island on 28 May 2015. On 28 October 2015, he was transferred to Yongah Hill IDC until 9 February 2017 when he was transferred back to Maribyrnong IDC.
455. Mr SH was detained in a different state from his wife and child for 22 months. During this period, he made multiple requests to be transferred to Maribyrnong IDC to be closer to his family.
456. Mr SG's wife and two young sons reside in Melbourne. Both their sons were born in Australia. The eldest son was granted a Protection visa and is therefore a permanent resident.
457. Mr SG was initially detained at Maribyrnong IDC on 20 August 2014. On 7 August 2015, he was transferred to Wickham Point APOD in Darwin. On 7 July 2016, Mr SG was transferred to Yongah Hill IDC. On 20 October 2016, he was transferred to North West Point Immigration Facility. On 9 August 2017, he was transferred to Yongah Hill IDC. In July 2018, he was transferred to MITA. Mr SG was separated from his family for 34 months despite numerous requests to be transferred to a Melbourne facility. Mr SG received a suspended sentence and did not serve any time in prison.
458. It is unclear how detention placement decisions are being made and the extent to which an individual's family links in the community are considered.

459. The Commission's request for guidelines or written policy setting out the decision-making process and criteria for the placement of individuals within the immigration detention network was refused. The Department's response is as follows:

Detention policy and instructions in relation to the placement of detainees within the immigration detention network were comprehensively reviewed in 2016 and on 29 September 2016, the Department implemented the Detention Standard Operating Procedure (SOP) '*Assessment and Placement of Detainees in Immigration Detention Facilities in Australia*'. This SOP is operationally sensitive and not publicly available. As such, the Department declines the AHRC's request to provide this document.

**(c) 'Arbitrary'**

460. In its General Comment on article 17, the UN HR Committee confirmed that a lawful interference with a person's family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the Covenant and is reasonable in the particular circumstances.<sup>76</sup>
461. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness. In relation to the meaning of reasonableness, the UN HR Committee stated in *Toonen v Australia*:<sup>77</sup>
- The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.
462. Whilst the *Toonen* case concerned a breach of article 17(1) in relation to the right of privacy, these comments would apply equally to an arbitrary interference with the family.
463. In the complainants' cases, the interference with the family and family life was the direct consequence of their detention. For the reasons given above, it is my view that their detention may be considered arbitrary for the purposes of article 9(1) of the ICCPR. It follows that I am of the view that the significant interference with family and family life has also not been shown to be necessary, and may consequently be considered arbitrary for the purposes of article 17(1).
464. For these reasons, it is my view that the detention of the complainants interfered with the family and family life of those complainants contrary to articles 17(1) and 23(1) of the ICCPR.

### 6.3 Family separation as a result of refusal of visa

465. Mr SF alleges that the Minister's failure to exercise his discretionary powers to grant him a visa constitutes a breach of articles 17(1) and 23 of the ICCPR. Mr SF was removed to Samoa on 1 May 2018.

#### (a) Article 17(1)

##### (i) Family

466. On 14 February 2013, while in Villawood IDC, Mr SF married Ms [REDACTED] who is an Australian citizen. They have a daughter, born in October 2013.

467. To make out a breach of articles 17(1) and 23(1) of the ICCPR, the complainants must be able to be identified as 'families'. The UN HR Committee has confirmed that the term 'family' is to be interpreted broadly,<sup>78</sup> but an effective family life or family connection must be shown to exist.<sup>79</sup>

468. Mr SF and Ms [REDACTED] commenced a romantic relationship in June 2012 while he was in detention and they had not lived together previously.

469. Ms [REDACTED] is Mr SF's advocate in his complaint before the Commission. Ms [REDACTED] and their daughter visited Mr SF regularly while he was detained at Villawood IDC. I accept that Ms [REDACTED] and their daughter have a close connection with Mr SF and their relationship is sufficient to constitute a 'family' for the purpose of this inquiry.

##### (ii) Interference

470. In *Aumeeruddy-Cziffra et al v Mauritius*, the UN HR Committee stated:

The Committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. Hence, as the State party has admitted, the exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of article 17. In principle, article 17(1) applies also when one of the spouses is an alien.<sup>80</sup>

471. Mr SF was removed to Samoa on 1 May 2018. His wife and child remain in Australia and have stated that they have no intention of relocating to Samoa.

472. I am satisfied that the removal of Mr SF from Australia constitutes interference with his family life.

473. The more significant examination is whether this interference is 'arbitrary' under article 17 of the ICCPR.

(iii) *Arbitrary*

474. The family separation jurisprudence of both the UN HR Committee and the European Court of Human Rights (ECtHR) begins from the principle that, as a matter of well-established international law and subject to their treaty obligations, States enjoy the right to control the entry, residence and expulsion of non-citizens. Both the UN HR Committee and the ECtHR have stated that it is only in 'extraordinary' or 'exceptional' circumstances that the removal of a non-national family member may constitute arbitrary interference with the rights of the family.

475. This grants States a wide margin of discretion in which to regulate their migration system and control the entry and deportation of foreigners.

476. In *Winata v Australia*,<sup>81</sup> the UN HR Committee made findings that Australia would breach article 17 of the ICCPR if it deported two parents who had been living unlawfully in Australia for 14 years because it would involve substantial changes to their long-settled family life.<sup>82</sup> In this matter, the authors' 13-year-old Australian-born son, Barry, was an Australian citizen who did not speak Indonesian and had never visited Indonesia. The crucial factor for the majority in *Winata* was the 13-year length of Barry's lifelong, and subsequently lawful, residence in Australia and the detrimental effects of either having to leave the only State that he had ties with or remain in Australia without his parents.

477. Significantly, the majority in *Winata* also affirmed that:

It is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances.<sup>83</sup>

478. The exceptionality of *Winata* was further confirmed by the UN HR Committee in its subsequent decision of *Sahid v New Zealand*. In *Sahid*, the complainant had been living in New Zealand for 11 years with his adult daughter and grandson and the State refused to grant him a residence permit. The UN HR Committee stated:

... the Committee notes its earlier decision in *Winata v Australia* that, in extraordinary circumstances, a State party must demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness ... in the absence of exceptional factors, such as those noted in *Winata*, the Committee finds that the State party's removal of the author was not contrary to his rights.<sup>84</sup>

479. Joseph and Castan state that it is 'clear' that parents do not have a right to be free from deportation from a State simply because their minor children are citizens of that State.<sup>85</sup>
480. Article 8 of the European Convention on Human Rights provides that:
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
  2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>86</sup>
481. While article 8 of the European Convention of Human Rights is drafted in different terms from article 17 of the ICCPR, the jurisprudence of the ECtHR is helpful in considering how the human rights concerning the family are to be balanced against a State's prerogative to regulate its immigration system.
482. The ECtHR has frequently held that it is important to consider 'whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of family life within the host state would be precarious'.<sup>87</sup> In such circumstances, 'it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8'.<sup>88</sup>
483. On 6 January 2016, Minister Dutton declined to intervene to grant Mr SF a visa under s 417 and s 195A of the Migration Act. The Department's submission to the Minister considered Australia's international obligations under article 17 and 23 of the ICCPR and concluded that removal would not constitute an arbitrary interference with a family unit. The Department provided the following relevant information:
- The appropriateness of measures to maintain family unity can be balanced against other rights and interests, including the integrity of the migration program and the protection of the Australian community. In this context, the weight of considerations given to his marriage and having an Australian citizen child is reduced by the fact that Mr SF's serious offending began in his teenage years, it included drug related offences, his sentences included 12 months of imprisonments, he has continued to re-offend, and has displayed little evidence of sustained capacity to reform.
- Mr SF and Ms [REDACTED] chose to enter in a relationship and conceive a child in the knowledge that his immigration status was unresolved and that he did not have a right to stay in Australia. Their actions were not beyond their control and they knew that they may be separated.

484. Recalling *Winata v Australia*, in order to avoid a characterisation of arbitrariness, a State may be required to provide justification, beyond the mere enforcement of its immigration law, if there are exceptional circumstances, such as substantial changes to long-settled family life.
485. Mr SF has endured a tumultuous upbringing and I am sympathetic to the problems he has faced since being abandoned in Australia at a young age. However, in terms of separation from his family, Mr SF cannot demonstrate a long-settled family life.
486. Furthermore, Mr SF and Ms ██████ commenced a romantic relationship and married while he was in immigration detention. It is my understanding that they never cohabited in the community. Their daughter was conceived while Mr SF was in detention at a time when both parents knew that his immigration status within Australia was precarious.
487. I am of the view that there are no extraordinary circumstances or exceptional factors present in this case sufficient to render the Minister's refusal to exercise his discretionary powers to grant Mr SF a visa as 'arbitrary' under article 17 of the ICCPR.

**(b) Article 23**

488. Article 23 of the ICCPR provides that the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State'.
489. While article 17(1) of the ICCPR guarantees a right to be free from arbitrary interference with one's family, article 23 imposes a positive obligation on State parties in guaranteeing families positive rights of protection, such as the provision of appropriate financial assistance or tax concessions.<sup>89</sup>
490. Joseph and Castan describe the obligation of the State party under article 23 as positive yet derogable, explaining that, 'despite the exalted position it confers on "the family" as a fundamental societal institution, article 23 does not act as a barrier to protect 'the family' from legitimate interference'.<sup>90</sup>
491. Given my above conclusion that the interference with Mr SF's family rights is legitimate and non-arbitrary, I find that there also has not been a breach of article 23 of the ICCPR in this matter.



# 7 Specific complaints about article 10 of the ICCPR

## 7.1 Right of detainees to be treated with humanity and dignity

492. Article 10(1) of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

493. General Comment No 21 on article 10(1) of the ICCPR by the UN HR Committee states:

Article 10, paragraph 1, imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons.<sup>91</sup>

494. The above comment supports the conclusions that:

- article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons
- the threshold for establishing a breach of article 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR
- the article may be breached if the detainees' rights, protected by one of the other articles in the ICCPR, are breached unless that breach is necessitated by the deprivation of liberty.

495. The above conclusions about the application of article 10(1) are also supported by the jurisprudence of the UN HR Committee,<sup>92</sup> which emphasises that there is a difference between the obligation imposed by article 7(1) not to engage in 'inhumane' treatment and the obligation imposed by article 10(1) to treat detainees with humanity and respect for their dignity.

In *Christopher Hapimana Ben Mark Taunoa v The Attorney General*,<sup>93</sup> the Supreme Court of New Zealand explained the difference between these two concepts as follows:

A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment ... the words 'with humanity' are I think properly to be contrasted with the concept of 'inhuman treatment' ... The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts 'inhuman' with 'inhumane'.<sup>94</sup>

496. The decision considered provisions of the New Zealand Bill of Rights which are worded in identical terms to articles 7(1) and 10(1) of the ICCPR.
497. The content of article 10(1) has been developed with the assistance of a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty, including:
- the *Standard Minimum Rules for the Treatment of Prisoners* (Standard Minimum Rules)<sup>95</sup>
  - the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).<sup>96</sup>
498. The UN HR Committee has invited States Parties to indicate in their reports the extent to which they are applying the Standard Minimum Rules and the Body of Principles.<sup>97</sup> At least some of these principles have been determined to be minimum standards regarding the conditions of detention that must be observed regardless of a State Party's level of development.<sup>98</sup>
499. Rule 54(1) of the Standard Minimum Rules provides:
- Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.
500. This rule provides limits on the circumstances in which force may be used, and limits the use of force in those circumstances to what is necessary.
501. Standard Minimum Rule 94 requires that civil prisoners 'shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order'.
502. The prohibition in article 7 of the ICCPR is absolute and non-derogable. A person's treatment in detention must not involve torture or cruel, inhuman or degrading treatment or punishment.

503. In the case of *Wilson v Philippines*, the UN HR Committee found a breach of article 7 of the ICCPR where a prisoner was treated violently in detention:

The Committee considers that the conditions of detention described, as well as the violent and abusive behaviour both of certain prison guards and of other inmates, as apparently acquiesced in by the prison authorities, are seriously in violation of the author's right, as a prisoner, to be treated with humanity and with respect for his inherent dignity, in violation of article 10, paragraph 1. As at least some of the acts of violence against the author were committed either by the prison guards, upon their instigation or with their acquiescence, there was also a violation of article 7.<sup>99</sup>

504. States have a responsibility to ensure that the rights guaranteed in articles 7 and 10 of the ICCPR are accorded to detainees in privately run detention facilities.<sup>100</sup>

## 7.2 November 2015 Christmas Island riots

505. Between 8 and 10 November 2015, a major disturbance occurred at the Christmas Island Detention Centre when detainees conducted a large-scale riot. Several complainants allege that their treatment during this disturbance breached their human rights.

### (a) Complaints

506. Mr SK, Mr SI, Mr SM and Mr SN allege that their treatment during riots at Christmas Island in November 2015 was inhumane in breach of the protection conferred by article 10(1) of the ICCPR. These complaints are summarised below.

507. Mr SI claims that during the disturbance he was cable-tied, dragged down the stairs and that his glasses and earphones were removed from him. He claims that he was punched and thrown through a fence by an Emergency Response Team (ERT) officer. He states that he was then placed outside in an exercise yard where he had to sleep in the dirt with no bedding and urinate in bottles. He claims that after two or three days he was transferred to another secure management unit where he was not able to contact his family or lawyer.

508. Mr SM alleges that during the riot, ERT officers handcuffed him, tied his legs together, and dragged him by his feet out of his room. He alleges he was punched, kicked and his head was pressed into the concrete floor whilst an ERT officer knelt on his head. Mr SM claims that he was made to sleep outdoors on a plastic bag for two nights.

509. Mr SN, a citizen of New Zealand, arrived in Australia on 18 June 2006. On 25 June 2015, Mr SN's TY444 visa was mandatorily cancelled under s 501(3A) because of his criminal record. On 10 July 2015, he was detained in immigration detention. He was removed from Australia to New Zealand on 6 December 2016. Mr SN alleges that during the riots, he was handcuffed with zip ties and an ERT officer punched him in the face eight to 12 times.
510. He claims that as a result, his left eye was badly swollen and he was in pain. Mr SN claims he was taken to the Red Compound and held in a cell for three days with no mattress or bedding and was not allowed to see a doctor or nurse. He also claims that he did not receive adequate food while in the compound and his lactose intolerance was not accommodated.
511. Mr SK alleges that during the riot, other detainees assaulted him. He claims that after the disturbance he was relocated to the Red Compound where he had to sleep outside without a mattress for one night. He claims that for the following week, he was not provided food that catered for his gluten intolerance, and as a result he lost 10kg.

**(b) Consideration of complaints**

512. The Department says that there are no individual incident reports because it was not practicable to document individual events and details given the pace of the operations during the disturbance. The Department states that detainees destroyed most of the CCTV footage. I note that some video footage has been provided to the Commission. However, this footage does not evidence altercations between detainees and the ERT.
513. I have reviewed a Post Incident Review Report prepared by Serco and a Serco logbook documenting the disturbance.
514. In summary, the Department denies that excessive force was used against the complainants. The Department also denies that the complainants were provided inadequate food or shelter.

*Excessive use of force*

515. In relation to Mr SI, Mr SM and Mr SN, the Department states that reasonable and proportionate force was used to apply flexi-cuffs to remove them out of the compounds because they refused to leave when instructed to do so by the Australian Federal Police (AFP). Flexi-cuffs were applied to Mr SI and Mr SM for 30 minutes, whereas Mr SN remained in flexi-cuffs for six and a half hours. It is unclear why Mr SN was restrained for such a prolonged period.
516. Medical records indicate Mr SM incurred slight bruising to a small part of his head and complained of a headache following the alleged assault. There is no evidence that Mr SI sustained any significant injuries.

517. Mr SN sustained a severe eye injury after an ERT officer allegedly punched him in the face several times. On 13 November 2015, Mr SN presented to the IHMS General Practitioner (GP) and was diagnosed as having a periorbital haematoma and sub conjunctival bleeding. On 14 November, he was urgently transferred to Royal Perth Hospital (RPH) for review. At the RPH, he was diagnosed with a traumatic microhyphema of the left eye and was managed with conservative treatment and medication therapy, including medicated eye drops. The Department said that the IHMS medical team regularly reviewed Mr SN. During his last appointment (prior to removal from Australia) on 17 February 2016, the GP did not detect any acute concerns with his eye.
518. I have reviewed Mr SN's medical file. The mental health reports confirm a diagnosis of Post-Traumatic Stress Disorder (PTSD) following the riots. During his regular mental health appointments, he consistently raised concern about the alleged assault by Serco and his feelings of injustice, as he was not involved in the riot, and because his hands were in restraints, he had no means to defend himself. Mr SN claims that his PTSD continues to affect his daily life.
519. I accept that some force needed to be deployed by ERT officers to manage the major disturbance at Christmas Island IDC and bring it under control. The Post Incident Review Report and the Serco logbook document that, during this disturbance, some detainees were armed with makeshift weapons, damaged property, lit multiple fires, barricaded themselves in and acted in a violent, agitated and highly aggressive manner towards ERT officers.
520. The Department does not suggest that any of the complainants were a primary instigator or agitator in the disturbance. The Department denies that Serco used excessive force against Mr SI, Mr SM and Mr SN during the disturbance as they allege.
521. I am concerned about the severity of the assault allegations concerning the ERT officers. In particular, in relation to Mr SN, I am concerned about how his eye injury occurred during the disturbance and the impact the incident has had on his mental health.
522. However, the lack of CCTV footage or contemporaneous records means that there is insufficient evidence for me to form a view about whether ERT officers used excessive force against the complainants. Accordingly, it is my view that no breach of article 10 has been established.

*Inadequate food and shelter*

523. Following the disturbance, Mr SK, Mr SM, Mr SN and Mr SI were transferred to the Support Unit (also known as the Red Compound) for about two days.

524. The Department states that the Support Unit is furnished with mattresses, bedding, toilets, showers, common dining area, basketball court and an outdoor area.

525. The Department explained that, while substantial bedding was available, it is possible that some detainees might have slept on the ground:

Substantial bedding was available; however, some detainees may have slept on the ground at various times of the day and night without bedding. Noting the significant disruptions caused by the major disturbance, Serco was unable to confirm with certainty if there was sufficient bedding for all detainees in the area at the time. While all reasonable efforts were made to ensure the continuous provision of services for detainees during the major disturbance, substantial damage to infrastructure and supplies affected Serco's ability to ensure that services were provided in the usual manner to detainees.

526. The Department denies that Mr SK, Mr SM and Mr SI were made to sleep outdoors.

527. In terms of food and water, the Department states that sufficient quantities were provided during this period. Furthermore, the complainants were provided with food that was nutritionally and culturally appropriate and where required, tailored to meet any medical requirements.

528. There is insufficient material before me to establish that, following the disturbance, the complainants were provided with inadequate food and water. I find it plausible that the complainants did not have mattresses while detained in the Support Unit for one or two nights. However, given the magnitude and volatility of the disturbance and the need to secure the facilities, as well as ensure the safety of all detainees and staff, I accept the operational difficulties faced by Serco in providing services in the immediate aftermath. Accordingly, it is my view that any failure to provide adequate bedding in the Support Unit was not inconsistent with or contrary to article 10 of the ICCPR.

## 7.3 Treatment during transfers between detention centres

### (a) Mr RA

529. Mr RA alleges that his human rights were breached during his transfer from Maribyrnong Immigration Detention Centre (MIDC) to Christmas Island on 28 August 2015. He claims that:

- he was awoken at 2:30am on the day of transfer, forcibly removed from his bed, and not given an opportunity to fully dress
- his wrists were bound with cable ties from MIDC to Melbourne Airport and that he was handcuffed throughout the journey from Melbourne Airport to Christmas Island

- a detainee under police investigation for sexually assaulting him was seated behind him during the flight from Melbourne to Perth
- he was not provided assistance when reporting chest pains
- he did not have access to his diabetic box while in transit from Melbourne to Perth and was unable to check his sugar levels when he arrived on Christmas Island

530. On 28 August 2015, 29 detainees were transferred from MIDC to Christmas Island.

531. The Department said that restraints were applied to Mr RA because his Escort Risk Rating and Detention Service Provider Assessment was assessed as 'High Risk':

Mr RA's high risk rating for escort was assessed based on his criminal history, incidents in detention, intelligence holdings and the perceived threat he poses to escorts outside the detention facility.

The Detention Service Provider Assessment (DSPA) is solely for the purpose of risk to aviation. Serco Immigration Services Intel uses the current Security Risk Assessment Tool (SRAT) which provides information re: criminal history, incidents in detention, behaviour in corrections, Immigration pathway, Intel holdings to assist in making a determination of the risk a detainee poses to aviation. Each assessment is conducted on an individual basis and details reasons for the assessment rating.

The DSPA for Mr RA stated positive responses for five behavioural risk indicators, which pose a potential threat to Aviation – hence high for escort purpose.

532. The Department says that flexi-cuffs were initially applied to Mr RA at MIDC, and these were replaced with handcuffs at Melbourne Airport. Mr RA remained in handcuffs until he was inside Christmas Island IDC. The total duration of restraints being in place was 16 hours.

533. The removal of Mr RA from his room and use of flexi-cuffs was filmed using a hand-held camera. I have reviewed the footage and consider that the level of force used to remove Mr RA from his bed and place him in restraints was not inappropriate.

534. I am concerned that Mr RA was not provided an opportunity to wear a shirt prior to the flexi-cuffs being placed. He was removed from his bed wearing only pants. Mr RA appeared to be calm and compliant at all times. He remained topless, until a Serco officer placed a jacket on his shoulders, however, his chest remained bare. While this may not amount to inhumane treatment, not allowing Mr RA to wear a shirt is undignified.

535. I have reviewed the Security Risk Assessment and the Aviation Security Risk Assessment conducted for Mr RA. Mr RA has committed violent and serious crimes and has several reported incidents of aggressive behaviour in detention. In light of this history, I consider the escort risk rating and aviation risk rating of 'high' that led to the decision to use restraints was reasonable. The escort operation log made by Serco indicates that handcuffs were checked approximately every 30–60 minutes during the flight and no concerns were reported.
536. Mr RA claims that a detainee under police investigation for sexually assaulting him was seated behind him during the flight from Melbourne to Perth. In response, the Department said that Serco:
- did not receive instruction or advice from the AFP that Mr RA and the other detainee should be separated, and has not been advised of any charges laid against the other detainee.
537. The Department states that Mr RA was personally assigned two Serco escort personnel for the flight, which provided sufficient protection:
- Serco is of the belief that the level of staffing assigned to ensure the safety and security of all persons on board the aircraft, combined the appropriate use of mechanical restraints for detainees during the flight, provided appropriate levels of protection for detainees and staff on board the aircraft.
538. The Department notes that there is no record of Mr RA expressing concern to Serco about his proximity to the other detainees during the flight or any interaction between both men.
539. I would find it concerning if a detainee subject to allegations of sexual assault against Mr RA was seated behind him on the flight from Melbourne to Perth. I note that, following the allegations, the Department was sufficiently concerned to transfer that detainee to a separate compound from Mr RA in MIDC.
540. Notwithstanding my concerns, and while acknowledging the distress experienced by Mr RA, I am satisfied that his safety was appropriately protected by the presence of two Serco officers sitting on either side of him.
541. In response to Mr RA's allegations regarding not having access to his diabetic box, the Department claims there is no evidence of him raising these concerns:
- Serco is unable to find any evidence of Mr RA raising concerns about his 'diabetic box' at any time immediately prior to or during his transport to Christmas Island. Serco is unable to find any reference to an object in Mr RA's property documents, which might be a 'diabetic box' as he alleges to have been in possession of.



542. The Department also states there is no record of Mr RA raising concerns about chest pains. The Department notes that IHMS is responsible for dispensing all prescription medication and IHMS representatives were present throughout the transfer to Christmas Island. I understand that Mr RA did not request any medical treatment from IHMS.
543. There is currently insufficient evidence to support Mr RA's allegations that he did not have access to his diabetic box or adequate medical treatment in relation to his chest pains.
544. It is my view that, on the material before me, the treatment of Mr RA during his transfer to Christmas Island does not appear to constitute a breach of his human rights under article 10(1) of the ICCPR.

**(b) Mr SI**

545. Mr SI was also transferred from MIDC to Christmas Island on 28 August 2015. Mr SI alleges that he was unnecessarily handcuffed during the transfer. He also claims that he was not given the opportunity to inform family members and legal advisers of the transfer, gather his belongings or wear shoes prior to the transfer.
546. The Department confirms that Mr SI was not provided with an opportunity to contact family or legal advisers because he was transferred at short notice. The Department says that Mr SI was wearing shoes for the transfer.
547. The Department states that Mr SI was restrained initially using flexicuffs, which were removed prior to boarding the airplane, and handcuffs were applied for the remainder of the transfer. The total duration of restraints being in place was 16 hours.
548. The Department states that Mr SI was a high-risk detainee for escort and therefore handcuffs were required:
- in accordance with Departmental directive(s), high-risk detainees for the purposes of escort are required to be mechanically restrained whenever outside a secure location.
549. The Department provided the Commission with a copy of Mr SI's Security Risk Assessment and Detention Service Provider Assessment immediately prior to the transfer.
550. Mr SI's Security Risk Assessment rating was 'high'. He had been in immigration detention for two months and had not been involved in any incident of abusive or aggressive behaviour during this period. His security assessment appears to be based on his criminal history, which includes offences involving violence.

551. However, Mr SI's Detention Service Provider Assessment, dated 14 August 2015, assessed him as being a low risk for the purposes of aviation transport. I understand that the Detention Service Provider Assessment is conducted solely for the purpose of risk to aviation.
552. In response to my preliminary view, the Department disputed Mr SI's risk rating as low:
- The Department does not accept the AHRC's preliminary view that the use of handcuffs on Mr SI appears to be contrary to article 10(1) of the ICCPR.
- Mr SI's Security Risk Assessment Tool (SRAT) rating from both 10 August 2015 and 28 August 2015 rated him as a high-risk detainee, not as a low risk as stated.
553. I accept that Mr SI's Security Risk Assessment was high, however, the Department has not explained why he was handcuffed despite the Detention Service Provider Assessment being a low risk.
554. I find that the use of handcuffs on Mr SI when he was assessed as being low risk to aviation was contrary to his rights under article 10 of the ICCPR to be treated with humanity and with respect for his inherent dignity.

## 7.4 Safe place of detention

555. Mr SL complains that during his time in detention his personal safety was not adequately protected in breach of his human rights.
556. On 21 April 2015, Mr SL made a complaint to Serco concerning his physical safety in detention. He alleges that while detained in Yongah Hill IDC, he was assaulted, abused and threatened by other detainees because of his criminal record.
557. In response to his concerns at Yongah Hill IDC, he was transferred to Perth IDC in May 2015. Mr SL claims that on 29 May 2015, he was threatened and punched in the face by another detainee and on 5 June 2015, a different detainee threatened him.
558. The Department said that in relation to the 29 May 2015 allegations, the matter was referred to the AFP and subsequently rejected on 6 July 2015.
559. Mr SL was transferred to Christmas Island IDC on 29 June 2015. He alleges that during the transfer he was threatened by another detainee who said 'keep that bastard away from me otherwise I'm going to kill him'.

560. The Department advises that on 2 July 2015, Serco interviewed Mr SL about his safety concerns. In a letter from Serco to Mr SL dated 6 July 2015, a summary of that interview was provided. According to the letter, during the interview with Serco, a mutual plan in the short term to protect his safety on Christmas Island was discussed. Mr SL agreed in the interview that if Serco could ensure that he did not have to interact with the concerned detainee, he would feel safer and be able to move freely throughout the centre. Mr SL stated during the interview that he felt safe in his current compound.
561. On the material before me, I am satisfied that Serco took adequate steps to protect Mr SL's safety following the alleged assaults and threats from other detainees. Following Mr SL's allegations occurring at Yongah Hill IDC, he was transferred to Perth IDC. I understand that, following the alleged incident on 29 May 2015, Mr SL was moved from Dorm 1 to Dorm 7 at Perth IDC, which is a locked area previously reserved for female detainees.
562. On 29 June 2015, Mr SL was transferred to Christmas Island. He raised concerns regarding his safety in an interview with Serco on 2 July 2015. From Serco's response to Mr SL dated 6 July 2015, it appears that he was satisfied with the proposed management of his personal safety. Since Serco's response dated 6 July 2015, Mr SL raised no further complaints or concerns about his safety. I understand that on Christmas Island Mr SL was detained in Green 1 compound at North West Point, which was accommodation for vulnerable detainees.
563. For the above reasons I find that following each allegation Mr SL appears to have been treated with humanity and with respect for his inherent dignity in accordance with article 10(1) of the ICCPR.

## 7.5 Other complaints

564. Mr SI alleges that he was unable to visit his daughter when she was having a surgical procedure. Mr SI claims that Serco arranged for him to visit his daughter in hospital on 21 August 2015 because she was having a significant medical procedure due to her vision impairment. He states that on the day of the scheduled visit Serco advised that he could only call his daughter because he was assessed as being 'high risk'.
565. Mr SI states that he does not understand why he was assessed as high risk because he has not been involved in any incidents of violence in prison or immigration detention. He claims that in July 2015 he was allowed on an excursion to Altona Beach without the use of restraints.

566. The Department confirms that Mr SI requested to be present at the Melbourne Eye and Ear Hospital when his daughter had eye transplant surgery on 21 August 2015. The Department says that because Mr SI's security risk assessment was high, he required a Special Purpose Visa to undertake an external visit. The Department explains that Special Purpose Visits are only offered in limited circumstances based upon consideration of significant compassionate or humanitarian grounds (for example, when an immediate family member dies or suffers a terminal illness).
567. Serco declined Mr SI's requests, as they did not meet the required criteria for a Special Purpose Visit, being significant compassionate or humanitarian grounds.
568. It is unclear why, if Mr SI was permitted to go on an excursion in July 2015, he was not able to visit his daughter in hospital the following month. I also note that the Detention Service Provider Assessment, dated 18 August 2015, assessed Mr SI as being a low risk for the purposes of aviation transport. While the decision-making process appears to be inconsistent, on balance, I am of the view that the failure to allow Mr SI to visit his daughter in hospital does not meet the requisite threshold to find a breach of article 10 of the ICCPR.

## 8 Recommendations

569. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with, or contrary to, any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.<sup>101</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>102</sup> The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.<sup>103</sup>
570. I consider that it is appropriate to make recommendations directed both at remedying or reducing the loss and damage suffered by the individual complainants and their families, and at preventing a repetition of the acts or a continuation of the practices that are described in my findings.

### 8.1 Detention review framework

571. The findings in this inquiry illustrate that the Department's detention review framework is not adequately safeguarding against arbitrary detention.
572. Critically, given the increase in the number and proportion of people in immigration detention who have had their visas cancelled under s 501, there must be practices and processes in place to assess how any risk could be managed outside of closed detention.

573. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary and proportionate on the basis of the *individual's* particular circumstances. Furthermore, there is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than detention to achieve the ends of the immigration policy in order to avoid the conclusion that detention was 'arbitrary'. Detention that is lawful under Australian law can still be arbitrary under international human rights law.
574. To comply with these obligations the Department would need to conduct an individualised risk assessment to determine first, whether there is a risk to the community, secondly, whether any risks an individual may pose to the community could be mitigated if they were released from detention, and thirdly, ongoing reviews to determine whether detention continues to be necessary.
575. The recommendations I have made propose a detention review framework that will protect the Australian community while safeguarding the human rights of detainees, in particular, the right to be free from arbitrary detention.

#### *Ministerial Guidelines*

576. The Minister has issued guidelines about when and how the department should refer cases to him inviting him to consider the exercise of his powers under s 197AB and s 195A.
577. It appears that these guidelines may operate to prolong the detention of people who have had their visa cancelled under s 501. That is because they may be interpreted to exclude such persons from being considered for alternatives to closed detention without allowing for an individualised assessment of whether their detention continues to be justified. That is so, even when those people have been detained for extended periods, or when their detention appears likely to continue for a significant period after the conclusion of any sentence imposed by Australian courts.
578. Each of the guidelines provide that the Minister would not expect referral of cases where a person does not meet the character test under s 501 of the Migration Act, unless there were exceptional circumstances. It is recommended that these guidelines be amended to reflect the changing cohort of the immigration detention population and make it clear that individuals who have had their visas cancelled or refused under s 501 are not automatically excluded from consideration. It is also recommended that the guidelines instead require an individual's risk to the community to be considered as well as whether that risk could be mitigated if they were released from closed detention.

## Recommendation 1

The Minister's s 197B and s 195A guidelines should be amended to provide:

- That all people in immigration detention are eligible for referral under s 197AB and s 195A, whether or not they have had a visa cancelled or refused under s 501 of the Migration Act
- In the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility (whether for reasons relevant to the 'character test' in the Migration Act or otherwise), the Department include in any submission to the Minister under s 197AB or s 195A:
  - i. a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment
  - ii. an assessment of whether any identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the department in forming its assessment.
- In the event that the Minister decides not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every six months and re-refer the case to the Minister to ensure that detention does not become indefinite.

### *Assessment of risk and imposition of conditions*

579. The Department advises that in 2016, the Community Protection Assessment Tool (CPAT) was introduced to assist a Status Resolution Officer assess the most appropriate placement for a detainee. The Department states that the CPAT provides:

A recommendation of placement based on the level of risk a person poses to the community. The tool is used to determine the level of community risk through a set of defined parameters underpinning the CPAT's four harm indicators. There are four placement recommendations:

- Tier 1 – Community Placement either through grant of a Bridging Visa E (subclass 050) visa (BVE), or a BVE with conditions, or referral for consideration of community placement under residence determination arrangements
- Tier 2 – continued placement in held detention, pending removal
- Tier 3 – Held Detention
- Tier 4 – Specialised Detention

A CPAT is a point in time assessment. It is possible for a detainee's CPAT recommendation to change over time depending on their circumstances. In addition, the CPAT parameters are regularly reviewed and may be adjusted depending on government policy and other operational requirements. For example, it is noted that in September 2017, the CPAT parameters were updated to reflect government policy in relation to persons who have had a visa refused or cancelled under section 501 of the Act, their CPAT will make a recommendation of Tier 3 – Held Detention.

580. The Department has not provided information on the defined parameters of the four harm indicators. It is recommended that, when assessing whether an individual may pose a risk to the community, the following factors be considered:
- a. the circumstances of the offence, how much time has passed since the criminal conduct, sentencing remarks, the sentence imposed by the criminal court and any mitigating or aggravating factors at the time of the offence or since that time
  - b. the Parole Board's evaluation of the risk posed by the person
  - c. any steps taken by the person to rehabilitate, including participation in programs offered in detention
  - d. whether there is ongoing danger to the public, especially for persons who have been in detention for a long time
  - e. the risk or likelihood of re-offending and the seriousness of the harm if the person re-offends
  - f. whether the offences were violent, sexual or drug-related
  - g. the risk of absconding, including any evidence of previous absconding
  - h. the risk of non-compliance, including any evidence of a previous failure to comply with visa conditions
  - i. the individual's ties with the Australian community
  - j. conduct or behaviour since the offence.
581. Under the CPAT, it appears that individuals who have had their visa cancelled or refused under s 501 will automatically be assessed as requiring held detention. This is problematic because there is no individualised assessment of the actual risk posed to the community and no recognition that a person's risk to the community may decrease over time. Many individuals have served the sentence imposed by Australian courts and been released on parole, have committed low-level offences or may not have even served time in prison. Those who have committed more serious offences should be given an opportunity to demonstrate that they have rehabilitated and are no longer a risk to the community. It is therefore critical that this cohort not be deemed on a blanket basis to pose a risk to the community. The alternative is long-term, potentially indefinite, administrative detention.

582. The CPAT purports to assess the risk an individual poses to the community without assessing whether that risk could be mitigated. It is recommended that if an individual is assessed to pose a risk to the community, a further assessment be conducted to consider whether conditions could be imposed to mitigate that risk.
583. A non-exhaustive list of conditions should be incorporated into the CPAT to ensure a departmental officer actively considers each one.
584. Examples of such conditions could include:
- a. adhere to a curfew
  - b. reside at a specified place
  - c. report to a specified place at specified periods or times in a specified manner
  - d. provide a guarantor who is responsible for the person's compliance with any agreed requirements and for reporting any failure by the person to comply with the requirements
  - e. not violate any law
  - f. be of good behaviour
  - g. not associate or contact a specified person or organisation
  - h. not possess or use a firearm or other weapon
  - i. wear an electronic monitoring tag.

## **Recommendation 2**

When conducting an individual risk assessment, the following factors be considered:

- a. the circumstances of the offence, how much time has passed since the criminal conduct, sentencing remarks, the sentence imposed by the criminal court and any mitigating or aggravating factors at the time of the offence or since that time
- b. the Parole Board's evaluation of the risk posed by the person
- c. any steps taken by the person to rehabilitate, including participation in programs offered in detention
- d. whether there is ongoing danger to the public, especially for persons who have been in detention for a long time
- e. the risk or likelihood of re-offending and the seriousness of the harm if the person re-offends
- f. whether the offences were violent, sexual or drug-related
- g. the risk of absconding, including any evidence of previous absconding



- h. the risk of non-compliance, including any evidence of a previous failure to comply with visa conditions
- i. the individual's ties with the Australian community
- j. conduct or behaviour since the offence.

### **Recommendation 3**

The CPAT be amended to not automatically recommend Tier 3 – Held Detention for individuals who have had their visa refused or cancelled under s 501 of the Migration Act.

### **Recommendation 4**

The CPAT be amended to include an assessment of whether any risks to the community identified can be mitigated by conditions including but not limited to:

- a. adhere to a curfew
- b. reside at a specified place
- c. report to a specified place at specified periods or times in a specified manner
- d. provide a guarantor who is responsible for the person's compliance with any agreed requirements and for reporting any failure by the person to comply with the requirements
- e. not violate any law
- f. be of good behaviour
- g. not associate or contact a specified person or organisation
- h. not possess or use a firearm or other weapon
- i. wear an electronic monitoring tag.

#### *Monthly case reviews*

- 585. A Departmental case manager conducts monthly case reviews that consider if a person's placement in detention is justified, including barriers to less restrictive forms of detention, and actions taken to overcome these barriers.
- 586. However, these reviews do not adequately safeguard against arbitrary detention. This is because when conducting the review, the case manager considers whether there are any circumstances that require the individual to be released from detention, rather than whether it is necessary to continue to detain the individual. The presumption should be that a person is not detained unless it is demonstrably necessary.

587. For example, it is common in these case reviews for the case manager to conclude that closed detention is appropriate because the detainee does not have any health or welfare issues which would warrant an alternative placement. However, the question that should be investigated is whether there are any reasons, such as risk posed to the community or flight risk, that warrant the individual's continued detention.
588. To adequately safeguard against arbitrary detention the monthly case reviews must consider the necessity for continuing to detain the individual and identify less restrictive means of detention or the grant of a visa.

### **Recommendation 5**

Monthly case reviews be amended to require the departmental case manager to review the necessity for an individual's continued detention and whether any risk factors could be mitigated in the community.

#### *Independent review for long-term detainees*

589. This inquiry has highlighted the prolonged and potentially indefinite periods individuals are spending in immigration detention. Under the Migration Act there is no time limit on how long a person can be detained. As a result, people who have had their visas refused or cancelled on character grounds may spend months, or even years, in closed immigration detention while their status is resolved. As at 31 May 2020, the average period of detention for people held in closed facilities was 553 days; and almost 25.8% of people held in closed facilities had been detained for more than two years. Four of the complainants in this group have been detained for over five years and I am also aware that a number of people have been detained for 10 years or more.
590. I am concerned that the current policies and practices in place are not adequately protecting individuals, in particular the complainants still in closed detention, from prolonged and indefinite detention.
591. Under s 486O of the Migration Act, the Commonwealth Ombudsman is required to assess the appropriateness of immigration detention arrangements for persons in detention for more than two years. The assessments are provided to the Minister and de-identified copies are tabled in Parliament. While the assessment may contain recommendations, the Minister is not bound by any recommendation made.

592. The Ombudsman review process is an important oversight measure. However, as discussed throughout this report, the changing cohort in detention present new challenges in relation to risk assessments. In my view, an independent process is required to assess the risk posed by an individual and whether that risk can be mitigated if the person were allowed to reside in the community, under clear conditions. This review process could be modelled on the Independent Reviewer for Adverse Security Assessments.
593. On 16 October 2012, the Australian Government announced an independent review process for refugees who have been refused a permanent visa as a result of an adverse security assessment by ASIO. The Government appointed the Hon Margaret Stone AO as the Independent Reviewer for Adverse Security Assessments. The current Independent Reviewer for Adverse Security Assessments is Mr Robert Cornall AO.
594. The Independent Reviewer is required to examine all the material relied upon by ASIO in making the security assessment and to provide an opinion to the Director-General of Security on whether the assessment is an appropriate outcome based on the material ASIO relied upon. The Independent Reviewer will then make recommendations to the Director-General of Security. The Independent Reviewer also conducts a periodic review of adverse security assessments every 12 months.
595. Under this review process, ASIO is required to provide an unclassified written summary of reasons for the decision to issue an adverse security assessment to the Independent Reviewer on the basis that it can be provided to the refugee.
596. In a similar way, I recommend that an independent reviewer be appointed in relation to people who:
- have been in immigration detention for more than two years
  - have been found by the Department and/or the Minister not to be suitable for alternatives to closed detention.
597. I recommend that, as part of the review, an independent reviewer:
- a. examine all the material the Department and Minister have relied upon to reach a decision to continue to detain the individual
  - b. conduct an assessment of the risk to the community posed by an individual and whether that risk can be mitigated
  - c. provide a written opinion, and recommendations as appropriate to the Minister for Home Affairs.

### **Recommendation 6**

The Commonwealth appoint an independent reviewer in relation to people who:

- have been in immigration detention for more than two years
- have been found by the Department and/or the Minister not to be suitable for alternatives to closed detention.

The role of the independent reviewer is to:

- a. examine all the material the Department and Minister have relied upon to reach a decision to continue to detain the individual
- b. conduct an assessment of the risk to the community posed by an individual and whether that risk can be mitigated
- c. provide a written opinion, and recommendations as appropriate to the Minister for Home Affairs.

## 8.2 Recommendations for Individual complainants

### **(a) Mr RA and Mr RB**

598. Mr RA and Mr RB remain in immigration detention and, as a result of this inquiry I have found their continued detention to be arbitrary. I deal below with the action that I recommend the Commonwealth take in order to remedy or reduce the loss or damage suffered as a result.

### **Recommendation 7**

599. The Minister indicate to the department that he will consider a further submission about the exercise of his powers under s 195A and/or s 197AB in relation to Mr RA and Mr RB.

600. In the event that the Minister is concerned that Mr RA or Mr RB may pose some real risk if allowed to reside in the community (such as a risk of re-offending), he direct the Department to prepare a detailed submission including the following:

- (a) a personalised assessment of the existence and/or extent of any such risk, including a detailed description of the nature of the risk and of the evidence and reasons leading to the assessment
- (b) a description of what measures might be implemented to ameliorate any risk in the event Mr RA or Mr RB were allowed to reside in the community
- (c) an assessment of whether any risk, if present, could be satisfactorily addressed by the identified measures.

601. The Department prepare a fresh submission to the Minister about the exercise of his discretionary powers in relation to Mr RA and Mr RB, including (if relevant) any matters referred to in the paragraph above.
602. The Minister consider the exercise of his discretionary powers in light of the fresh Departmental submission.

**(b) Mr SI**

603. In relation to Mr SI, I found the use of handcuffs to transfer him from MIDC to Christmas Island on 28 August 2015 when he was assessed as being low risk to aviation was contrary to article 10(1) of the ICCPR.
604. Mr SI has not identified any medical issues that arose as a result of the use of handcuffs on him, however, I accept that the requirement that he wear handcuffs for 16 hours was distressing for him and consider a recommendation for compensation is appropriate.
605. In considering the assessment of a recommendation for compensation under s 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.<sup>104</sup> I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.<sup>105</sup>
606. The Commission has set out in other inquiries the jurisdictional basis for the Commission to make recommendations for the payment of compensation and the available administrative avenues for the payment of such compensation by the Commonwealth.<sup>106</sup> I do not repeat those matters again here.

**Recommendation 8**

I recommend that the Commonwealth pay to Mr SI an appropriate amount of compensation to reflect the distress he suffered as a result of being placed in restraints for 16 hours.

## 9 The Department's response to my findings and recommendations

607. On 29 September 2020, I provided the Department with a notice of my findings and recommendations.
608. On 24 November 2020, the Department provided the following response to my findings and recommendations:

The Department of Home Affairs (the Department) values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings and recommendations made.

The Department notes that this is a thematic inquiry based on specific complaints made by a group of 11 non-citizens who were detained as a result of the cancellation or refusal of their visas on character grounds under section 501 of the Migration Act 1958 (the Act). The Department also notes that at the time this Report was written, nine of the 11 complainants were no longer in held detention.

### **Detention review framework**

The Department does not agree that the Department's detention review framework is not adequately safeguarding against arbitrary detention. The Department does conduct individualised risk assessments and has a framework in place for regular reviews, escalation and referral points to ensure that people are detained in the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. The Department maintains that review mechanisms regularly consider the necessity of detention and where appropriate, identify alternate means of detention or the grant of a visa.

### *Ministerial Guidelines*

The Department notes recommendation one, as the Portfolio Minister issues the section 195A and section 197AB Ministerial Intervention (MI) guidelines to the Department at his discretion. The Minister's personal intervention powers under the Act, allow him to grant a visa to a person, if he thinks it is in the public interest to do so. What is in the public interest is a matter for the Minister to determine. The Minister's Intervention powers are non-delegable and non-compellable, meaning that only a Portfolio Minister can exercise these powers and the Ministers are under no obligation to consider exercising or to exercise these powers in any case. The guidelines were last endorsed by the Minister for Home Affairs in November 2016 (section 195A) and October 2017 (sections 197AB and 197AD). On 24 October 2019, the Department referred a submission to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, which proposed the review of the section 195A MI guidelines and the amendment of the section 197AB/AD guidelines. On 14 May 2020, this

submission was returned unsigned by the office of the Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs. The Acting Minister's office indicated that a review of the guidelines may be considered when there is an incumbent Minister with ongoing responsibility for MI.

#### *Assessment of risk and imposition of conditions*

The Department agrees in part with recommendations two, three and four. The Community Protection Assessment Tool (CPAT) is a decision support tool to assist Status Resolution Officers (SRO) to assess the most appropriate placement for a detainee whilst status resolution processes are being undertaken. The CPAT already takes the majority of the recommended factors into consideration when assessing the risk a person poses to the Australian community if released from immigration detention. The Department acknowledges the importance of developing and refining its community risk assessment framework and does so continuously.

An individual who has had their visa refused or cancelled on character grounds under section 501 of the Act can only be released from immigration detention through MI. The MI guidelines indicate certain cases that do not meet the guidelines for referral are inappropriate to consider, including individuals who have had their visa refused or cancelled on character grounds under section 501 of the Act. The Department notes that it may refer individuals for MI consideration where unique or exceptional circumstances exist.

#### *Monthly Case Reviews*

The Department disagrees with recommendation five, maintaining that amendment to monthly case reviews is not needed, as multiple review mechanisms already regularly consider the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa are considered.

Each detainee's case is reviewed monthly by an SRO to ensure that emerging vulnerabilities or barriers to case progression are identified and referred for action. In addition, the SRO considers whether ongoing detention remains appropriate and refers relevant cases for further action. Monthly detention review committees also provide formal executive level oversight of the placement and status resolution progress of each immigration detainee. SROs use the CPAT to assess the level of risk an unlawful non-citizen poses to the community and the most appropriate placement for them while status resolution processes are being undertaken. Placement includes looking at alternatives to an immigration detention centre, such as in the community on a bridging visa or under a residence determination placement. The tool also assesses the types of support or conditions that may be appropriate and is generally reviewed every three to six months and/or when there is a significant change in an individual's circumstances. Using the CPAT, SROs identify cases where the Minister is the only person with the power to grant the non-citizen a visa or to make a residence determination in order to allow an unlawful non-citizen to reside in community detention. Where the case is determined to meet

the MI guidelines, the case is referred to the Minister for consideration under section 195A of the Act to grant a visa to a person in immigration detention, or under section 197AB of the Act, allowing a detainee to reside in the community.

#### *Independent review for long-term detainees*

The Department disagrees with recommendation six and notes there is already an existing statutory process for the independent review of detainees who have been in prolonged immigration detention. As noted in the Commission's report, under section 486O of the Act, the Commonwealth Ombudsman is required to assess the appropriateness of immigration detention arrangements for persons in detention for more than two years.

Under section 486N of the Act, the Department is required to provide the Commonwealth Ombudsman with reports detailing the circumstances of individuals who have been immigration detention for a cumulative period of two years, and every six months thereafter until they are removed from Australia or released from detention. Following receipt of the Department's section 486N reports, the Commonwealth Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister with a report under section 486O of the Act. The Commonwealth Ombudsman may make recommendations to the Minister/Department regarding the circumstances of the individual's detention. These recommendations can include:

- a recommendation for the continued detention of a person
- a recommendation that another form of detention would be more appropriate for a person (for example, residing at a place in accordance with a residence determination)
- a recommendation that a person be released into the community on a visa, and/or
- general recommendations relating to the Department's handling of its detainee caseload.

In accordance with the provisions of section 486O(5) and 486P of the Act, the Department tables a deidentified copy of these assessments and the Minister's response to the recommendations within 15 sitting days of receiving the Commonwealth Ombudsman's assessment.

### **Recommendations for individual complainants**

#### *Mr RA and Mr RB*

The Department disagrees with recommendation seven. As detailed above the Minister's powers under sections, 195A and 197AB of the Act are non-compellable, meaning the Minister is under no obligation to exercise or to consider exercising these powers, nor can he be directed to use these powers.



As noted above, only cases that are assessed as meeting the MI guidelines are referred for the Minister's consideration. MI does not provide for automatic assessment against the MI guidelines or referral of cases under MI powers for detainees in immigration detention. Cases are referred for assessment against the MI guidelines based on the detainee's individual circumstances. It is not a legal requirement that a detention case be considered for assessment against MI guidelines, or be referred to the Minister for consideration of his personal intervention powers.

As noted in the Commission's report, the MI guidelines under section 195A and 197AB establish that generally, individuals who have had a visa refused or cancelled under section 501 do not meet the guidelines for referral to the Minister. Given the underlying purpose of the character test in section 501(6) of the Act is to protect the Australian community, the fact that a person has had a visa refused or cancelled under section 501 'prima facie' indicates there is a risk that the person may cause harm to the Australian community or a segment of it. In order for Mr RA and Mr RB's cases to meet the section 195A and 197AB guidelines to be referred to the Minister for his consideration, they would need to have significant vulnerabilities that cannot be managed within a held detention environment.

On 14 August 2020, Mr RA was assessed using the CPAT, which found him to be a high risk of harm to the community, and recommended that he remains in held immigration detention.

On 21 September 2020, Mr RB was assessed using the CPAT, which found him to be a high risk of harm to the community, and recommended that he remains in held immigration detention.

*Mr SI*

The Department notes recommendation eight. The Department is required to manage claims for compensation in accordance with Appendix C of the Legal Services Directions 2017. Appendix C requires that claims can only be resolved in accordance with legal practice and principle, which requires at least the existence of a meaningful prospect of liability. On the basis of the information currently available, it would not be within legal principle and practice to settle this matter by making an offer of monetary compensation.

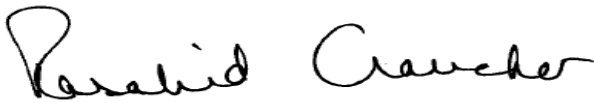
In cases where there is no legal liability to pay compensation, the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme is a discretionary compensation scheme, which provides a mechanism for the Commonwealth to compensate persons who have experienced financial detriment as a result of the defective administration of certain Commonwealth entities, as outlined in Resource Management Guide 409. The CDDA Scheme is generally an avenue of last resort and is not used where there is another viable avenue available to provide redress.

Further information on claiming compensation from the Department can be found on the Department's website.

**Table 1 - Summary of Department's response to recommendations**

Recommendation number	Department's response
1	Note
2	Agree in part
3	Agree in part
4	Agree in part
5	Disagree
6	Disagree
7	Disagree
8	Note

609. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM  
**President**  
Australian Human Rights Commission

February 2021

## Endnotes

- 1 Department of Home Affairs, *Key visa cancellation statistics* (Web Page, n.d.). <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>>.
- 2 Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary* (Web Page, 31 December 2014) 6 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-dec2014.pdf>>.
- 3 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 31 August 2020) 4 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-august-2020.pdf>>.
- 4 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 31 August 2020) 12 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-28-feb-2018.pdf>>.
- 5 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212-3 and 214-5.
- 6 Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014). See also Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*'); Human Rights Committee, *Views: Communication No. 900/1999*, 67<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('*C v Australia*'); Human Rights Committee, *Views: Communication No 1014/2001*, 78<sup>th</sup> sess, CCPR/C/78/D/1014/2001 (2003) ('*Baban v Australia*').
- 7 Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014) [18]; Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6].
- 8 *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the Human Rights Committee in *Views: Communication No. 305/1988*, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('*Van Alphen v The Netherlands*'); Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*'); Human Rights Committee, *Views: Communication No. 631/1995*, 67<sup>th</sup> sess, UN Doc CCPR/C/67/D/631/1995 (1999) ('*Spakmo v Norway*').
- 9 Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (2014); Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*') (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); Human Rights Committee, *Views Communication No. 900/1999*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) ('*C v Australia*').
- 10 Human Rights Committee, *Views: Communication No. 305/1988*, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) ('*Van Alphen v The Netherlands*').
- 11 Human Rights Committee, *Views: Communication No. 900/1999*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) ('*C v Australia*'); Human Rights Committee, *Views: Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004*, 90<sup>th</sup> sess, UN Doc CCPR/C/90/D/1255 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 (20 July 2007) ('*Shams & Ors v Australia*'); Human Rights Committee, *Views: Communication No 1014/2001*, 78<sup>th</sup> sess, CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*'); Human Rights Committee, *Views: Communication No. 1050/2002*, 87<sup>th</sup> sess, CCPR/C/87/D/1050/2002 (9 August 2006) ('*D and E and their two children v Australia*').
- 12 Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014) [18], footnotes omitted.
- 13 Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6]; Human Rights Committee, *Views: Communication No. 305/1988*, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) ('*Van Alphen v The Netherlands*'); Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*'); Human Rights Committee, *Views Communication No. 900/1999*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) ('*C v Australia*').
- 14 Statement of Compatibility with Human Rights, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).
- 15 *Migration Act 1958* (Cth) s 197AB(2)(b).
- 16 This is also clear from s 197AB(2)(a) of the Migration Act. This section provides that the residence determination must specify the person covered by the determination by name, and not by description of a class of persons. It can, however, be made in respect of more than one person, such as a family unit.
- 17 Pursuant to s 41(1) of the *Migration Act 1958* (Cth).
- 18 These conditions can be applied to a Bridging E (General) (subclass 050) (BVE) visa.
- 19 See, e.g., s 19ALA(1)(a) of the *Crimes Act 1914* (Cth); s 128(3)(a) of the *Crimes (Administration of Sentences) Act 1999* (NSW); ss 98(1)(a), 99 and 205(2)(a)(ii) of the *Corrective Services Act 2006* (Qld); s 293(2)(i) of the *Crimes (Sentence Administration) Act 2005* (ACT); and s 68(1b) of the *Corrective Services Act 1982* (SA).
- 20 See, e.g., ss 98(1)(a) and 99(d) of the *Corrective Services Act 2006* (Qld).
- 21 See, e.g., ss 98(1)(a) and 99(f) of the *Corrective Services Act 2006* (Qld); s 293(2)(a) of the *Crimes (Sentence Administration) Act 2005* (ACT); s 68(2)(a) of the *Corrective Services Act 1982* (SA).
- 22 See, e.g., ss 98(1)(b) and 100(1)(a) of the *Corrective Services Act 2006* (Qld); s 293(2)(f) of the *Crimes (Sentence Administration) Act 2005* (ACT).

- 23 See, e.g., r 218(1)(b) of the *Crimes (Administration of Sentences) Regulation 2014* (NSW); ss 98(1)(a) and 99(c) of the *Corrective Services Act 2006* (Qld); section 68(2)(c) of the *Correctional Services Act 1982* (SA).
- 24 See, e.g., s 68(2)(e) of the *Correctional Services Act 1982* (SA).
- 25 See, e.g., s 128(3)(b) of the *Crimes (Administration of Sentences) Act 1999* (NSW); ss 292(1), 293(2)(b) and (c) of the *Crimes (Sentence Administration) Act 2005* (ACT); s 68(2)(ca) of the *Correctional Services Act 1982* (SA).
- 26 See, e.g., ss 98(1)(a) and 99(g) and (h) of the *Corrective Services Act 2006* (Qld); ss 293(2)(d) and (e) of the *Crimes (Sentence Administration) Act 2005* (ACT); ss 68(2)(f)(i) and (ii) of the *Correctional Services Act 1982* (SA).
- 27 See, e.g., r 218(1)(d) of the *Crimes (Administration of Sentences) Regulation 2004* (NSW); s 68(2)(g) of the *Correctional Services Act 1982* (SA).
- 28 See, e.g., s 19AP(4A)(b) of the *Crimes Act 1914* (Cth).
- 29 See, e.g., s 19AN(a) of the *Crimes Act 1914* (Cth); r 214(1)(b) of the *Crimes (Administration of Sentences) Regulation 2014* (NSW); r 83(1) and item 1 in Form 1 in Schedule 4 to the *Corrections Regulations 2009* (Vic); s 200(1)(f) of the *Corrective Services Act 2006* (Qld); s 137(1)(a) of the *Crimes (Sentence Administration) Act 2005* (ACT); s 68(1)(a)(i) of the *Correctional Services Act 1982* (SA).
- 30 See, e.g., s 19AN(a) of the *Crimes Act 1914* (Cth); r 214(1)(b) of the *Crimes (Administration of Sentences) Regulation 2014* (NSW); s 200(3)(a) of the *Corrective Services Act 2006* (Qld).
- 31 See, e.g., r 214A(1)(a)(i) of the *Crimes (Administration of Sentences) Regulation 2014* (NSW); r 83(1) and item 6 in Form 1 in Schedule 4 to the *Corrections Regulations 2009* (Vic); s 200(1)(d) of the *Corrective Services Act 2006* (Qld).
- 32 See, e.g., r 214(1)(c)(v) of the *Crimes (Administration of Sentences) Regulation 2014* (NSW).
- 33 See, e.g., ss 68(1)(a)(ia) and 68(1aa)(a)(ii) of the *Correctional Services Act 1982* (SA).
- 34 Sections 89(2)(a), (c), (d), (e), (f) and (g) and 99(2)(a), (b), (c), (d) and (e) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- 35 *Criminal Code* (Cth) s 104.1.
- 36 *Criminal Code* (Cth) s 104.5(3).
- 37 Australian Human Rights Commission, Submission No 7 to Parliamentary Joint Committee on Intelligence and Security, *Review of AFP Powers* (10 September 2020) 9.
- 38 *Immigration Act 2016* (UK) sch 10 item 1(2).
- 39 *Immigration Act 2016* (UK) sch 10 items (2) and 3(1).
- 40 *Immigration Act 2009* (NZ) s 309(1)(b).
- 41 *Immigration Act 2009* (NZ) s 315(1).
- 42 *Immigration Act 2009* (NZ) s 315(3).
- 43 *Immigration Act 2009* (NZ) s 315(6).
- 44 *Immigration Act 2009* (NZ) s 315(5).
- 45 *Immigration and Refugee Protection Act*, SC 2001, c.27, s36(1)(a).
- 46 *Immigration and Refugee Protection Act*, SC 2001, c.27, ss 55(1)-(2).
- 47 *Immigration and Refugee Protection Act*, SC 2001, c.27, s 56(1).
- 48 *Immigration and Refugee Protection Act*, SC 2001, c.27, s 58(1)(a).
- 49 Immigration and Refugee Board of Canada, *Guidelines Issued by the Chairperson, Pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act* (Web page, 1 April 2009) <<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx#s22>>.
- 50 See, e.g., ss 56(1) and 58(3) of the *Immigration and Refugee Protection Act*, SC 2001, c.27.
- 51 *Immigration and Refugee Protection Act*, SC 2001, c.27, s 34(1).
- 52 *Immigration and Refugee Protection Act*, SC 2001, c.27, s 56(3).
- 53 *Immigration and Refugee Protection Regulations*, SOR/2002-227, reg 250.1.
- 54 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 18 February 2014. The guidelines are incorporated into the Department's Procedures Advice Manual.
- 55 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the Department's Procedures Advice Manual.
- 56 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 21 October 2017. The guidelines are incorporated into the Department's Procedures Advice Manual.
- 57 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s 345, s 351, s 417 and s 501)*, 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the Department's Procedures Advice Manual.
- 58 *DNCW v Minister for Immigration and Citizenship* [2010] AATA 610 [69].
- 59 *DNCW v Minister for Immigration and Citizenship* [2010] AATA 610 [33].
- 60 Department of Immigration and Border Protection, *Submission to Assistant Minister for Immigration and Border Protection re: s501CA(4) of the Migration Act 1958 consideration of revocation of a decision made by a delegate on 25 May 2015 to cancel his visa under s 501(3A)*, 10 November 2016.
- 61 *DEY16 v Minister for Immigration and Border Protection* [2016] FCA 1261.
- 62 *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96.
- 63 *Confidential v Minister for Immigration and Border Protection* [2013] AATA 818 [21].
- 64 *Confidential v Minister for Immigration and Border Protection* [2013] AATA 818 [32].
- 65 *Confidential v Minister for Immigration and Border Protection* [2013] AATA 818 [53].

- 66 Australian Human Rights Commission, *Sri Lankan refugees v Commonwealth of Australia* [2012] AusHRC 56.
- 67 Human Rights and Equal Opportunity Commission, *Report of a complaint by six asylum seekers concerning their transfer from immigration detention centres to State prisons and their detention in those prisons* (Report No. 21, 2002).
- 68 Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2<sup>nd</sup> ed, 2005) 518.
- 69 See, e.g., Human Rights Committee, *General Comment No. 16: Article 17 The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32<sup>nd</sup> sess, UN DOC HRI/GEN/1/Rev.9 (Vol.1) (8 April 1988) [5]; Human Rights Committee, *General Comment No 19: Article 23 Protection of the Family, the Right to Marriage and Equality of the Spouses* (27 July 1990) 39<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.1 (27 July 1990) [2].
- 70 Human Rights Committee, *General Comment No 19, Article 23 Protection of the Family, the Right to Marriage and Equality of the Spouses* (27 July 1990) [2].
- 71 Sarah Joseph, Jennifer Shultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2003) 589.
- 72 Human Rights Committee, *Views: Communication No 417/1990*, 51<sup>st</sup> sess, UN Doc CCPR/C/51/D/417/1990 (27 July 1994) (*Balaguer Santacana v Spain*).
- 73 Ibid [10.2]. See also *AS v Canada*, Communication No 68/1980, 12<sup>th</sup> sess, UN Doc CCPR/C/OP/1 at 27 (HRC 1981), where the UN Human Rights Committee did not accept that the author and her adopted daughter met the definition of 'family' because they had not lived together as a family except for a period of 2 years approximately 17 years prior.
- 74 Human Rights Committee, *Views: Communication No 35/1978*, 12<sup>th</sup> sess, UN Doc CCPR/C/12/D/35/1978 (9 April 1981) (*Shirin Aumeeruddy-Cziffra and 19 other Mauritian Women v Mauritius*) [9.2(b)].
- 75 Human Rights and Equal Opportunity Commission, *Nguyen and Okoye v Commonwealth (Department of Immigration and Multicultural Affairs) and GSL (Australia) Pty Ltd* [2007] AusHRC 39 [95]-[97].
- 76 Human Rights Committee, *General Comment No. 16, Article 17 The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32<sup>nd</sup> sess, UN DOC HRI/GEN/1/Rev.9 (Vol.1) (8 April 1988) [4].
- 77 Human Rights Committee: *Views: Communication No 488/1992*, 50<sup>th</sup> sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) (*Toonen v Australia*) [8.3].
- 78 Human Rights Committee, *General Comment No. 16: Article 17 The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32<sup>nd</sup> sess, UN Doc HRI/GEN/1/Rev.9 (Vol.1) (8 April 1988) [5]; Human Rights Committee, *General Comment No. 19: Article 23 Protection of the Family, the Right to Marriage and Equality of the Spouses*, 39<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.1 (27 July 1990) [2]; Human Rights Committee, *Views: Communication No. 201/1985*, 33<sup>rd</sup> sess, UN Doc CCPR/C/33/D/201/1985 (27 July 1988) (*Hendriks v the Netherlands*) 24 [10.3].
- 79 Human Rights Committee, *Views: Communication No. 68/1980*, 12<sup>th</sup> sess, UN Doc CCPR/C/OP/1 (31 March 1981) (*A.S. v Canada*). See also, Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2013), 669-670.
- 80 Human Rights Committee, *Views: Communication No 35/1978*, 12<sup>th</sup> sess, UN Doc CCPR/C/12/D/35/1978 (9 April 1981) (*Shirin Aumeeruddy-Cziffra and 19 other Mauritian Women v Mauritius*) [9.2].
- 81 Human Rights Committee, *Communication No. 930/2000*, UN Doc CCPR/C/72/D/930/2000 (26 July 2001) (*Winata and Li v Australia*).
- 82 Human Rights Committee, *Communication No. 930/2000*, UN Doc CCPR/C/72/D/930/2000 (26 July 2001) (*Winata and Li v Australia*) [7.2].
- 83 Human Rights Committee, *Communication No. 930/2000*, UN Doc CCPR/C/72/D/930/2000 (26 July 2001) (*Winata and Li v Australia*) [7.3].
- 84 Human Rights Committee, *Communication No. 893/1999*, 77<sup>th</sup> sess, UN Doc CCPR/C/77/D/893/1999 (11 April 2003) (*Mohammed Sahid v New Zealand*) [8.2].
- 85 Sarah Joseph, Jennifer Shultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2003) 684.
- 86 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, art 8 (entered into force 3 September 1953).
- 87 *Rodrigues Da Silva & Hoogkamer v the Netherlands* (European Court of Human Rights, Former Second Section, Application No. 50435/99, 31 January 2006) [39].
- 88 *Rodrigues Da Silva & Hoogkamer v the Netherlands* (European Court of Human Rights, Former Second Section, Application No. 50435/99, 31 January 2006) [39].
- 89 See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Engels Publishers, 2<sup>nd</sup> ed, 2005) 518, on the negative/positive distinction between articles 17 and 23. However, he concedes that the distinction is 'difficult to maintain in practice'.
- 90 Sarah Joseph, Jennifer Shultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2003) 666.
- 91 Human Rights Committee, *General comment No. 21, Article 10 (Humane treatment of persons deprived of their liberty)* (10 April 1992) [3].
- 92 Human Rights Committee, *Communication No 629/1993*, UN Doc CCPR/C/60/D/639/1995 (28 July 1997) (*Walker and Richards v Jamaica*); Human Rights Committee, *Communication No 845/1998*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/845/1998 (26 March 2002) (*Kennedy v Trinidad and Tobago*); Human Rights Committee, *Communication No 684/1996*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/684/1996 (2 April 2002) (*R.S. v Trinidad and Tobago*).
- 93 *Taunoa v Attorney-General* [2007] NZSC 70.
- 94 *Taunoa v Attorney-General* [2007] NZSC 70 [79].

- 95 The Standard Minimum Rules were approved by the UN Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. They were adopted by the UN General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1. At <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>>.
- 96 The Body of Principles were adopted by the UN General Assembly in resolution 43/173 of 9 December 1988 Annex: UN Doc A/43/49 (1988). At <<https://digitallibrary.un.org/record/53865?ln=en>>.
- 97 Human Rights Committee, *General Comment 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (10 April 1992) [5].
- 98 Human Rights Committee, *Communication No. 458/1991*, 51<sup>st</sup> sess, UN Doc CCPR/C/51/458/1991 (21 July 1994) ('*Mukong v Cameroon*') [9.3]; Human Rights Committee, *Communication No. 632/1995*, 60<sup>th</sup> sess, UN Doc CCPR/C/60/D/632/1995 (28 July 1997) ('*Potter v New Zealand*') [6.3]. See also, Human Rights Committee, *Concluding Observations on the United States*, UN Doc A/50/40 (3 October 1995) [285] [299].
- 99 Human Rights Committee, *Communication No. 868/1999*, 79<sup>th</sup> sess, UN Doc CCPR/C/79/D/868/1999 (30 October 2003) ('*Wilson v Philippines*') [7.3].
- 100 Human Rights Committee, *Communication No. 1020/2001*, 78<sup>th</sup> sess, UN Doc CCPR/C/78/D/1020/2001 (7 August 2003) ('*Cabal and Bertran v Australia*') [7.2].
- 101 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 102 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 103 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
- 104 *Peacock v The Commonwealth* (2000) 104 FCR 464 [483] (Wilcox J).
- 105 *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217 [239] (Lockhart J).
- 106 For example, see Australian Human Rights Commission, *Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth of Australia (DIBP)* [2016] AusHRC 110 [196]-[205].

## Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street  
SYDNEY NSW 2000

GPO Box 5218  
SYDNEY NSW 2001  
Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419  
General enquiries and publications: 1300 369 711  
TTY: 1800 620 241  
Fax: (02) 9284 9611

Website: [www.humanrights.gov.au](http://www.humanrights.gov.au)

For detailed and up to date information about the Australian Human Rights Commission visit our website at: [www.humanrights.gov.au](http://www.humanrights.gov.au)

To order more publications from the Australian Human Rights Commission download a Publication Order Form at: <https://www.humanrights.gov.au/our-work/legal/projects/human-rights-reports>  
or call: (02) 9284 9600 fax: (02) 9284 9611  
or email: [publications@humanrights.gov.au](mailto:publications@humanrights.gov.au)

