



Australian
Human Rights
Commission

**Six persons with adverse
security assessments detained
in immigration detention, and
family members affected by their
detention v Commonwealth of
Australia (DIBP)**

[2016] AusHRC 107

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Report into arbitrary detention and
arbitrary interference with family life

Australian Human Rights Commission 2016

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**Australian
Human Rights
Commission**

April 2016

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaints made by or on behalf of ten people against the Commonwealth alleging arbitrary detention and interference with family life.

I have found that the following acts of the Commonwealth resulted in arbitrary detention contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR):

- (a) the failure by the Department of Immigration and Border Protection (the department) to ask the Australian Security Intelligence Organisation to assess relevant complaints' individual suitability for community based detention while awaiting their security clearance (either at all, or for a lengthy period without reasonable explanation); and
- (b) the failure to assess on an individual basis whether the circumstances of each individual relevant complainant indicated that they could be placed in less restrictive forms of detention.

I have found that these two acts of the Commonwealth were also inconsistent with the rights of Mr NJ, Ms NF, Master NG, Master NH and Master NI under articles 17(1) and 23(1) of the ICCPR.

The department and the Hon. Peter Dutton MP, Minister for Immigration and Border Protection, provided written responses to my findings and recommendations on 8 March 2016 and 26 February 2016 respectively. I have set out the responses of the department and the Minister in their entirety in part 9 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Gillian Triggs". The signature is written in a cursive style with a long horizontal flourish at the end.

Gillian Triggs
President
Australian Human Rights Commission

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (the Commission) and the reasons for those findings following an inquiry into complaints made by or on behalf of ten people against the Commonwealth of Australia (Department of Immigration and Border Protection) (the department) alleging breaches of their human rights. The complaints arise out of the detention in immigration detention facilities of:
 - six adults who have been assessed to be refugees and who received adverse security assessments;
 - two children of one of these refugees, who have also been assessed to be refugees, but were detained with their mother; and
 - a third child of this adult refugee, who was born in immigration detention.
2. It is complained that the complainants' detention was and/or is arbitrary and therefore contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).¹
3. A number of the complainants have now been released from detention. Their complaints therefore relate to the period prior to their release.
4. In addition, a complaint was made by the husband of the mother of the children referred to in paragraph [1] above. He was not detained in immigration detention, but complains on his own behalf and of that of his family members that the detention of his wife and children amounted to an arbitrary interference with their family life, contrary to articles 17(1) and 23(1) of the ICCPR.
5. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
6. All of the persons described above appear to be 'persons aggrieved' for the purposes of the AHRC Act.² For convenience, in the remainder of this document I refer to each of these persons as a 'complainant', whether they have themselves lodged a complaint, or a complaint has been made on their behalf.
7. In order to protect the privacy and human rights of the complainants, I have made directions that their identities not be disclosed in accordance with s 14(2) of the AHRC Act. For the purposes of this report each complainant has been given a pseudonym beginning with 'N'.
8. The situation of the present complainants who have been detained in immigration detention facilities is substantially similar to the situation of the complainants who were the subject of the Commission's reports *Sri Lankan refugees v Commonwealth of Australia (Department of Immigration & Citizenship)* [2012] AusHRC 56 and *Immigration detainees with adverse security assessments v Commonwealth of Australia (Department of Immigration and Citizenship)* [2013] AusHRC 64. In the course of this inquiry I have relied on relevant information contained in those reports. This report draws on the findings contained in those two reports and refers to discussions of legal principle contained therein. Where indicated, I have not repeated those discussions in full in this report.

9. As a result of this inquiry, I find that the following two acts of the Commonwealth were inconsistent with or contrary to the rights which are recognised under article 9(1) of the ICCPR of those complainants who have been detained in immigration detention:
- (a) the failure by the department to ask the Australian Security Intelligence Organisation (ASIO) to assess their individual suitability for community based detention while awaiting their security clearance (either at all, or for a lengthy period without reasonable explanation)
 - (b) the failure to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention.
10. I find that these two acts of the Commonwealth were also inconsistent with the rights of Mr NJ, Ms NF, Master NG, Master NH and Master NI under articles 17(1) and 23(1) of the ICCPR.

2 Background

11. The individuals in the table below have made complaints or had complaints made on their behalf in writing to the Commission. The table sets out, where relevant, the date on which each of them was detained, the date that they were found to be a refugee, and the date that the department received an adverse security assessment in respect of them from ASIO.

Complainant	Arrived in Australia	Refugee finding	ASA finding
Mr NA	28 June 2009	7 September 2009 (although not notified until 13 December 2010)	29 November 2010
Mr NB	7 February 2010	2 December 2010	11 July 2012
Mr NC	20 March 2010	9 July 2010	4 August 2011
Ms ND	8 May 2010	12 January 2011	30 May 2012
Mr NE	20 July 2010	12 January 2011	24 November 2011
Ms NF	8 September 2010	12 September 2011	24 April 2012

Complainant	Arrived in Australia	Refugee finding	ASA finding
Master NG	8 September 2010	12 September 2011	N/A
Master NH	8 September 2010	12 September 2011	N/A
Master NI	N/A	N/A	N/A
Mr NJ	N/A	N/A	N/A

12. Messrs NA, NB and NC, Mses ND and NF and Masters NG and NH are originally from Sri Lanka. Mr NE is from Afghanistan. All of these complainants arrived in Australia at Christmas Island by boat and were detained on behalf of the Commonwealth under s 189(3) of the *Migration Act 1958* (Cth) (Migration Act) immediately upon their arrival. All were subsequently transferred to immigration detention facilities on the Australian mainland, and subsequently detained under s 189(1) of the Migration Act. The Commonwealth has determined all of these complainants are refugees within the meaning of the *1951 Convention Relating to the Status of Refugees* and the *1967 Protocol relating to the Status of Refugees*.
13. Messrs NA, NB, NC and NE, and Mses ND and NF were all referred to ASIO for security assessments, in accordance with PIC 4002 in the *Migration Regulations 1994* (PIC 4002 was subsequently found to be invalid by the High Court, after these complainants had received security assessments).³ As discussed below, a number of these complainants have now received revised security assessments from ASIO, and been released from closed immigration detention.
14. Masters NG and NH are minors. They are the children of Ms NF and travelled to Australia with her. They did not receive adverse security assessments. However, as they were minors, they were held in immigration detention facilities with their mother. On 20 June 2013, they were granted protection visas. On 28 January 2014, they left immigration detention to live in the community with Mr NJ, their step-father.
15. Mr NJ is a permanent resident of Australia. He is married to Ms NF. They married while she was resident in community detention (this period of community detention is discussed further below). At the time she was taken back into closed detention, she was pregnant. She subsequently gave birth to their son, Master NI. Master NI is an Australian citizen, but lived in immigration detention facilities with his mother from the time of his birth in January 2013 until the release of Ms NF from closed detention in November 2015 (more detail about her release is given below).

2.1 Residence in community prior to receipt of adverse security assessments

16. Prior to receiving adverse security assessments, Mr NB, Mr NE, Ms ND and Ms NF were all allowed to live in the community for limited periods. Masters NG and NH were also allowed to live in the community with their mother during that time.
17. Mr NE was granted an unconditional protection visa. Following the receipt of his adverse security assessment, the Minister decided to cancel his visa on character grounds. Mr NB was granted a bridging visa under s 195A of the Migration Act. Following the receipt of his adverse security assessment, the Minister decided to cancel this visa. Ms ND, Ms NF and Ms NF's children were placed in the community in community detention after the Minister exercised his discretion to make residence determinations under s 197AB of the Migration Act. Following the receipt of Ms ND and Ms NF's adverse security assessments, the Minister decided to revoke those residence determinations under s 197AD of the Migration Act.
18. There is nothing in the material that has been provided to me by the department that indicates that these complainants manifested any risk to the community while resident outside of immigration detention facilities.
19. A summary of these complainants' residence in the community after their arrival in Australia, but prior to their re-detention following the receipt of an adverse security assessment, is given in the table below:

Complainant	Date released from detention in immigration detention facility	Reason released from immigration detention facility	Date redetained
Mr NE	6 April 2011	Protection visa	30 November 2011
Mr NB	6 March 2012	Bridging visa	24 July 2012
Ms ND	8 March 2012	Residence determination (community detention)	6 June 2012
Ms NF	8 April 2011	Residence determination (community detention)	10 May 2012

Complainant	Date released from detention in immigration detention facility	Reason released from immigration detention facility	Date redetained
Master NG	8 April 2011	Residence determination (community detention)	10 May 2012
Master NH	8 April 2011	Residence determination (community detention)	10 May 2012

20. As noted above, Masters NG and NH were granted protection visas on 20 June 2013. On 28 January 2014, they left immigration detention to live with Mr NJ in the community.

2.2 Subsequent receipt of revised security assessments by some complainants, and release from detention

21. On 21 October 2015, the department advised me that a number of the complainants have now received revised security assessments from ASIO, and several of them have been released from detention.
- a. On 24 March 2015, ASIO issued a revised non-prejudicial ('clear') security assessment with respect to Mr NC. The Minister subsequently exercised his power under s 195A of the Migration Act and granted Mr NC a short term humanitarian stay visa and a bridging visa. On 1 July 2015 he was released from immigration detention. At that time, he had been detained for approximately five years and three months.
 - b. On 4 February 2015, ASIO issued a revised, non-prejudicial, security assessment with respect to Mr NA. The Minister subsequently exercised his power under s 195A of the Migration Act and granted Mr NA a short term humanitarian stay visa and a bridging visa. On 2 April 2015 he was released from immigration detention. At that time, he had been detained for approximately five years and nine months.
 - c. On 2 July 2015, ASIO issued a revised, non-prejudicial, security assessment with respect to Ms ND. The Minister subsequently exercised his power under s 195A of the Migration Act and granted her a short term humanitarian stay visa and a bridging visa. On 25 August 2015, she was released from immigration detention. At that time, she had been detained for approximately three years and two months since her re-detention in June 2012. As noted in the table above, she had also spent a period of three months in detention prior to her initial release into community detention.

- d. On 25 September 2015, ASIO issued a revised ‘qualified’ security assessment with respect to Ms NF. The Minister subsequently exercised his discretionary powers, and Ms NF was released from closed detention on 12 November 2015. I understand Master NI also left closed detention at that time. Ms NF had then spent three and a half years in closed detention since her re-detention in May 2012, as well as 7 months prior to her initial release into community detention. Master NI had spent his whole life, almost two years, in closed detention.
 - e. The department has further advised that on 4 August 2015, the Minister exercised his discretion under s 46A of the Migration Act to allow each of Mr NA, Mr NB, Ms ND, and Ms NF to lodge an application for a Temporary Protection visa or a Safe Haven Enterprise visa. I understand from the department’s submission that the Minister had not granted any such visas as at 21 October 2015.
22. In summary, as at 21 October 2015, Mr NB and Mr NE remained held in closed detention. The department has provided no information relating to the potential release of Mr NE.

3 Legislative framework

3.1 Functions of the Commission

23. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly s 11(1)(f) gives the Commission the following functions:
- to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
24. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
25. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

3.2 What is a ‘human right’?

26. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.⁴ The following articles of the ICCPR are relevant to the acts and practices the subject of the present inquiry.

27. Article 9(1) of the ICCPR 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.

28. 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.

29. 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.

3.3 What is an 'act' or 'practice'?

30. 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.

31. 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.

32. 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;⁵ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

4 The complaints

33. I have given consideration to the following acts of the Commonwealth in relation to each of the complainants:

Act 1: The failure by the department to ask ASIO in a timely fashion to assess their individual suitability for community based detention while awaiting their security clearance.

Act 2: The failure to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention.

34. Each of these acts is considered in the context of article 9 of the ICCPR.

35. With respect to Mr NJ, Ms NF and her three children, I have also considered these acts in the context of articles 17(1) and 23(1) of the ICCPR.

36. For the reasons set out below, my findings are as follows:

- Act 1 was inconsistent with or contrary to the rights of the following complainants under article 9(1) of the ICCPR:
 - Mr NA
 - Mr NB
 - Mr NC
 - Ms ND
 - Mr NE
 - Ms NF
 - Master NG
 - Master NH
- Act 2 was inconsistent with or contrary to the rights of the following complainants under article 9(1) of the ICCPR:
 - Mr NA
 - Mr NB
 - Mr NC
 - Ms ND
 - Mr NE
 - Ms NF
 - Master NG
 - Master NH
 - Master NI
- Act 2 was inconsistent with or contrary to the rights of the following complainants under articles 17(1) and 23(1) of the ICCPR:
 - Mr NJ
 - Ms NF
 - Master NG
 - Master NH
 - Master NI

5 Arbitrary detention

37. 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;⁶
- (b) lawful detention may become arbitrary when a person’s deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth’s legitimate aim of ensuring the effective operation of Australia’s migration system;⁷
- (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;⁸ and

- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁹
- (e) in the context of immigration, to avoid the conclusion that prolonged detention is arbitrary, a State party must demonstrate that there is not a less invasive way to achieve its immigration policies.

- 38. The UN Human Rights Committee has held that Australia's policy of detaining asylum seekers with adverse security assessments in immigration detention facilities on an indefinite basis without demonstrating on an individual basis that that detention is justified is in violation of article 9(1) of the ICCPR.¹⁰
- 39. A more detailed discussion of this jurisprudence can be found in previous Commission reports.¹¹

5.1 Act 1: Failure by the department to ask ASIO in a timely manner to assess the individual suitability of the complainants for community based detention while awaiting their security clearance

- 40. The department asked ASIO to provide security assessments in relation to all of the adult complainants. As has been discussed in previous reports, at all relevant times the Commonwealth's practice has been not to grant protection visas to persons assessed to be refugees until they have received a non-prejudicial security assessment from ASIO.¹²
- 41. The security assessment process has been discussed in detail in previous Commission reports.¹³ Relevantly for the purposes of the present inquiry:
 - The department asks ASIO to provide a security assessment for all persons in the position of the complainants who have been subject to detention (that is, asylum seekers who have arrived in Australia by boat, been found to be refugees and who wish to apply for protection visas). These security assessments relate to granting a person a visa that would allow them to reside permanently in Australia (I shall hereinafter refer to these security assessments as 'permanent visa security assessments')
 - ASIO also provides, on the request of the department, security assessments in relation to the Minister exercising his powers to make residence determinations allowing persons in immigration detention to be placed in community detention (under s 197AB of the Migration Act) or to grant bridging visas (under s 195A of the Migration Act). These assessments can frequently be completed within 24 hours. These assessments are referred to in the remainder of this document as 'community detention security assessments'.

42. With respect to two of the complainants, the department only asked ASIO to conduct permanent visa security assessments. The department did not ask ASIO to conduct community detention security assessments. The relevant complainants, and the length of time they had been held in immigration detention at the time the department received their adverse permanent visa security assessments are given below:
- Mr NE (eight months)
 - Mr NA (17 months)
43. As noted above, Mr NE was granted a protection visa after he had been detained for eight months, but prior to the receipt of his adverse permanent visa security assessment. (It is not clear why Mr NE was granted a protection visa in advance of the receipt of a security assessment from ASIO, in what appears to be a departure from the Commonwealth's usual practice). Mr NE was not referred to ASIO for a community detention security assessment during that eight month period.
44. The department submits that these complainants were not referred for community detention security assessments because they only became 'eligible' for consideration for community detention in January 2011, when 'single adult males were identified as a further cohort eligible for inclusion in the expanded CD [community detention] programme.'¹⁴ This 'eligibility' was a matter of government policy, and was not mandated by the Migration Act.
45. For the reasons given in previous reports, I find that the failure of the department to request that ASIO conduct community detention security assessments in relation to the complainants listed above was inconsistent with or contrary to article 9(1) of the ICCPR. A community detention security assessment could have been conducted quickly and might have led to these complainants being held in a less restrictive form of detention.¹⁵
46. Prior to their receiving adverse permanent visa security assessments, the department did ask the Minister to consider exercising his discretionary powers in relation to five of the complainants. In most cases, this led to the relevant complainants being allowed to reside in the community for a period. The relevant complainants and the lengths of their detention at the time ASIO was asked to provide advice about the Minister exercising his discretionary powers under ss 195A and 197AB are given in the table below:

Complainant	Date of arrival in Australia	Date of first referral for CD security assessment	Delay in referral
Ms NF	8 September 2010	4 March 2011	6 months
Master NG*	8 September 2010*	4 March 2011*	6 months*
Master NH*	8 September 2010*	4 March 2011*	6 months*

Complainant	Date of arrival in Australia	Date of first referral for CD security assessment	Delay in referral
Mr NC	20 March 2010	'July 2011'	16 months
Ms ND	8 May 2010	1 April 2011	11 months
Mr NB	7 February 2010	12 January 2012	23 months

(Masters NG and NH were not subject to adverse security assessments but were detained prior to 28 January 2014 as a result of their mother's security assessment status.)

47. In the case of Ms NF and Mr NB, ASIO advised that it had no objections on security grounds to their being allowed to reside in the community. The Minister subsequently exercised his discretionary powers and each of these complainants, (as well as Master NG and Master NH), was allowed to live in the community until they received adverse permanent visa security assessments and were re-detained (as discussed in paragraphs [17]–[20] above).
48. In the case of Ms ND, ASIO initially provided a negative security assessment in relation to placing her in community detention. In January 2012, it advised that it had no objection on security grounds to granting her a temporary bridging visa. She was subsequently released into community detention until she received an adverse permanent visa security assessment and was re-detained (as discussed in paragraphs [17]–[20] above). (It is unclear why ASIO was asked to provide advice in relation to a bridging visa, while the Commonwealth elected to release her into community detention.)
49. In the case of Mr NC, ASIO recommended that the Minister should not exercise his power to place him in community detention.
50. Each of the complainants in the table above was detained for a significant period prior to a community detention security assessment being requested.
51. As discussed above, detention for an extended period without demonstrating on an individual basis that that detention is justified is arbitrary within the meaning of article 9 of the ICCPR. It follows that the very significant delays in referring the complainants for community detention security assessments rendered their detention arbitrary in the relevant sense. I note that in relation to most of these complainants, it appears probable that the delay in referring them to ASIO resulted in them remaining in closed detention facilities when they could have been placed in less restrictive places of detention. However the same reasoning applies to all of the complainants, even though several of them, once their cases were referred to ASIO, ultimately received negative community detention security assessments.

5.2 Act 2: Failure to assess on an individual basis whether the circumstances of each complainant indicated that they could be placed in less restrictive forms of detention

52. As the Commission has discussed in relation to previous inquiries,¹⁶ the Minister at all relevant times had the power to make a residence determination under s 197AB of the Migration Act, which would have allowed the relevant complainants (those at various times held in immigration detention) to be placed in community detention. The Minister also had the power to grant temporary visas under s 195A, or to approve some other less restrictive place (or places) to be a place (or places) of 'immigration detention' under s 5.
53. After negative permanent visa security assessments were received from ASIO, the department did not refer any of the relevant complainants' cases to the Minister for consideration of the exercise of his discretionary powers.
54. However, a negative permanent visa security assessment constitutes an assessment by ASIO that an individual would pose a risk to the community if granted a permanent visa (in the case of each of the complainants, a protection visa). It is not an assessment by ASIO that an individual would pose a risk to the community if placed in community detention.¹⁷
55. Further, the department did not conduct any individualised assessment of whether the risk that each complainant posed to the Australian community could be mitigated in a way that would allow them to reside in the community or some other less restrictive place of detention consistently with national security. Nor did the department ask ASIO to consider whether any risk each complainant posed to the community could be mitigated.
56. It may well be that there were (or, in the case of those complainants who remain in detention, there are) alternatives to prolonged detention in secure facilities which can appropriately address the risk posed by each complainant. These alternative options may include less restricted 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.
57. For the reasons given in reports [2012] AusHRC 56 and [2013] AusHRC 64, I find that in failing to consider whether any risks could be mitigated, the department failed to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention. For the reasons given above, that failure is inconsistent with the rights protected in article 9(1) of the ICCPR.
58. My finding is that the breach identified above arises from a failure adequately to consider less restrictive forms of detention or alternatives to detention taking into account the circumstances of each complainant. The Commission does not express any view as to what the outcome of any such consideration in each particular case would be (or, in the case of the complainants now released from detention, what the outcome would have been).

59. This finding applies to the following complainants:

- Mr NA
- Mr NB
- Mr NC
- Ms ND
- Mr NE
- Ms NF
- Master NG
- Master NH
- Master NI

60. In the case of Ms NF, the failure to consider risk mitigation led to the continued detention of Masters NG and NH until their release on 28 January 2014, and the detention of Master NI from his birth until 12 November 2015.

5.3 Third country resettlement

61. As noted above, a number of the complainants have now been released from immigration detention. At the time of writing, all of the complainants in this matter who are currently held in closed detention have been continuously detained in closed detention for over three and a half years.

62. The department has previously stated that it is exploring options to resettle the complainants in third countries. Where the complainants have provided details of family members in third countries, the department has approached those countries to see if they will resettle the complainants. The department has also made 'cohort approaches' for some complainants to a number of countries. The department has previously indicated that it does not have 'high expectations' that this will lead to resettlement.¹⁸ It appears that a number of the countries approached by the department have already indicated that they will not accept the complainants.

63. Prior to finalising this report, the Commission invited the department to provide an update about its progress in pursuing third country resettlement for the complainants who remain in detention. The Commission asked the department to provide an update about both direct approaches made on the basis of family ties, and its cohort approaches, including details about which countries have been approached and refused resettlement, and from which countries the department is still awaiting a response. The department provided the following response:

The Department thanks the AHRC for the opportunity to provide further updates regarding third country resettlement. As these are bilateral discussions between governments, it is not appropriate for the Department to disclose details of these discussions.¹⁹

64. I note that this response does not explicitly confirm that the department's efforts to pursue third country resettlement are ongoing; or that there are countries that have been approached but not yet given a negative response.

65. Given the length of time that has now elapsed and the response to my most recent requests for information, I find that the prospects of third country resettlement for those complainants who remain in closed detention must now be regarded, at best, as very low.

6 The independent reviewer of security assessments

66. On 16 October 2012, the government announced that it would provide an independent review process in relation to adverse security assessments furnished by ASIO to the department in relation to persons in immigration detention who have been found by the department to be owed protection obligations under international law. The Hon Margaret Stone was appointed as the Independent Reviewer. The role of the independent reviewer is described in Commission report [2013] AHRC 64.²⁰
67. The department has previously advised in relation to persons held in immigration detention with adverse security assessments that ‘consistent with previous Government policy, while this review process is undertaken the Minister is not minded to exercise his non-compellable powers under section 46, section 195A or section 197AB’.²¹
68. ASIO has now issued revised security assessments in relation to the majority of complainants. However, it has not done so with respect to Mr NB or Mr NE. The department has advised that these complainants have had their adverse security assessments upheld by the independent reviewer. The independent reviewer will now continue to review their security assessments every 12 months.
69. In light of the fact that the independent reviewer has now upheld the adverse security assessments of the complainants who remain in closed detention, the Commission invited the department to advise whether the Minister is still ‘not minded’ to exercise his discretionary powers while the ‘review process is undertaken.’ The department did not respond to this invitation.
70. The Commission also invited the department to advise what avenues remain open to the complainants being released from closed immigration detention.
71. The department has advised that the Minister has ‘lifted the bar’ under s 46A of the Migration Act with respect to Mr NB. However it has provided no information with respect to Mr NE.

7 Articles 17(1) and 23(1) of the ICCPR – complaint by Mr NJ

7.1 The complaint

72. Mr NJ has complained on behalf of himself, his wife, two stepsons and son that the continued immigration detention of his family and visiting restrictions within the immigration detention facility constitutes interference with their family contrary to articles 17(1) and 23(1).
73. As noted above, Mr NJ and Ms NF married while she was resident in community detention. At that time, Mr NJ became stepfather to Masters NG and NH. The complainants lived together as a family from 23 March 2012 until 10 May 2012. At that time, they were resident in Victoria.

74. On 10 May 2012, Ms NF and Masters NG and NH were re-detained. They were subsequently transferred to Villawood detention centre in suburban Sydney. Mr NJ relocated to Sydney to be closer to his family.
75. Master NI was born on 15 January 2013.
76. The residence of Ms NF and, for various periods, her children in immigration detention facilities prior to Ms NF's release on 12 November 2015 necessarily had an effect on their relationships with Mr NJ. He has only been able to visit them at limited times. For extended periods of time he has only been able to see them in the visiting area at the detention centre.

7.2 Articles 17(1) and 23(1)

77. 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.

78. 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.

79. Professor Manfred Nowak states that 'since life together is an essential criterion for the existence of a family, members of a family are entitled to a stronger right to live together than other persons.'²²
80. For the reasons set out in Commission report [2008] AusHRC 39,²³ 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 that breach is in addition to (or in conjunction with) a breach of article 23(1).

(a) 'Family'

81. The UNHRC has confirmed on a number of occasions that 'family' is to be interpreted broadly.²⁴ 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 23.²⁵ However, more than a formal familial relationship (ie father-son) 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.²⁶ For example, in *Balaguer Santacana v Spain*,²⁷ after acknowledging that the term 'family' must be interpreted broadly, the UNHRC 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 relationship, etc.²⁸

82. I am satisfied that these five complainants are a family for the purposes of articles 17(1) and 23(1). The relationship between stepfather and step-children clearly falls within the class of relationships protected by that term, provided that the required degree of family life or connection is shown.

83. The ‘life together’ of these complainants has been limited by the detention of Ms NF and the Masters NG, NH and NI. However, I find that that the complainants’ relationships have the required degree of regularity and intensity to constitute a family both for the purposes of the ICCPR and the ordinary meaning of that term. The strength of the family bonds is evidenced by the following:

- Mr NJ lived together with Ms NF and his two step-sons as a family between 23 March 2012 and 10 May 2012. Mr NJ and Ms NF were married on 7 April 2012.
- When Ms NF and her sons were redetained and relocated to Sydney, Mr NJ relocated to Sydney.
- Master NI is the biological child of Mr NJ and Ms NF. This founds a strong inference of the existence of family.²⁹
- Between 2012 and Ms NF’s release in November 2015, Mr NJ frequently visited his wife and the children in immigration detention within the limitations placed upon him by the detention facility, and has consistently sought greater access to them.
- Since their release from immigration detention, Masters NG and NH have resided with Mr NJ.

(b) ‘Interference’

84. There is no clear guidance in the jurisprudence of the UNHRC 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 UNHRC appeared to accept that a ‘considerable inconvenience’ could suffice.³⁰

85. Interpreting the word ‘interference’ using its ordinary meaning, as explained in Commission report [2008] Aushrc 39,³¹ I am satisfied that significant interference with the family unit is demonstrated by the simple fact that the members of the family were physically separated by the placement of Ms NF and the children in immigration detention. Mr NJ was forced to reside separately from Ms NF and all the children until 28 January 2014. After that date, Mr NJ and Masters NG and NH were separated from Ms NF and Master NI until 12 November 2015.

86. The Commission acknowledges that the department took steps to increase the amount of contact between the family members. In January 2015, the department advised that Ms NF was then allowed to visit the family home on three days each week: on Sundays between 12 pm and 5 pm, and on Tuesdays and Thursdays between 3 pm and 8 pm. During school holidays, Masters NG and NH were allowed to stay with their mother between 8 am and 6 pm. They were also approved to stay with her in the detention centre as ‘on-site visitors’ on weekends. While these arrangements were clearly an improvement, I find that they did not have the result that there was not interference in the family lives of the complainants.

87. (As noted earlier in this report, on 12 November 2015, Ms NF and Master NI were released from closed immigration detention. The interference with the family life of her, her children, and her husband as discussed in these reasons therefore ceased at that date.)

(c) 'Arbitrary'

88. In its General Comment on article 17, the UN Human Rights 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.³²
89. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness.³³ In relation to the meaning of reasonableness, the UNHRC stated in *Toonen v Australia*:³⁴
- 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.
90. Whilst the *Toonen* case concerned a breach of article 17(1) in relation to the right to privacy, these comments would apply equally to an arbitrary interference with the family.
91. In this case, the interference with the family and family life of the complainants was the direct consequence of the detention, at various times, of Ms NF and Masters NG, NH and NI. For the reasons given above, I have found that that detention was arbitrary for the purposes of article 9(1) of the ICCPR. It follows that I find that the significant interference with family and family life has also not been shown to be necessary, and is consequently arbitrary for the purposes of article 17(1).
92. For these reasons, I find that the detention of Ms NF and Masters NG, NH and NI interfered with the family and family life of those complainants and Mr NJ, contrary to articles 17(1) and 23(1) of the ICCPR.

8 Conclusions and Recommendations

8.1 Conclusions

93. I find that the following acts amount to a breach of article 9(1) of the ICCPR:
- the failure by the department to ask ASIO to assess the complainants' individual suitability for community-based detention while awaiting their security clearance (either at all, or for an extended period without reasonable explanation)
 - the failure to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention.
94. The failure to take these steps raises the real possibility that each of the complainants was either detained unnecessarily or detained in a more restrictive way than their circumstances required. The detention of the complainants in these circumstances was arbitrary.
95. I also find that these failures were inconsistent with the rights of Ms NF, Mr NJ and Masters NG, NH and NI recognised in articles 17(1) and 23(1) of the ICCPR.

96. 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.³⁵ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.³⁶

8.2 Recommendation to the Minister

97. I have found that the detention of the complainants (with the exception of Mr NJ, who was not detained) was arbitrary. That was in part because the Migration Act bestows discretionary powers on the Minister which would have enabled him to allow the complainants to reside in the community, either on a bridging visa or in community detention. The complainants' cases were not referred to the Minister for him to consider exercising these powers (either at all, or for extended periods) as a result of the government's policy that individuals who have been assessed by ASIO to be directly or indirectly a risk to security should remain in held detention, rather than the community, until such time as resettlement in a third country or removal is practicable.³⁷
98. This policy is currently embodied in a Ministerial Instruction issued to the department, which state that in the absence of exceptional reasons, persons should not be referred to the Minister for consideration for community detention:
- where ASIO has issued an adverse security assessment which states that "ASIO assesses [the person] to be directly or indirectly a risk to security, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979".³⁸
99. In these circumstances, I consider it is appropriate to make a recommendation to the Minister in the following terms.

Recommendation 1

The Minister for Immigration and Border Protection indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention because the department has received an adverse security assessment in relation to that person from ASIO, unless the department has taken appropriate steps to determine whether any risks the individual might pose could be mitigated (for instance, through the imposition of appropriate conditions).

8.3 Recommendations to the department

100. As noted above, on the most recent advice from the department, Mr NB and Mr NE remained detained in immigration detention facilities.
101. The department has also indicated that the Minister has exercised his discretion under s 46A to allow Ms NF and Mr NB to apply for a Temporary Protection visa or a Safe Haven Enterprise visa. However, there is no guarantee that the Minister will subsequently decide to grant these visas. In particular, in the case of Mr NB, in the absence of a revised security assessment it is not clear that the Minister would decide to grant a substantive visa.

102. In these circumstances, I consider it is appropriate to make recommendations in relation to Mr NB and Mr NE in the same terms as those I made in Commission report [2013] AusHRC 64, for the reasons given in that report.

Recommendation 2

The department refer each of the complainants who remain held in closed detention to ASIO and request that ASIO provide a security assessment pursuant to s 37(1) of the ASIO Act relevant to the following prescribed administrative actions:

- (a) granting the complainant a temporary visa and imposing additional conditions necessary to deal with any identified risk to security, for example, a requirement to reside at a specified location, curfews, travel restrictions, reporting requirements or sureties;
- (b) making a residence determination under s 197AB of the Migration Act in favour of the complainant;
- (c) making a residence determination in favour of the complainant, if necessary subject to special conditions to ameliorate any identified risk to security, for example, curfews, travel restrictions, reporting requirements or sureties.

Recommendation 3

To the extent that the security assessment carried out in Recommendation 2 would result in an adverse security assessment, the department ask ASIO to advise it of any measures that could be taken to allow the complainants to be placed in a less restrictive form of detention consistently with the requirements of national security.

Recommendation 4

The department seek advice from ASIO of the kind identified in Recommendations 2 and 3 in respect of each person held in immigration detention who has received an adverse security assessment from ASIO.

Recommendation 5

As the department receives advice sought from ASIO in relation to Recommendations 2, 3 and 4, the department refer the cases of each relevant person to the Minister for consideration of the exercise of appropriate public interest powers. The submissions accompanying the referrals should include details of how any potential risk identified by ASIO can be mitigated.

Recommendation 6

The Commonwealth continue actively to pursue alternatives to detention, including the prospect of third country resettlement, for each of the complainants who remain in immigration detention and for other people in immigration detention who are facing the prospect of indefinite detention. The Commonwealth inform each of these individuals on a regular basis of the steps taken to secure alternatives to detention and the Commonwealth's assessment of the prospects of success of these steps.

9 The Minister's and department's responses

103. On 17 December 2015 I provided a notice to the Minister for Immigration and Border Protection, the Hon. Peter Dutton MP, and the department under s 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to the complaints dealt with in this report.
104. By letter dated 26 February 2016 the Minister provided the following response to Recommendation 1:
- I do not accept this recommendation.
- It is Government policy that individuals who have been assessed to be directly or indirectly a risk to Australia's security will remain in held immigration detention until such time that a durable solution for individuals with adverse security assessments is found that is consistent with Australia's international obligations.
- Given the serious nature of the assessment by ASIO, and in light of Government policy, I am not minded to exercise my Ministerial intervention powers in respect of individuals with adverse security assessments.
105. By letter dated 8 March 2016 the department provided the following response to my findings:

Response to finding 1

The Department notes the finding of the AHRC.

As per the response to the AHRC's preliminary views, the Department did request that ASIO assess the individual suitability for community detention (CD) for four of the complainants (Ms ND, Ms NF, Mr NB and Mr NC). In three of the cases (Ms ND, Ms NF and Mr NB), ASIO advised they had no objections on security grounds to the grant of a Bridging E visa or placement in CD. In the case of Mr NC, advice was received from ASIO which recommended that the Minister should not exercise his power to place Mr NC in CD. Advice was sought from ASIO in relation to the complainants between March 2011 and February 2012.

Mr NE was not referred to ASIO for an assessment of his suitability for CD as he was not eligible at the time for CD. From January 2011, under Government policy, only illegal Maritime Arrival (IMA) single adult males with particular vulnerabilities were considered for a CD placement and Mr NE was not identified as part of this group. Mr NE was granted a permanent protection visa within four months of the expansion of the CD programme.

In January 2011, the community based detention programme was expanded for vulnerable single adult IMA males. Where no individual vulnerabilities were identified, the person was not referred for a section 197AB guidelines assessment.

In addition, Mr NA was the subject of an adverse security assessment prior to the expansion of the CD programme in January 2011. Mr NA was referred by his case manager for assessment against the Minister's section 197AB guidelines for community detention after receipt of the adverse security assessment. In accordance with Government policy, people who have been assessed to be directly or indirectly a risk to Australia's security will remain in held immigration detention until such time that a durable solution for individuals with adverse security assessments is found and that is consistent with Australian international obligations.

The Department submits that it has not breached article 9(1) of the ICCPR.

Response to finding 2

The Department notes the finding of the AHRC.

The Department considers less restrictive detention placements for each individual in line with Government policy. Under Government policy, individuals who have been assessed to be directly or indirectly a risk to Australia's security will remain in held immigration detention until such time that a durable solution for individuals with adverse security assessments is found that is consistent with Australia's international obligations.

As per the Department's response to the AHRC's preliminary views and to finding 1 above, the individual circumstances of each complainant has been assessed at various times by Department and/or ASIO to assist in determining their suitability for referral to the Minister to exercise his non-delegable powers under section 195A and 197AB of the Act with the view of potentially placing the complainants in less restrictive forms of detention.

The section 197AB guidelines signed by the then Minister on 30 May 2013, provide that cases where ASIO has issued an adverse security assessment which states that "ASIO assesses [the person] to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*" are generally not to be referred for the Minister's consideration under section 197AB.

As at 24 February 2016, five (Mr NC, Mr NA, Ms ND, Ms NF and Mr NB) of the six individuals had been released from immigration detention following the issuance of a qualified or non-prejudicial security assessment by ASIO, and the Minister subsequently intervened under section 195A of the *Migration Act 1958* (the Act) to grant a BVE.

Since the Department's response to the AHRC's preliminary views, on 23 November 2015, ASIO issued a qualified security assessment in respect of Mr NB. On 24 February 2016, the Minister intervened under section 195A of the Act to grant Mr NB a BVE. The Minister also exercised his power under subsection 46A(2) of the Act to allow Mr NB to lodge further BVE applications.

The Department maintains that the complainants' respective placements, and their continued detention within detention centres, was appropriate, reasonable and justified in the individual circumstances of their respective cases, and therefore, was not arbitrary.

The Department submits that it has not breached article 9(1) of the ICCPR.

Response to finding 3

The Department notes the finding of the AHRC.

Ms NF's immigration detention, being the action giving rise to the alleged interference with her family (Mr NJ and Masters NG, NH and NI), was lawful at domestic law given she did not hold a valid visa, resulting in her being an unlawful non-citizen. Further, her detention was predictable in the sense that under section 189 of the Act, all persons known or reasonably suspected of being unlawful non-citizens must be detained.

The Department submits that Ms NF's detention was lawful and proportionate to the legitimate aim of protecting the Australian community. As a matter of policy, the Australian Government has determined that individuals who have been assessed by ASIO to be directly or indirectly a risk to Australia's security should remain in held detention, rather than live in community, until such time that a durable solution for individuals with adverse security assessments is found that is consistent with Australia's international obligations.

Ms NF's family circumstances were considered while she was detained. The Department approved for Ms NF to visit the family home three days a week from 3pm to 8pm and for Masters NG and NH to stay with her on weekends and during school holidays between 8am and 8pm.

On 12 November 2015, following the issuance of a qualified security assessment, the Minister intervened under section 195A of Act [sic] to grant a three month BVE and a seven day Humanitarian Stay (Temporary) visa to Ms NF. She was released from immigration detention that day. The Minister also exercised his power under subsection 46A(2) of the Act to allow Ms NF to lodge further BVE applications.

The Department submits that its actions were not inconsistent with articles 17(1) and 23(1) of the ICCPR.

106. The department provided the following response to my recommendations:

Response to recommendation 2 to 5

The Department notes the findings and recommendations of the AHRC in particular the recommendation that the Department refer individuals who are subject of an ASA to ASIO for assessment as to whether they may be suitable for placement in community detention. The Department would like to reaffirm the previous statement regarding this recommendation. It is long standing Australian Government policy that non-citizens who are subject of an adverse security assessment will be managed in held immigration detention until such time as a durable solution can be found. The Department notes that this matter is subject of a tabling response from the Attorney-General dated 10 December 2013, in response to Immigration detainees with adverse security assessments v Commonwealth [2013] AusHRC 64.

Based on the recommendations presented in this report, the Department has once again engaged with ASIO on this matter. It has been confirmed that the matter for placement of persons who are subject of adverse security assessments is a matter for the Department and that ASIO do not provide placement advice.

Of the complainants, only Mr NE remains in immigration detention and subject of an adverse security assessment. Further, the Department notes that since December 2012, immigration detainees who have been found to be owed protection and are subject to an adverse security assessment have had access to the Independent Reviewer process.

On 15 December 2014, Mr NE was notified that the Independent Reviewer had affirmed his adverse security assessment.

The Department further notes that since the introduction of the Independent Reviewer process and ASIO's own reviews of the adverse security assessed cohort, a number of individuals have received either a qualified or non-prejudicial security assessment. As a consequence of these further assessments, the Minister has intervened under section 195A of the Act to grant BVEs to five of the complainants. Where a person has remained the subject of an adverse security assessment the Government's policy regarding their management has not changed.

Response to recommendation 6

The Department notes recommendation 6.

The Department continues to explore options for the adverse security assessment cohort. These options include third country resettlement, and referring cases to the Minister to consider intervening to grant a visa under section 195A of the Act if a non-prejudicial or qualified security assessment is issued by ASIO.

Case managers have regular discussions with people in detention to advise them of detention placement decisions and other steps that are being pursued to resolve their case.

107. I report accordingly to the Attorney-General.

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a long horizontal flourish at the end.

Gillian Triggs
President
Australian Human Rights Commission
April 2016

- 1 *International Covenant on Civil and Political Rights*, (New York, 16 December 1966), 999 UNTS 171, [1980] ATS 23 (entered into force for Australia 13 November 1980).
- 2 See AHRC Act, s 20(1)(b).
- 3 *Plaintiff M47 v Director-General of Security* (2012) 251 CLR 1.
- 4 The ICCPR is referred to in the definition of ‘human rights’ in s 3(1) of the AHRC Act. The text of the ICCPR is reproduced in Schedule 2 of that Act.
- 5 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 6 UN Human Rights Committee, *General Comment 8* (1982). See also *A v Australia* Communication No 560 of 1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia* Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* Communication No 1014 of 2001, UN Doc CCPR/C/78/D/1014/2001.
- 7 UN Human Rights Committee, *General Comment 31* (2004) at [6]. See also S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) p 308, at [11.10].
- 8 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]–[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands* Communication No 305 of 1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia* Communication No 560 of 1993, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* Communication No 631 of 1995, UN Doc CCPR/C/67/D/631/1995.
- 9 *A v Australia* Communication No 560 of 1993, UN Doc CCPR/C/59/D/560/1993 (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); *C v Australia* Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999.
- 10 *FKAG et al v Australia* Communication No 2094 of 2011, UN Doc CCPR/C/108/D/2094/2011 at [9.4]; *MMM et al v Australia* Communication No 2136 of 2012, UN Doc CCPR/C/108/D/2136/2012 at [10.3]–[10.4].
- 11 For example, [2012] AusHRC 56 at [42]–[47].
- 12 [2013] AusHRC 64 at [33]ff. As noted in that report, on 5 October 2012 in *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, the High Court found PIC 4002 to be invalid. All of the present complainants received their adverse security assessments before that decision was handed down. It appears that after that decision was handed down, the Minister did not consider exercising his personal non-compellable discretionary power under s46A of the Migration Act to allow persons who had received adverse security assessments from ASIO to apply for protection visas. The Migration Act was subsequently amended to make a person ineligible for the grant of a protection visa if they have been assessed by ASIO to be a risk to security: Migration Act s 36(1A) & (1B), inserted by *Migration Act Amendment Act 2014* (No 30 of 2014), s 2 & sch 3 cl 1.
- 13 See for instance [2012] AusHRC 56 at [48]–[70]; [2013] AusHRC 64 at [33]ff.
- 14 Submission of the Department of Immigration and Border Protection dated 21 October 2015.
- 15 Cf [2012] AusHRC 56 at [69]–[70]; [2013] AusHRC 64 at [33]–[56].
- 16 For instance, [2012] AusHRC 56 at [85]ff.
- 17 See [2012] AusHRC 56 at [48]–[52].
- 18 [2013] AusHRC 64, [84].
- 19 Submission of the Department of Immigration and Border Protection dated 21 October 2015.
- 20 [2013] AusHRC 64, [117]–[125].
- 21 [2013] AusHRC 64, [125].
- 22 M Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd ed 2005), p 519.
- 23 Human Rights and Equal Opportunity Commission, *Nguyen and Okoye v Commonwealth (Department of Immigration and Multicultural Affairs) and GSL (Australia) Pty Ltd* [2008] AusHRC 39 (1 January 2008), at [80]–[88].
- 24 See, eg, UN Human Rights Committee, *General Comment 16* (Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation) at [5]; UN Human Rights Committee, *General Comment 19* (Article 23: Protection of the Family, the Right to Marriage and Equality of the Spouses) at [2]; *Hendriks v Netherlands*, Communication No 201/1985, UN Doc CCPR/C/33/D/201/1985 (1988) at [10.3].
- 25 UN Human Rights Committee, *General Comment 19* (Article 23: Protection of the Family, the Right to Marriage and Equality of the Spouses) at [2].
- 26 S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004) 589.
- 27 Communication No 417/1990, UN Doc CCPR/C/51/D/417/1990 (1994).
- 28 *Ibid* [10.2]. See also *AS v Canada*, Communication No 68/1980, UN Doc CCPR/C/OP/1 at 27 (1985), 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.
- 29 *Tcholatch v Canada*, Communication No 1052 of 2002, UN Doc CCPR/C/89/D/1052/2002 at [8.2].
- 30 *Mauritian Women v Mauritius*, Communication No 35 of 1978, UN Doc CCPR/C/OP/1 at 67 (1985) at [9.2(b)].
- 31 Human Rights and Equal Opportunity Commission, *Nguyen and Okoye v Commonwealth (Department of Immigration and Multicultural Affairs) and GSL (Australia) Pty Ltd* [2008] AusHRC 39 (1 January 2008), at [95]–[97].
- 32 UN Human Rights Committee, *General Comment 16* (1988) at [4].
- 33 S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) pp 482–3.
- 34 Communication No 488 of 1992, UN Doc CCPR/C/50/D/488/1992 at [8.3].
- 35 AHRC Act s 29(2)(a).
- 36 AHRC Act s 29(2)(b).
- 37 This policy has previously been discussed in Commission Reports [2013] AusHRC 64 at [58]; [2012] AusHRC 56 at [71]–[83].
- 38 This direction is now contained in a Ministerial Instruction issued on 29 March 2015. It has previously existed in substantially the same form in earlier Ministerial guidelines. See for instance [2014] AusHRC 92 at [112].

Further Information

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