Human Rights and Equal Opportunity Commission

Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights in an Immigration Detention Centre

HRC Report No. 12

28 November 2000

The Hon Daryl Williams AM QC MP
Attorney-General
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Attorney,

Pursuant to my responsibilities under s.29(2) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) I attach a report of my inquiry into two complaints of acts or practices inconsistent with or contrary to human rights in an immigration detention centre.

Yours sincerely,

Alice Tay
President and Delegate of the Human Rights Commissioner

Contents

1. Introduction

This report to the Attorney-General concerns inquiries made by the Human Rights and Equal Opportunity Commission ('the Commission') into complaints by Quan Ri Qing and Su Yu Fei against the Commonwealth of Australia, Department of Immigration and Multicultural Affairs ('the Department') concerning violations of human rights under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('the HREOC Act') which allegedly occurred during the detention of the complainants as unauthorised arrivals at the Port Hedland Detention Centre in 1996. The Act provides for the Human Rights Commissioner ('the Commissioner') to perform these functions.

1.1 The Commission's jurisdiction

The Commission's functions in relation to the investigation and conciliation of complaints of human rights breaches against the Commonwealth of Australia and its functions in relation to reporting on complaints with substance that have not been resolved through the process of conciliation are outlined in the Immigration Detention Report[1] and in the Commission's 1998-99 Review of Immigration Detention ('the Immigration Detention Review').[2] The human rights law and principles relevant to this complaint are also outlined in the Immigration Detention Report and the Immigration Detention Review.[3]

1.2 Outline of complaint and the inquiry process

Mr Quan lodged his complaint with the Commission on 11 April 1997, alleging that he had been treated in a manner that constituted a breach of his human rights. He alleged that

- he was not advised of his right to ask for legal assistance when he was taken into immigration custody
- his requests for legal assistance and to apply for refugee status were not responded to in a timely manner
- he was kept in a separated accommodation area for a period of around three months and was not able to make contact with the outside world
- these actions and omissions breach his human rights under the HREOC Act.

Mr Su lodged his complaint with the Commission on 5 October 1996, alleging that he had been treated in a manner that constituted a breach of his human rights under the HREOC Act. Specifically, he alleged that

- he was not advised of his right to ask for legal assistance when he was taken into immigration custody
- his requests for legal assistance and to apply for refugee status were not responded to in a timely manner
- he was kept in a separated accommodation area for a period of around three months and was not able to make contact with the outside world.

Mr Quan's and Mr Su's complaints were investigated by the Commission pursuant to section 11(1)(f) of the HREOC Act.

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1 Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals* 1998.

2 Section 1.8, located on the Commission's website at www.hreoc.gov.au/human_rights/asylum/index.html.

3 Chapter 3 of the Report and sections 7.2.2 and 8.7 of the Immigration Detention Review.

The Human Rights Commissioner, Mr Chris Sidoti, carefully considered all the information obtained through the inquiry into the complaints and through the Commission's broader inquiry into the detention of asylum seekers which was tabled in federal parliament in 1998 (the Immigration Detention Report). He formed the view that these matters were not amenable to conciliation on the basis that the matters about which Mr Quan and Mr Su complain are the result of practices and procedures of the Department at the Port Hedland Immigration Detention Centre ('IDC') in processing people who arrive by boat and in handling their requests for assistance. The Department is very clear in its view that its practices and procedures in relation to requests for legal advice and the initial processing of people who arrive by boat without entry documents are consistent with its obligations under the *Migration Act 1958* (Cth) ('the Migration Act').

On 2 March 1998 the Human Rights Commissioner formed the preliminary view that the Department, on behalf of the Commonwealth of Australia, had breached Mr Quan's and Mr Su's human rights.

On 22 June 1998 the Department provided its comments in relation to the Human Rights Commissioner's preliminary findings.

On 13 August 2000, pursuant to s.29(2) of the HREOC Act, the Commissioner forwarded to the Department a notice of his inquiry into these complaints setting out his findings, reasons and recommendations.

On 3 October 2000 the Department forwarded to the Commission its response regarding the findings and recommendations of the Commission.

2. Process of the inquiry

2.1. The complainants' evidence

- ***Common evidence***

The evidence of Mr Quan and that of Mr Su had many common elements.

Mr Quan and Mr Su, both nationals of the People's Republic of China of Han ethnicity, came to Australia on the boat code-named the Grevillea, which arrived in Darwin on 15 June 1996. The boat departed from Qiao Gang, Bei Hai, China, on 11 May 1996.

Mr Quan stated that as the boat neared Australia the people on board were very seasick and the boat had run out of water and fuel. Another boat came alongside and a few people came up onto the boat and they recorded people's names. He knew that they were from the Australian government but did not know what department. They were accompanied by an interpreter who said that they had violated section 189 of the Migration Act.

Along with all the other 65 people on board the Grevillea they were taken into immigration custody and were transported from Darwin to Port Hedland by plane on 16 June 1996.

Mr Quan stated that the centre manager met them when they arrived at the Port Hedland IDC. The centre manager introduced the Australian Protective Service (APS) manager and guards to them. The centre manager said, "Australia is a good holiday spot. Welcome here for a holiday." Mr Quan stated that he could not understand why the centre manager would consider them as coming for a holiday. The centre manager also said that they had entered Australia illegally.

Mr Su stated that he arrived at Port Hedland IDC at 4.00 pm. The initial induction of the group commenced that day. Mr Su states that at the induction the centre manager said, "I can tell you this is the centre of holiday. After you have a holiday, you will be sent back." He claimed that the centre manager also said, "No one in Australia welcomes you". He states that at no point in this initial induction process was he advised that he could ask to see a lawyer nor was he informed that he might be able to make an application to stay in Australia. Mr Su was interviewed by departmental officers on 17 and 19 June 1996.

When the Grevillea detainees were transferred to Port Hedland IDC they were accommodated in E block at the centre. It was a confined block with a small external area, separated from other parts of the centre by high covered wire fences. Detainees in E block have contact with each other but they are effectively segregated from other detainees in the centre. They have little or no access to information from outside the area in which they are confined and very limited opportunity to make contact with anyone outside the area.

Mr Quan stated that when he was in E block he wanted help but he did not have an opportunity to obtain it. He could not make contact with the world outside the detention centre. There was no telephone in E block. The television could only be used for the video recorder. He does not know why the television was not working. He thought it was the regulations. A lot of people wrote to the centre manager because they wanted solicitors to help them with refugee status but these letters were of no help. He did not write a letter at this stage because the group in E block did not have a representative. They did not realise that they could write to the manager to request legal advice. He said that, if he had been able to get a lawyer at that time, he would have asked for refugee status.

Mr Quan further stated that in E Block there were restrictions on going outside. They could not go freely outside E block. There was only one door in the block that went outside and the door was always locked. Their meals were delivered to E block and eaten there. They had breaks in the open air in the small yard outside the block, but still within the segregated area, three times a day and these were generally after the meals. The length of the breaks depended on the availability of the APS. The longest time was 30 minutes.

Mr Quan was detained in E block for three months and three days, after which time he was transferred to H block in the main compound of the centre.

Mr Su stated that, as E block is separated from the main part of the compound, he could not speak to other groups of detainees in the centre. He claims that the windows in E block were covered over so they could not see out and they were only allowed outside the accommodation building for short breaks. He states that he remained in E block for around a month and was then moved to J Block, which is also a separated accommodation area. Mr Su claims that he remained in J Block until 19 September 1996, when he was released into the main compound. He states that while he was in these separate accommodation areas he did not have access to a lawyer. He also claims that he did not have access to television, radio or newspapers.

Mr Quan and Mr Su both gave accounts of a meeting with the centre manager early in July 1996 at which the detainees sought advice and assistance with their protection applications.

According to Mr Quan, sometime in July 1996 the centre manager met with the people from the Grevillea boat and read out an agreement between the Australian and Chinese governments to the effect that any person who proves to be Vietnamese-Chinese will be sent back to China immediately. At this time another detainee asked what would happen to the Chinese people, that is, people of Han ethnicity. He recalled the centre manager's answer was that, after investigation, they would also be sent back to China. This other detainee also asked the centre manager for legal

advice. The centre manager told him that he could give him the address of legal people. After the meeting the manager called the captain of the boat and this other detainee to his office. The complainant did not know what was said at that meeting but the centre manager gave them a list of legal people in Port Hedland. The other people from his group thought that no one else had a right to this information and to ask for legal assistance.

Mr Su claimed that on 5 July 1996 the centre manager met with the people from the Grevillea boat group and they were given a letter from the Department in Chinese. This letter said that, according to an agreement between Australia and China, all the Sino-Vietnamese people on the boat would be returned to China after their identities had been confirmed. Mr Su states that another detainee in the Centre, Mr Yang, asked the centre manager what would happen to the Han Chinese people and he was told that they would also be sent back.

The accounts of Mr Quan and Mr Su about events between 15 June and 5 July 1996 are substantially the same. Each then deals with particular events concerning his own experiences.

- ***Mr Quan=s evidence***

Mr Quan stated that after he was moved from E block to the main compound he tried to write a letter to the centre manager to clarify his identity and to progress his application for refugee status. He talked with the centre manager on 3 October 1996 about these matters. He did not receive a reply to these requests until March 1997.

Mr Quan stated that he would have liked to have access to legal advice but no one from his group knew how to obtain it. He wrote a letter to the Department in October 1996 and sent this letter through a religious person. He also wrote a letter to the Minister on the same day. He sent this letter through the centre manager. In his letters he told the Department and the Minister directly about his identity and requested information about the correct legal procedure to follow to apply to become a refugee. When he gave the centre manager his letter to the Minister, he also gave him a letter asking for a refugee application form on the basis of his real identity and his past experience in China. He thought that, when the Department had confirmed his identity, they would advise him of the proper legal procedure to apply for refugee status. He was not aware where he could get an application form to apply to become a refugee. He had an address of a person to write to only after he received the letter from the Department in March 1997 in response to his request of October 1996.

Mr Quan stated that he wrote to the Department again at the beginning of March 1997 for advice in relation to refugee status. He did not receive a response. After writing this letter he asked the centre manager for the correct legal procedure to follow and the address of the Legal Aid Commission of Western Australia (‘the LAC’). The manager said that he would pass this request on to the Department.

Mr Quan stated that on 20 May 1997 he went to see the assistant centre manager and again requested a form to fill in to make an application for refugee status, called an application for a Protection Visa (866). The assistant manager said that he would have to check with the centre manager. He asked Mr Quan to wait, that he would send Mr Quan a note when he received a response from the Department. Mr Quan says he waited until Tuesday 27 May 1997 and again went to see the assistant manager who then gave him the application form. The assistant manager promised him that he would send the form to the Department immediately.

Mr Quan states that on 29 May 1997 he received a response from the Department to his March letter. It acknowledged his application for a protection visa and said that he now had the correct forms to fill out.

On 30 May 1997 the centre manager told him that Department had arranged a solicitor for him. The centre manager also said that the solicitor would come to see him with officers from the Department.

Mr Quan complained that during the months it took for him to obtain a form to apply for a protection visa he had trouble sleeping.

- ***Mr Su=s evidence***

Mr Su stated that on 6 July 1996, following the meeting with the centre manager the previous day, he wrote a letter to the centre manager titled *Application*. In this letter Mr Su

- asked what the criteria and definition of refugees were
- asked the Department to correct its views of him and regard him as a Chinese refugee who needed help and resettlement
- claimed that he wanted to stay in Australia and that if he was returned to China he would be punished by Chinese law and pursued and killed by the secret society
- asked if there were any "warmed hearted lawyers" who could help him remain in Australia and
- requested that this letter be forwarded to the Department, the media and solicitors to seek assistance for him.

Mr Su stated that he did not provide all the details about his treatment in China in this letter. He claimed he did not feel safe to do so because he had been told that this was a holiday centre and that he would be returned to China.

Mr Su stated that he waited for a response to this letter and did not write again. He claimed that he met with the centre manager now and then and would ask him what was happening with his letter. He states that the centre manager would say that he was waiting for a response from the Department. He further stated that the centre manager advised him that his role was only to pass on letters to the Department. Mr Su stated that he did not know what else he had to write to receive legal assistance, as he did not know what he was entitled to ask for.

Mr Su claimed that he heard nothing from the Department until September 1996 when he received a letter which apologised for the delay in responding to him and advised him that the centre manager would be able to assist him obtain legal advice.

On 9 September 1996 Mr Su wrote two letters to the centre manager expressing his gratitude at being able to apply for legal aid and stating that he and his family would cooperate with the government departments concerned to ensure that their application for legal aid was processed smoothly.

On 15 September 1996 Mr Su wrote a letter addressed to Mr Lawyer. In this letter he stated that

- he was glad that a lawyer has been appointed for his case
- he did not know the correct procedures to apply for legal aid
- the centre manager had advised him that he needed to ask for legal aid to assist with his application for refugee status
- in his letter of 6 July 1997 he had talked about making an application for refugee status
- he was afraid of political persecution if he was returned to China
- the centre manager, the lawyer and the Department should change their attitudes towards him and his family and regard them as Chinese refugees in need of help and resettlement.

On 17 September 1996 Mr Su met with a solicitor from the South Hedland office of the LAC. He states that at the time he did not know that she was a solicitor, as she did not introduce herself, and that he thought the telephone interpreter was the solicitor. He states that, because he thought the solicitor was someone from the centre who was just taking notes, he did not provide her with much information about his situation and so he kept writing to the centre manager asking for legal advice.

Mr Su stated that on 14 October 1996 he wrote a letter to the Department titled *Application for Legal Aid.* In this letter he stated that he has suffered from political persecution from the Chinese communist regime for a long period of time and that he feared that his life would be threatened if he were repatriated to China. He asked for a chance to get legal aid so that he could apply for refugee status.

Mr Su further stated that on 21 January 1997 he wrote another letter to the Department titled *Request for completing an application form for refugee status.* In this letter he stated that he had a well-founded fear of going back to his country of origin. He also stated that he had requested an application for refugee status and legal assistance from the Department both orally and in writing many times and had not heard anything. He stated that because of this he was in a constant state of anxiety and desperation.

On 23 January 1997 a LAC solicitor visited Mr Su at the Centre and assisted him in filling out a form to apply for a protection visa.

On 19 February 1997 Mr Su received a letter from the Department which thanked him for his letters of 14 October 1996 and 21 January 1997 in which he had asked for legal assistance to apply for refugee status and assured him that the necessary arrangements would be made to provide him with application assistance.

On 18 April 1997 Mr Su received a letter advising him that his application for a protection visa had been refused.

2.2 The respondent's evidence

The Department stated that the boat code-named the Grevillea was intercepted at Charles Point at 18.40 on 15 June 1996. A departmental officer, through an interpreter, read a formal notice advising Mr Quan, Mr Su and the other passengers of the Grevillea of the reasons they were taken into immigration detention under section 189 of the Migration Act. That day or the following day the detainees were provided with information about their rights and privileges, which included the role of the centre and its staff and the provision of welfare, medical and education services. Information was also provided on the procedures for the initial immigration interviews.

The Department stated that the Migration Act does not place an onus on immigration officials to advise people who are unauthorised arrivals of their options. It states that the Migration Act places the onus on the unauthorised arrival to raise protection claims and to request legal advice. Section 193 makes it clear that officers have no obligation to advise unauthorised arrivals of their options. Section 256 makes it clear that all reasonable facilities for legal advice and other assistance are to be provided to a detainee in connection with an application for a visa or with his or her detention but only after the detainee makes a request for assistance.[4]

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4 The Department's policies and procedures for providing detainees with access to legal advice and the refugee determination process are outlined in chapter 14 of the Immigration Detention Report.

- ***Segregated detention***

The Department stated that E, I and J blocks are generally used as separation accommodation blocks for either new arrivals or detainees who are being prepared for removal from Australia. Newly arrived residents are separated from those in the main compound while health, quarantine, customs and initial immigration processing takes place. Detainees in E, I and J Blocks are free to associate with others in those blocks but not with residents in the main compound until health screening and initial immigration processing is completed.

Time spent in separation detention depends on the processing of a person's immigration status and whether claims are raised which prima facie engage Australia's protection obligations. If these obligations have been engaged, residents are generally moved to the main compound after the initial interviews for protection visas are completed. If not, detainees can stay in separation accommodation until they are removed from Australia. The average time spent in separation detention is 33 days.

The Department advised that E, I and J blocks provide shared sleeping accommodation in private rooms, toilets and showers, a common room for meals and for use of a television and video and their own grounds for exercise and activities. There may be periods when the television is not available as it needs to be repaired. For example, in E block damage to the wiring and antenna mast in the January 1997 cyclone meant that free to air television programs could not be received at times.

According to the Department E, I and J blocks have provision for telephones. It is normal practice on arrival and during initial processing for outgoing telephone calls to be restricted. However, this restriction does not apply to detainees who wish to contact a lawyer and seek legal advice.[5]

- ***Mr Quan=s requests for assistance***

The Department stated that Mr Quan wrote a letter to the Minister dated 2 March 1997. When received by the Department the letter was referred to the Translating and Interpreting Service ('TIS') for translation. An unofficial translation by an interpreter at the Port Hedland IDC was received by the Compliance and Detention Section of the Department on 19 March. The official translation by TIS was received by the Department on 21 March 1997. In this letter Mr Quan outlined his experiences in the Chinese Navy, requested legal assistance and asked to be granted a protection visa on humanitarian grounds.

The Department stated that Mr Quan wrote a further letter to the Department dated 26 March 1997, which was forwarded to TIS on 12 April 1997. The Compliance and Detention Section received an unofficial translation of Mr Quan=s letter by an interpreter at the IDC on 1 April 1997. An official translation was received from TIS on 9 May 1997. This letter, titled *Application for Refugee Status,* stated that he was making a specific application for refugee status from the Department and requested legal assistance.

On 29 March 1997 Mr Quan met with the centre manager and asked for contact details for Legal Aid. He then wrote to the LAC. On 18 April 1997 he met with the assistant centre manger about a letter he had received from the LAC. It advised him that the centre manager could arrange for him

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5 The conditions in the separated accommodation blocks at the Port Hedland IDC are outlined in chapter 7 of the Immigration Detention Report and section 7.2 of the Immigration Detention Review.

to call the LAC to obtain legal advice. On 21 April 1997 arrangements were made for Mr Quan to talk with a LAC solicitor.

According to the Department Mr Quan approached the centre manager on 19 May 1997 to seek an application form for a protection visa. On 26 May 1997 Mr Quan lodged a completed Part A of the protection visa application form. A registered migration agent provided him with application assistance. A departmental case officer interviewed Mr Quan on 8 June 1997. Mr Quan=s application was refused at the primary stage on 8 July 1997 and he subsequently requested a review of this decision by the Refugee Review Tribunal.

The Department stated that Mr Quan was provided with reasonable facilities pursuant to section 256 of the Migration Act following receipt and translation of his letters of 2 March 1997 and 26 March 1997. Although there was a delay in obtaining a translation from TIS of his letter, Mr Quan also approached the LAC directly by letter and phone. The Department facilitated a call between him and the LAC on 21 April 1997.

The Department further advised that the centre management referred all questions and requests, written or oral, relating to immigration status to the central office of the Department in Canberra for translation and advice. The Protection and Family Residence Branch of the Department is responsible for responding to requests from detainees for legal assistance or information or assistance to make an application for refugee status. Requests are responded to as soon as possible. Requests from people in detention are given priority. Delays may occur due to the volume of correspondence received that requires translation into English.

According to the Department=s account Mr Quan met with management at the centre on at least five occasions in relation to obtaining legal assistance and applying to become a refugee.

- ***Mr Su=s requests for assistance***

The Department agreed that Mr Su wrote several letters to the Department which expressed his desire to seek asylum.

The Department stated that in a group letter received by the Department on 3 July 1996 the people from the Grevillea boat, including Mr Su, jointly requested the provision of legal assistance. Reasonable facilities to access legal assistance were provided on 5 July 1997. Because arrangements were in place to provide the Grevillea boat group with reasonable facilities to access legal advice, the official translation of and formal responses to Mr Su's correspondence were accorded a lower priority.

The Department states that, in response to a request from Mr Su for legal advice, assistance was provided to facilitate his contact with a lawyer. A lawyer from the South Hedland office of the LAC visited Mr Su to assist him lodge a protection visa application.

The Department states that Mr Su wrote to the Department by letter dated 6 July 1996. The Compliance and Detention Section of the Department in Canberra referred the letter to the TIS for translation and it received the translation sometime in July 1996. This letter was the subject of an e-mail dated 30 July 1996 between that section in Canberra and an officer at the Port Hedland IDC. The e-mail seeks advice on any action that should be taken as a result of this letter.

Mr Su wrote again in a letter dated 9 September 1996 which was faxed to the Compliance and Detention Section in Canberra on 12 September 1996 by the centre manager at the Port Hedland IDC. On the fax cover sheet the centre manager advised that reasonable facilities would be arranged.

An e-mail of 16 September 1996 titled *Appointment with Lawyer* recorded that a departmental officer at the Port Hedland IDC met with the group from the Grevillea including Mr Su in relation to their request for legal advice. It records that the group was advised the Department would arrange for a telephone call to the South Hedland office of the LAC and for the services of an interpreter from the TIS. It states that by agreement Mr Su and Mr Zeng Lan Sheng would speak to the LAC on behalf of the group. It notes that, as a solicitor from the LAC was coming to the centre the next day to see other members of the Grevillea, she would also speak to Mr Su and Mr Zeng.

An e-mail between departmental officers on 17 September 1996 titled *Request for access to lawyers* recorded that the members of the Grevillea group were being kept in separate accommodation areas in E and J blocks for safety and security reasons. It records that those living upstairs in J block had all requested to speak to a lawyer and reasonable facilities would be arranged later that day. The Department states that Mr Su was a member of this group.

An e-mail of 18 September 1996 titled *Appointment with Lawyer - Legal Aid* stated that the members of the Grevillea group living upstairs in J block would move to the main compound on 19 September 1996 and were going to see a lawyer about staying in Australia. It stated that this matter might ultimately be re-submitted to Canberra to consider the appointment of contract lawyers.

An e-mail dated 23 January 1997 titled *Correspondence* states that a solicitor from the LAC visited Mr Su and his wife at the centre so that they could complete Part A of the form *Application for a Protection Visa (866) by a person in detention.*

2.3 Other evidence

- ***Evidence provided by the Legal Aid Commission of Western Australia***

The Commission obtained records from the LAC which show that the first time a LAC solicitor spoke to Mr Su was on 17 September 1996, when a LAC solicitor visited the Port Hedland IDC.

- ***Evidence provided by other detainees at the Port Hedland IDC***

During the Commission's visits to Port Hedland IDC since 1996 a number of detainees expressed concern at the time it had taken for the Department to respond to their requests to see a lawyer and to apply for refugee status. The detainees to whom the Commission spoke stated that these delays had caused them a great deal of distress, anxiety and uncertainty. Detainees were also confused about what rights they had and what they had to do to make an application to stay in Australia. They commonly thought that their requests for assistance constituted an application for refugee status. It should also be noted that the detainees to whom the Commission spoke, particularly those from China, did not have a clear understanding of the role played by lawyers in a society like Australia.

During these visits a number of people spoke about being detained in accommodation areas separate from the main compound. They gave very similar accounts of the conditions that exist in E, I and J blocks.

- ***Evidence provided by the centre manager at the Port Hedland IDC***

During the Commission's visit to this Centre in May 1997 the centre manager advised that, while letters to relatives overseas are posted during the initial period of separation, detainees are not permitted to make telephone calls to or correspond with people in the Australian community.

3. Issues to be determined

One of the functions conferred on the Commission is to inquire into any act or practice that may be inconsistent with or contrary to human rights (section11(1)(f) of the HREOC Act). In deciding whether the matters complained of fall within the terms of section 11(1)(f) of the HREOC Act, I was required to consider two main issues:

- whether there is an act or practice under the HREOC Act; and if so
- whether the act or practice is inconsistent with or contrary to any human right under the HREOC Act.

3.1 Whether there is an act or practice

Section 3 of the HREOC Act defines an 'act' or 'practice' as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth.

The Department is a federal government department, under the Minister for Immigration and Multicultural Affairs. The *Migration Act 1958* (Cth) gives the Minister authority to establish immigration detention centres and make regulations for the operation of detention centres, including the conduct and supervision of detainees and the powers of persons performing functions in connection with the supervision of detainees.

The acts or practices complained of relate to the conditions in which the complainants were held and the treatment of the complainants in detention under the *Migration Act 1958.*

I agree with the Department that section 256 of the Migration Act does not require its officers to advise detainees that they have a right to seek independent legal advice when they are taken into detention. This issue was considered by the Full Federal Court in *Fang and Others v Minister for Immigration and Ethnic Affairs and Another*.[6] Justice Nicholson for the majority confined himself to examining domestic law and found that section 256 of the Migration Act does not place an obligation on the Department to advise detainees of their entitlement to seek legal assistance. Similarly, section 193(2), which relates to legal advice in relation to visas, does not require officers to provide detainees with this information.

However, these sections do not prohibit the provision of this advice. They are in fact silent on the issue. They in fact neither require nor prohibit officers advising detainees of their right to request legal advice. The Migration Act clearly gives the Department and its officers a discretion in relation to this issue. Under that Act this discretion can be exercised by either advising or not advising people in detention of their entitlement to seek independent legal assistance. The failure to provide advice is therefore an act or practice within the scope of the HREOC Act.

3.2 Whether the act or practice is inconsistent with or contrary to human rights

Section 3 of the HREOC Act defines 'human rights' as including the rights and freedoms recognised in the ICCPR, which is Schedule 2 to the Act.

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6 (1995) 135 ALR 583.

Articles 9(1) and 10(1) of the ICCPR are relevant to this complaint.

Article 9(1) of the ICCPR states:

> 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.

Article 10(1) of the ICCPR states:

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

Article 10(1) is particularly relevant to this complaint. The provision itself establishes a broad general standard of humaneness in detention. The content of this standard has been developed with the assistance of the Standard Minimum Rules for the Treatment of Prisoners (the Standard Minimum Rules) and the Body of Principles for the Protection of all Persons under any form of Detention (the Body of Principles). The rules and principles most relevant to this complaint are Standard Minimum Rules 35, 36, 37, 93 and 94 and Body of Principles numbers 1, 13, 15, 17, 18 and 33.

The Third Committee of the General Assembly in its 1958 Report on the drafting of the ICCPR stated that the Standard Minimum Rules should be taken into account when interpreting and applying Article 10(l).[7] Also, the Human Rights Committee established by the ICCPR as the most authoritative interpreter of the ICCPR has held that compliance with the Standard Minimum Rules and the Body of Principles is the minimum requirement for compliance with the ICCPR's obligation that people in detention are to be treated humanely (article 10)[8]

As a matter of international law, the Standard Minimum Rules are not binding of themselves on Australia and there is no specific obligation to implement them in Australia. However, the Standard Minimum Rules do elaborate the standards which the international community considers acceptable and are relevant to interpreting the scope and content of the protection given to persons deprived of their liberty in article 10 of the ICCPR.

I am satisfied that the acts or practices complained of relate to 'human rights' under the ICCPR and HREOC Act.

4. Findings and recommendations

On 13 August 2000 the Human Rights Commissioner forwarded the Notice of his inquiry into these complaints to the parties. The findings contained in that notice are set out below.

4.1 Findings

- ***Advice of the entitlement to legal advice***

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7 United Nations, Official Records of the General Assembly, Thirteenth Session, Third Committee, 16 September to 8 December 1958, pages 160-173 and 227-241.

8 Human Rights Committee General Comment No. 21 (1992), paragraph 5.

I have considered the evidence provided by Mr Quan, Mr Su and the Department in relation to the provision of legal advice to the complainants. The Department has indicated that in its view both complainants were advised on 5 July 1996, within 3 weeks of entering detention, that facilities were available for accessing legal advice. It is clear from what transpired between that date and the dates when Mr Quan and Mr Su finally lodged their applications for protection visas, that they were not aware in any meaningful way of their right to request legal assistance and so there is some doubt as to the effectiveness of the communication to them. However, there is no doubt that no advice was provided between 15 June 1996, when Mr Quan and Mr Su were taken into detention, and 5 July 1996.

The Standard Minimum Rules and the Body of Principles provide that persons in detention be advised of their right to legal advice. Even if, as the Department argues, those instruments are not incorporated into ICCPR Article 10.1, I consider that the right to be advised of the availability of independent legal advice is an essential element of the humane treatment that a person who is deprived of liberty is entitled to receive under Article 10.1.

I find that the Department's acts and practice in not informing Mr Quan and Mr Su of this right between 15 June and 5 July 1996 breached their right under ICCPR Article 10.1 and therefore their human right under the HREOC Act to be treated humanely and in accordance with human dignity while in detention. Although I am not satisfied that the communication on 5 July 1996 was effectively understood by the complainants, I make no finding on this issue in relation to the period after this date.

- ***Timely provision of legal assistance and application for refugee status***

I note the Department=s comments that reasonable facilities to access legal advice in accordance with section 256 of the Migration Act were offered to Mr Quan and Mr Su, along with other Grevillea detainees, at a meeting between the centre manager and all the Grevillea group on 5 July 1996 in response to a request received from them on 2 July 1996. The complainants= concerns, however, relate not to what occurred and what was offered on 5 July 1996 but to what transpired after that.

In Mr Quan=s case, the relevant period was between October 1996 and May 1997. He first sought assistance in letters of October 1996. In his letter of 2 March 1997 he expressed a strong desire to seek asylum in Australia and asked for legal assistance to help him do this. On 19 March 1997 the Compliance and Detention Section of the Department received a translation of this letter. On 26 March 1997 Mr Quan again wrote to the Department asking to apply for refugee status and to be provided with a form. On 1 April 1997 the Compliance and Detention Section received a translation of this letter.

Mr Quan spoke to a solicitor at the South Hedland LAC office on 21 April 1997, after he had initiated contact with that office in writing. This was the first occasion on which Mr Quan spoke to a lawyer. This contact was organised by the assistant manager at the centre after Mr Quan showed him a letter he had received from the LAC. This contact was a result of direct approaches Mr Quan had made to the LAC and took place independently from the letters he had written to the Department.

The Department responded to Mr Quan=s letters of 2 March 1997 and 26 March 1997 by providing him with a protection visa application form on 27 May 1997 and by writing to him on 28 May 1997. This letter thanked him for his previous correspondence and stated that he had received the appropriate application form.

The Department provided Mr Quan with an opportunity to apply for a protection visa seven months after his first letter, ten weeks after he expressed a desire in very specific terms to seek asylum and to obtain legal assistance and over 11 months after he was taken into detention. Application assistance was also approved at this time. Mr Quan was detained throughout the period of many months he waited for an effective response to his requests. He suffered stress and anxiety as a result of delays in handling his requests.

In the case of Mr Su, the relevant period was between 6 July 1996 and February 1997. He made many requests for legal assistance:

- On 6 July 1996 he wrote a letter titled *Application*, which was received by the centre manager and forwarded to the Compliance and Detention Section of the Department in Canberra, expressing a strong desire to seek asylum in Australia and requesting legal assistance to help him with this.
- On 9 September 1996 he wrote two letters to the centre manager, expressing his gratitude that arrangements were to be made for him to receive legal assistance and stating that he and his family would cooperate with the government to ensure their application ran smoothly.
- On 15 September 1996 he wrote a letter addressed to Mr Lawyer to obtain legal assistance to apply for refugee status.
- On 14 October 1996 he wrote a letter titled *Application for Legal Aid* to the Department, asking for legal aid so that he could apply for refugee status.
- On 21 January 1997 he wrote a further letter to the Department titled *Request for completing an application form for refugee status*, stating that he had asked the Department for an application for refugee status and for legal assistance both orally and in writing many times and to date had not heard anything.

The Department responded to Mr Su=s requests for legal assistance on a number of occasions and in a number of ways:

- A letter on 9 September 1996 advised him that, if he required legal assistance, he should speak to the centre manager who would make the necessary arrangements.
- Arrangements were made for him to speak with a solicitor from the LAC on 17 September 1996.
- On 23 January 1997 Ms Zimmerman of the LAC attended the Port Hedland IDC and helped Mr Su and his wife complete application forms to apply for protection visas.
- On 19 February 1997 the Department replied to Mr Su's letters of 14 October 1996 and 21 January 1997 and advised him that he would receive assistance for his application for refugee status.

Mr Su's letters were not responded to by the Department in a timely manner. His letter of 6 July 1996 was not responded to until more than two months later. His clear requests for assistance in September and October 1996 and January 1997 were not responded to by the Department until 19 February 1997.

The Department stated in its reply to my preliminary report that A[t]he advice given on 5 July 1996 was that those wanting access to legal advice should let the DIMA staff at the centre know and arrangements would be made to provide a room, telephone, writing materials, interpreter and list of lawyers from the telephone book@. Mr Su sought it almost immediately but no assistance was provided until 17 September 1996, more than two months later. Even then Mr Su misunderstood the nature and purpose of meeting with a solicitor on that day.

In its reply to my preliminary report, the Department states that Aprotection visa forms are also held at Port Hedland and are provided on request by the DIMA Centre Manager@. Mr Su requested one, or at least he requested advice as to what he should do to apply for protection, from as early as 6 July 1996. It is not clear to me what else Mr Su should have done to indicate that he wished to apply for a protection visa in addition to the steps which he took to obtain assistance.

I do not accept the Department=s justification for its decision to accord a lower priority to Mr Su's letters relating to his individual situation and his desire to seek asylum and to obtain legal assistance.

The Department states that in my preliminary report I was assuming that the right in question here is Aan unqualified right to application assistance publicly funded through DIMA and of a right of entry into the protection visa system and legal procedures to determine refugee status@. I agree with the Department that there is no such right. Rather, the right in question is a right to actual, adequate and effective access. That may require publicly funded assistance for some people but equally it need not. The issue in relation to Mr Quan and Mr Su is that, for whatever reason, in spite of their repeated requests for legal advice and application assistance they were not provided with any effective advice and assistance for several months.

ICCPR Article 10.1 requires that a person in detention be treated in a humane manner. The Standard Minimum Rules and the Body of Principles provide a minimum standard for humane treatment. In particular Standard Minimum Rules 93 and 94 are applicable to this case. The requirement that people in administrative detention shall not be treated less favourably than untried prisoners imposes an obligation on the Department to provide timely access to a legal advisor for the purposes of providing general legal advice and, where appropriate, assisting with an application for refugee status.

In Australia it is unthinkable that an untried prisoner charged with a criminal offence would have to wait months for legal assistance for advice and/or the preparation of a defence. In the criminal jurisdiction normal practice is to provide legal assistance on the same day it is requested. I am therefore satisfied that the Department's treatment of Mr Quan=s and Mr Su=s requests is inconsistent with the principles in Rules 93 and 94, as they were treated in a manner less favourable than untried prisoners. More relevantly, the treatment breaches ICCPR Article 10.1.

Rule 36 of the Standard Minimum Rules and Principle 33 of the Body of Principles provide that every request or complaint from a prisoner or detainee shall be promptly dealt with and replied to without undue delay. The Human Rights Committee has held that ICCPR Article 10.1 also requires prompt dealing with such requests. It has interpreted "promptly" to the effect that delays must not exceed a few days.[9]

In October 1996 Mr Quan wrote to the Department to request advice on applying for refugee status. On 2 March 1997 he requested asylum in Australia and asked for legal assistance. He did not receive legal assistance until 21 April 1997, seven weeks later, as a direct result of approaches he had made to the local LAC office. It was not organised by the Department in response to the letters he wrote in October 1996 and March 1997. He was not provided with a protection vise application form until 27 May 1997, more than seven months after his first request and twelve weeks after his letter of 2 March 1997.

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[9] General Comment No.8 Article 9 (Sixteenth session, 1982), paragraph 2, as compiled in UN Doc. HRI/GEN/1/Rev.3 dated 15 August 1997.

On 6 July 1996 Mr Su indicated a wish to apply for asylum in Australia and requested legal assistance. He did not receive legal assistance until 17 September, more than 10 weeks later, and even then the interview was clearly unsatisfactory. He did not receive effective legal assistance for a further three months, until 23 January 1997. He did not receive an application form for a protection visa until late January 1997, almost seven months after his initial request.

I accept that the level of correspondence and the need to translate letters may mean that it is not always possible to respond to letters within one or two days. However, due to the fundamental rights that Mr Quan and Mr Su are seeking to exercise and the fact that every day they wait to gain access to the formal refugee determination process is an extra day they spend in detention, I find that the delays experienced in their cases are unjustifiable and inexcusable.

The Department's handling of Mr Quan's and Mr Su's requests was not timely and thus inconsistent with the international standards contained in the Standard Minimum Rules and the Body of Principles. I find that the Department's handling of these requests does not constitute humane treatment in detention and therefore breached Mr Quan's and Mr Su's rights under article 10(1) and their rights under the HREOC Act.

- ***Delays in assistance and arbitrary detention***

The complainants allege that the delays in providing access to legal assistance and applications for a protection visa prolonged their time in detention. The Department states that Mr Quan's and Mr Su's detention was not manifestly unpredictable or indefinite so as to be arbitrary and in breach of ICCPR Article 9.1 because the reasons for and the conditions defining the duration of the detention are set out in domestic legislation and because during the period of their detention the Department was actively working to finalise arrangements for their removal from Australia.

In *A v Australia* the Human Rights Committee stated that arbitrariness must not be equated with unlawfulness but must be interpreted more broadly to include such elements as inappropriateness and injustice.[10] It also stated that remand in custody should be considered arbitrary if it is not necessary in all the circumstances of the case.

In its Immigration Detention Report, the Commission found that Australia's policy of mandatory detention of unauthorised arrivals was arbitrary and so in breach of ICCPR Article 9.1. That practice is required by law and so is not subject to the Commission's complaint jurisdiction, as I have already indicated. However, discretionary acts and practices that prolong the process of determining an application for a protection visa are capable of being the subject of a complaint.

Acts and practices that delay the provision of legal advice and of application forms for protection visas prolong detention by delaying the determination of status. They therefore make the resultant detention arbitrary as detainees cannot predict when they would be able to make an application for refugee status or when their immigration status would be finally determined and they could be released.

I find that Mr Quan's detention from October 1996 until 27 May 1997 and Mr Su's detention from July 1996 to February 1997 were arbitrary within the meaning of ICCPR article 9(1) and constituted a breach of their human rights under the HREOC Act. Over these months they were detained without appropriate justification.

- ***Separation detention***

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[10] Communication No. 560/1993, UN doc.CCPR/C/59/D/560/1993, 30 April 1997.

From 16 June 1996 to 19 September 1996 Mr Quan was detained in E block at the Port Hedland IDC and Mr Su was held in E and J blocks. These accommodation blocks are separated by a series of internal fences from the rest of the centre. While in separation detainees are limited in their ability to contact the outside world through restrictions or prohibitions on using the telephone, obtaining news and receiving correspondence. Separated detainees are not allowed to receive visits from other people in the IDC or people outside the centre, other than legal advisors. While in separation detention detainees are required to eat in the common room of the accommodation block rather than in the main dining area with other detainees in the centre.

Mr Quan and Mr Su spent 96 days in separation accommodation. This is almost three times the average period of time which the Department said was 33 days at that stage.

Some of the conditions of the separation detention at Port Hedland distinguish the practice of segregation from the commonly held understanding of 'incommunicado detention'. Incommunicado detention occurs when people in detention are unable to communicate with the world outside the place of detention. A person in detention should have access to a lawyer, family members and a doctor. A person who is being held incommunicado does not have access to any of these. The Human Rights Committee has found that incommunicado detention for even brief periods will be in breach of ICCPR article 10(1). In *Arzuaga (Gilboa) v Uruguay* a period of incommunicado detention of 15 days was found to breach article 10(1).[11] The Human Rights Committee has repeatedly taken the view that incommunicado detention does not constitute humane conditions of detention and is in breach of article 10(1).

The Department argues that it is incorrect to describe Mr Quan and Mr Su as being in incommunicado detention and that rather they were held in 'separation detention'. It points to the fact that during the initial period of isolation detainees who arrive with friends and family members are not separated from each other or held in solitary confinement but are accommodated together. There is regular contact with the centre's medical and welfare staff. Detainees are able to speak with a lawyer if they are aware of their right to ask for legal assistance and make this request to officers of the Department. They may also be able to write to relatives and others in their home country, although there may also be severe restrictions on correspondence. Also, the circumstances of their detention are open to public scrutiny.

As the Department noted itself, however, Athe conditions in separation detention may have a cumulative effect which over an extended period of time may raise issues of consistency with obligations under article 10.1 of the ICCPR@.

I consider that many aspects of separation detention are comparable to incommunicado detention.

- Legal assistance is difficult to obtain. Detainees first have to know that they have a right to legal advice before they can ask for it. Even if they are aware of this right, in many cases requests for legal assistance are not responded to in reasonable time frames.
- The period of separation is indeterminate and the reason for the separation is not explained clearly.
- Tight restrictions are placed on the use of the telephone and detainees are not permitted to make telephone calls to or correspond with people in the Australian community.
- Detainees do not have access to the outside world through the radio and newspaper and for some periods of time the television.
- Apart from legal advisors, detainees in separation detention are not permitted to have visits from other people inside or outside the centre.

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[11] Communication No. 147/1983, selected decisions of the Human Rights Committee under the Optional Protocol, UN doc. CCPR/C/OP/2, 1990 p. 176.

The period of time Mr Quan and Mr Su spent in separation detention was excessive and is not justified on any grounds. No good reason has been advanced for keeping them in the isolated accommodation area past the first fortnight in July 1996. This treatment is inconsistent with Principle 15 which provides that communication of a detained person with the outside world, and in particular his legal counsel and family, should not be denied for more than a matter of days. It is also inconsistent with Rule 37 which provides that detainees should be allowed to communicate with family and friends through correspondence and visits. It is not humane treatment and so it violates ICCPR article 10.1.

I find that Mr Quan and Mr Su were held for periods exceeding 90 days in conditions which in many respects are identical to incommunicado detention. The conditions of their detention were in breach of Principle 15 and Rule 37 and of ICCPR article 10.1 and therefore of human rights under the HREOC Act.

I note the Department=s advice, in its reply to my preliminary findings, of the improvements effected to the separation detention regime and to the separation blocks at Port Hedland. While I endorse the efforts that have been made to reduce the periods of separation detention at Port Hedland, I consider that separation detention should be used sparingly and in compliance with the Standard Minimum Rules and the Body of Principles to comply with the obligation in ICCPR article 10.1. Detainees who are in separation detention should be informed of the reasons and the likely time-frame for their separation.

NOTICE OF FINDINGS

I find that the Department's acts and practice in not informing Mr Quan and Mr Su of their right to legal advice between 15 June and 5 July 1996 breached their right under ICCPR Article 10.1 and therefore their human right under the HREOC Act to be treated humanely and in accordance with human dignity while in detention.

I find that the Department's handling of Mr Quan=s and Mr Su=s requests for access to legal advice and for application forms for protection visas was not timely and so inconsistent with their humane treatment in detention and therefore breached Mr Quan=s and Mr Su=s rights under ICCPR Article 10(1) and therefore their rights under the HREOC Act.

I find that Mr Quan=s detention from October 1996 until 27 May 1997 and Mr Su's detention from July 1996 to February 1997 were arbitrary within the meaning of ICCPR Article 9(1) and constituted a breach of their human rights under the HREOC Act.

I find that Mr Quan and Mr Su were held for 96 days in separation detention in conditions which in many respects are identical to incommunicado detention, in breach of ICCPR Article 10.1 and therefore of human rights under the HREOC Act.

4.2 Recommendations

On 13 August 2000 the Human Rights Commissioner forwarded the Notice of his Inquiry to the parties. The recommendations contained in that Notice are set out below:

The HREOC Act requires that, where I conclude that an act or practice breaches a human right, I should then make findings to that effect and such recommendations, including where appropriate recommendations for compensation, as may be desirable to compensate and make good, to the extent possible, the harm or damage caused. Having found violations of human rights under the Act I now turn to recommendations.

Australia's policy of mandatory detention of 'unlawful non-citizens' should be revised with a view to maintaining an immigration process which is not in violation of Australia's human rights obligations and which strives to implement a best practice approach to compliance with the ICCPR article 10.1, the Standard Minimum Rules and the Body of Principles.[12] To this end, I recommended in the Immigration Detention Report that sections 189 and 196 of the *Migration Act 1958* (Cth), which require the detention of almost all unauthorised arrivals regardless of their individual circumstances, be repealed and replaced with a system requiring that all unauthorised arrivals be assessed to gauge their suitability for release on a bridging visa. At present only limited classes of detainees held under sections 189 and 196 may be released from detention if they satisfy the restrictive criteria for bridging visas.[13]

I make the following further recommendations directed to preventing further acts or practices such as those in these complaints:

- In compliance with the ICCPR detainees should be informed promptly and effectively of their right to apply for a protection visa and to access independent legal advice and assistance.

- In compliance with the ICCPR, once a detainee has requested legal advice and assistance, that advice and assistance and any necessary interpretive services should be provided in a timely and effective fashion that does not delay the determination of the detainee's status or prolong the detention.

- Separation detention should be used sparingly for the shortest possible period of time and in compliance with the Standard Minimum Rules and the Body of Principles. Detainees who are in separate detention should be informed of the reasons for and the likely time-frame of their separation.

The HREOCA Act also provides that I may make recommendations as to compensation to be paid to those who are subjected to human rights violations. I have been reluctant to make such recommendations but I am conscious of the seriousness of the allegations and findings in these complaints. In our criminal justice system deprivation of liberty is the most severe form of punishment for the most serious crimes. Yet here I have found that two persons not accused let alone convicted of a crime have been subjected to significant periods of arbitrary detention as a

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[12] On 28 July 2000 the 69th session of the Human Rights Committee issued its Observations and Recommendations on Australia's periodic report under the ICCPR [CCPR/CO/69/AUS]. Relevantly, the Committee considered that mandatory detention under the Migration Act of 'unlawful non-citizens', including asylum-seekers, raised questions of compliance with the Covenant. The Committee made the following comments:

> The Committee considers that the mandatory detention under the Migration Act of "unlawful non-citizens", including asylum seekers, raises questions of compliance with article 9, paragraph 1, of the Covenant, which provides that no person shall be subjected to arbitrary detention. The Committee is concerned at the State party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organizations to the detainees in order to inform them of this right.
>
> The Committee urges the State party to reconsider its policy of mandatory detention of "unlawful non-citizens" with a view to instituting alternative mechanisms of maintaining an orderly immigration process. The Committee recommends that the State party inform all detainees of their legal rights, including their right to seek legal counsel.

[13] Bridging visas are described in the Australian Report, CCPR/C/AUS/98/3, paras. 490-495. Regarding restrictiveness, note that only two children out of 581 child detainees were released on a bridging visa between 1994 and 1998, as it has been held that it is more in the child's interests to stay with his or her parents, who are usually not eligible for bridging visas. See Immigration Detention Report, p.22.

result of human rights violations. Under these circumstances I consider it appropriate that I recommend the payment of compensation.

Compensation in human rights cases is difficult to assess. There is no formal or informal schedule. The level of damages awarded in discrimination cases, which constitute by far the great majority of human rights cases decided, is modest compared to damages in other jurisdictions such as tort. I am required to take this into account when assessing the appropriate sums to recommend.

I also take into account the somewhat longer period of arbitrary detention to which Mr Su was subjected compared with Mr Quan. It is appropriate that this difference be reflected in the amounts recommended.

Finally I indicate that I have not attempted to fix a level of damages for each element of human rights violation I have found. Rather, I have attempted to determine an appropriate amount to compensate for the damage done as a whole as a result of the violations.

Accordingly I recommend that the Department pay Mr Su the sum of $20 000 and Mr Quan the sum of $15 000 by way of compensation for the damages each suffered as a result of the human rights violations to which he was subjected. I appreciate that these sums are modest and that no financial payment can truly compensate those unjustly deprived of their liberty and subjected to human rights violations for prolonged periods.

NOTICE OF RECOMMENDATIONS

I make the following recommendations directed to preventing further acts or practices such as those in these complaints.

1. *In compliance with the ICCPR detainees should be informed promptly and effectively of their right to apply for a protection visa and to access independent legal advice and assistance.*

2. *In compliance with the ICCPR, once a detainee has requested legal advice and assistance, that advice and assistance and any necessary interpretive services should be provided in a timely and effective fashion that does not delay the determination of the detainee's status or prolong the detention.*

3. *Separation detention should be used sparingly for the shortest possible period of time and in compliance with the Standard Minimum Rules and the Body of Principles. Detainees who are in separate detention should be informed of the reasons for and the likely time-frame of their separation.*

I also recommend that the Department pay Mr Su the sum of $20 000 and Mr Quan the sum of $15 000 by way of compensation for the damages each suffered as a result of the human rights violations to which he was subjected.

4.3 Respondent's reply

On 3 October 2000, the respondent replied to the notice. Pursuant to section 29(2)(e) of the Act I have set out their reply in full.

> "DIMA disputes the Commissioner's findings that it has breached the ICCPR in its treatment of either Mr Quan or Mr Su. The Department therefore declines to follow the Commissioner's recommendation to pay

compensation to the two individuals. DIMA's Full response to the Notice of findings and recommendations is at Attachment One".

Pursuant to s.29(2)(e) of the HREOC Act, I propose to quote that response in full:

1. Detainees should be informed promptly and effectively of their right to apply for a protection visa and to access independent legal advice.

As the Commissioner has noted, under section 256 of the Migration Act 1958 there is no onus on departmental officers to advise persons in detention of their right to obtain legal advice. The obligation to provide reasonable facilities for obtaining legal advice only arises once an officer has received a request. Departmental policy in this regard is based on the clear intent of legislation passed by Parliament.[14]

The Commissioner argues that the United Nations Human Rights Committee (HRC) has held that compliance with the Standard Minimum Rules for the Treatment of Prisoners (SMR) and the Body of Principles for the Protection of all Persons under any form of Detention (BoP) represent the minimum requirement for complying with Article 10(1) of the ICCPR.

The BoP principle relevant to advice on the right to obtain legal advice is Principle 13. It requires information about how detainees can avail themselves of their rights to be given to them at the commencement of detention or promptly thereafter. Relying on the MSR and BoP, the Commissioner states that he considers 'the right to be advised of the availability of independent legal advice is an essential element of the humane treatment that a person who is deprived of their liberty is entitled to receive under Article 10(1).'

Consistent with its legal advice and its response to the Commissioner's preliminary findings, the Department agrees that while the SMR and BoP represent much of the current international thinking on detention, they are not binding instruments. The SMR and the BoP have not been incorporated into the ICCPR.

In the Department's view, to find a right to be advised of the availability of independent legal advice arising from the ICCPR represents a significant extension of the text of the Convention and goes well beyond the ordinary meaning of its terms. This is inconsistent with the settled approach to the interpretation of the Convention, as provided for in the Vienna Convention on the Law of Treaties.[15]

In the circumstances of this complaint, Mr Su and Mr Quan, together with the other members of the Grevillea boat, were advised of the facilities available for accessing legal advice on 5 July 1996, within 3 weeks of entering detention. The Department believes that this action and the subsequent actions of the Department satisfied both the requirements of the Migration Act as well as the ICCPR.

2. Advice and assistance should be provided in a timely and effective fashion that does not prolong detention.

The Department agrees with this recommendation as it applies to people who have prima facie claims to protection (see point 3 below for elaboration). The Department recognises that the timely provision of advice and application assistance is in the interests of both detainees and the Government. The speedy resolution of possible asylum claims facilitates both the regularisation of the migration status of those unauthorised arrivals ultimately granted protection, and the removal of those individuals to whom Australia does not owe protection obligations.

Turning to the circumstances of the instant complaint, the Department disputes that the complainants had to wait months for legal assistance. As stated in the Department's response to the Commissioner's preliminary findings, reasonable facilities to access legal advice in accordance with section 256 of the Migration Act 1958 were offered to both men, along with other Grevillea boat arrivals at a meeting with the Centre Manager on 5 July 1996, within three weeks of entering detention, in response to a request received from them on 2 July 1996.

Both complainants were provided with assistance in applying for protection visas in an effective manner, through the Immigration Advice and Application Assistance Scheme (IAAAS) funded by the Department.

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14 *Compare with section 193(2) of the Migration Act 1958.*

15 Confirmed by the Human Rights Committee in *Alberta Union v Canada* Communication 11811982 actions of the Department satisfied both the requirements of the Migration Act as well as the ICCPR.

The Commissioner refers to SMR (Rule 36) and BoP (Principle 33) which require requests from detainees to be dealt with promptly. He states "promptly" has been interpreted as meaning not exceeding a few days. In the Department's view it is implausible to rely on these provisions to argue that any delay exceeding a few days amounts to treating detainees without humanity and without respect for the inherent dignity of the human person. It may amount to a breach of the SMR or the BoP but these are not formally incorporated into the ICCPR.

While accepting that there were administrative delays in translation of correspondence and in providing forms to the complainants, the Department does not consider that their consequences led to a breach of Article 10(1) of the ICCPR.

The Department has made continuous improvements in the provision of advice and assistance for detainees, notwithstanding the unprecedented boat arrivals since mid 1999.

3. Separation detention should be used sparingly and detainees in separation should be informed of the reasons for, and the likely time frame of, their separation.

Separation detention is employed in the processing of all new unauthorised boat arrivals. Its purpose is to protect the integrity of the protection visa process and to ensure that Australia's resources are directed at those with genuine claims for protection not those who would use the protection process in an attempt to achieve migration outcomes.

To recommend that separation detention be used sparingly and that detainees be informed of the reasons for them being held in separation detention, demonstrates a fundamental misunderstanding of its purpose and application. All unauthorised arrivals are actively questioned to identify any concerns they may have about returning to their homeland. If they raise claims that prima facie may engage our protection obligations, they are provided, as soon as possible, with assistance to complete a protection visa application. As soon as their protection visa interview has been completed, they are transferred out of separation detention.

In relation to the complaint, the Department disputes that many aspects of separation detention experienced by Mr Su and Mr Quan are comparable to incommunicado detention and therefore in breach ICCPR Article 10(1). 'Incommunicado detention' has been defined by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as follows:

> In incommunicado detention the detained person is totally cut off from any contact with the outside world. Visits by lawyers and relatives are not allowed. Information on the conditions of detention are not available. The detainee is not allowed to write letters or send requests to anyone outside.[16]

The conditions of separation detention experienced by the complainants fall far short of incommunicado detention. The complainants were free to write to relatives and others in their home country. Information on the conditions of their detention was, and is, publicly available.

The Department acknowledged in its response to the Commissioner's preliminary finding that conditions in separation detention may have a cumulative effect, which over an extended period of time may raise issues of consistency with obligations under Article 10(1) of the ICCPR. However, separation detention did not have such an effect in this case.

4. The Department should pay compensation for the damages suffered by the complainants as a result of the human rights violations which they suffered.

The Department does not accept that its acts and practices are inconsistent with, or contrary to, the complainants' human rights, or have resulted in a breach of Articles 9(1) or 10(1) of the ICCPR in respect of the complainants. Consequently, the Department rejects the Commissioner's recommendation pursuant to section 29(2)(c)(i) of the Human Rights and Equal Opportunity Act 1986 to pay compensation to the complainants.

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16 Report by the Special Rapporteur, Mr P Kooijmans, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E/CNA/1986115, 19 February 1986, paragraph 109.