



Australian
Human Rights
Commission

Mr JC v Commonwealth of Australia (Department of Home Affairs)

[2023] AusHRC 153

November 2023

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Report into arbitrary detention

Australian Human Rights Commission 2023

The Hon Mark Dreyfus KC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into the human rights complaint of Mr JC, alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr JC was detained in a closed immigration detention facility for approximately two years and nine months. He complains that his detention was 'arbitrary', contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the following acts of the Commonwealth are inconsistent with, or contrary to, article 9(1) of the ICCPR:

- a. The failure by the Department to refer Mr JC's case to the Minister prior to 24 August 2020, for the Minister to consider exercising his discretionary power to grant Mr JC a visa.
- b. The failure by the Department to assess Mr JC's case against the Minister's s 197AB guidelines at any time during his detention, for possible referral to the Minister to consider exercising his discretionary power to allow Mr JC to reside outside a closed immigration detention centre.

Pursuant to s 29(2)(b), I have included two recommendations to the Department in this report.

On 13 July 2023, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 19 October 2023. That response can be found in Part 8 of this report.

I enclose a copy of my report.

Yours sincerely,

Rosalind Croucher

Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

November 2023

Contents

1	Introduction to this inquiry.....	6
2	Summary of findings and recommendations	6
3	Background	7
4	Legislative framework	11
4.1	<i>Functions of the Commission</i>	11
4.2	<i>What is an ‘act’ or ‘practice’.....</i>	11
4.3	<i>What is a human right?.....</i>	11
5	Arbitrary detention	12
5.1	<i>Law on article 9 of the ICCPR.....</i>	12
6	Findings	13
6.1	<i>Act or practice of the Commonwealth?.....</i>	13
6.2	<i>The Department’s delay in referring Mr JC’s case to the Minister under s 195A and the Department’s failure to assess Mr JC’s case against the s 197AB guidelines.....</i>	15
7	Recommendations.....	20
7.1	<i>Alternatives to held detention</i>	20
7.2	<i>Referrals for ministerial consideration.....</i>	22
8	The Department’s response to my findings and recommendations ..	23

1 Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) has completed its inquiry into a complaint by Mr JC against the Commonwealth of Australia (Department of Home Affairs) (Department), alleging a breach of his human rights. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr JC was detained in a closed immigration detention facility for approximately two years and nine months. He complains that his detention was 'arbitrary', contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).¹
3. The right to liberty and freedom from arbitrary detention is not protected in the Australian Constitution or in legislation. The High Court has upheld the legality of indefinite detention under the *Migration Act 1958* (Cth) (Migration Act).² As a result, there are limited avenues for an individual to challenge the lawfulness of their detention.
4. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights. Detention may be lawful under domestic law but still arbitrary and contrary to international human rights law.
5. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary, and proportionate on the basis of the individual's particular circumstances. There is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the immigration policy, for example the imposition of reporting obligations, sureties or other conditions, in order to avoid the conclusion that detention was 'arbitrary'.
6. This is a report setting out my findings in relation to this inquiry and my recommendations to the Commonwealth.
7. At Mr JC's request, and given that Mr JC has an application for a protection visa that remains outstanding, I have made a direction under s 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

2 Summary of findings and recommendations

8. As a result of the inquiry, I have found that the following acts of the Commonwealth are inconsistent with, or contrary to, article 9(1) of the ICCPR:
 - (a) The failure by the Department to refer Mr JC's case to the Minister prior

to 24 August 2020, for the Minister to consider exercising his discretionary power to grant Mr JC a visa.

- (b) The failure by the Department to assess Mr JC's case against the Minister's s 197AB guidelines at any time during his detention, for possible referral to the Minister to consider exercising his discretionary power to allow Mr JC to reside outside a closed immigration detention centre.

9. I make the following recommendations:

Recommendation 1

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated
- the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement
- increasing community-based placements for low and medium risk detainees, through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

Recommendation 2

The Commission recommends that the Minister's s 195A and s 197AB guidelines should be amended to provide that:

- all people in closed immigration detention are eligible for referral under s 195A and s 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period.

3 Background

10. On 11 May 2012, Mr JC arrived at Christmas Island by boat and was subsequently detained under s 189(3) of the Migration Act and accommodated at Christmas Island Immigration Detention Centre (IDC). At

that time, Mr JC was under 18 years of age.

11. Mr JC arrived in Australia without documentation. Since arrival, he has consistently claimed to be a citizen of Iraq. The Department has stated that identity assessments identified inconsistencies in Mr JC's claims. However, on 16 January 2016, an identity assessment undertaken by the Department found him likely to be an Iraqi citizen.
12. On 6 June 2012, Mr JC was transferred to the mainland and was detained under s 189(1) of the Migration Act. He was held in immigration detention at Leonora Alternative Place of Detention (APOD).
13. On 12 July 2012, the then Minister for Immigration and Citizenship intervened and lifted the bar at s 46A of the Migration Act, to allow Mr JC to lodge a Protection visa application.
14. On 16 July 2012, Mr JC lodged a Protection visa application and the associated Bridging E visa (BVE) application with the Department. On the same day, the then Minister intervened under s 197AB of the Migration Act, to allow Mr JC to reside in Community Detention arrangements.
15. On 19 July 2012, Mr JC was transitioned into Community Detention arrangements in South Australia.
16. On 6 August 2012, the BVE application associated with the Protection visa application was assessed as invalid because the application was barred by s 46A of the Migration Act, and the Minister had not lifted the bar to allow the application for a BVE.
17. On 26 September 2012, a delegate of the Minister refused Mr JC's Protection visa application determining that Mr JC did not meet the refugee or complementary protection requirements.
18. On 2 October 2012, Mr JC lodged an application with the former Refugee Review Tribunal (RRT), seeking merits review of the delegate's decision to refuse his application for a Protection visa. On 15 January 2013, the RRT affirmed the delegate's decision.
19. On 7 March 2013, Mr JC filed an application with (what was then) the Federal Magistrates Court, seeking judicial review of the RRT's decision.
20. On 6 May 2013, the then Minister intervened under s 195A of the Migration Act, granting Mr JC a BVE and releasing him from Community Detention placement on 7 May 2013.
21. On 23 May 2014, (what was then) the Federal Circuit Court dismissed Mr JC's judicial review application (in April 2013 the Federal Magistrates Court became

known as the Federal Circuit Court. It is now known as the Federal Circuit and Family Court of Australia).

22. On 20 June 2014, Mr JC's BVE ceased, and he became an unlawful non-citizen on 21 June 2014.
23. On 16 October 2017, the Department initiated a Ministerial Intervention referral under s 195A of the Migration Act, to grant Mr JC a Humanitarian Stay (Temporary) Visa and a BVE. Mr JC failed to attend the departmental office for grant.
24. On 9 November 2017, the Department initiated a further Ministerial Intervention referral under s 195A of the Migration Act to grant Mr JC a Humanitarian Stay (Temporary) visa and a BVE. Mr JC again failed to attend the departmental office for grant.
25. The Minister's power on both occasions could not be enlivened without Mr JC attending the office to be administratively detained. As Mr JC was not engaging with the Department, he was not included in future submissions.
26. On 10 August 2018, the Australian Border Force (ABF) located Mr JC during a warrant action under s 251 of the Migration Act. The ABF detained Mr JC as an unlawful non-citizen under s 189(1) of the Migration Act and he was transferred to Villawood IDC on the same day.
27. On 3 September 2018, Mr JC lodged a BVE application. On 6 September 2018, the Department assessed Mr JC's BVE application as invalid because the application was barred by s 46A of the Migration Act, and the Minister had not lifted the bar to allow the application for a BVE.
28. On 26 October 2018, Mr JC signed a Request for Removal from Australia form. On 6 November 2018, the Department approached the Consulate-General of the Republic of Iraq in Sydney to obtain a travel document for Mr JC. On 13 November 2018, the consulate advised it was unable to progress the matter, as they require Mr JC to provide documents in support of his identity.
29. On 25 February 2019, the Department initiated an assessment of Mr JC's case against the Minister's s 195A guidelines.
30. On 13 March 2019, Mr JC withdrew his request for removal.
31. Due to an internal processing error, assessment of Mr JC's case against the Minister's guidelines did not commence until July 2019.
32. On 16 January 2020, the Department determined that Mr JC met the s 195A

- guidelines for referral to the Minister.
33. On 24 August 2020, Mr JC's case was referred to the then Assistant Minister for Customs, Community Safety and Multicultural Affairs.
 34. On 21 December 2020, following a Ministerial reshuffle, Mr JC's submission was returned to the Department for updating.
 35. On 7 January 2021, the Department referred Mr JC's submission to the former Minister of Immigration, Citizenship, Migrant Services and Multicultural Affairs.
 36. On 19 January 2021, the Minister declined to consider Mr JC's case.
 37. The Department commenced a further ministerial intervention process on 20 April 2021. A submission was referred to the Minister on 29 April 2021.
 38. The Minister subsequently decided to consider Mr JC's case, and on 4 May 2021, intervened under s 195A of the Migration Act and granted Mr JC a Humanitarian Stay (Temporary) (Subclass 449) visa which was valid for a period of seven days and a BVE which ceased to have effect on 4 November 2021.
 39. Mr JC was released from closed immigration detention on 4 May 2021, as the holder of a BVE.
 40. On 13 October 2021, Mr JC lodged a s 48B Ministerial Intervention request with the Department, requesting that the Minister lift the statutory bars to allow him to apply for a Temporary Protection visa or a Safe Haven Enterprise visa.
 41. On 28 October 2021, Mr JC was granted a further BVE, which ceased to have effect on 28 January 2022.
 42. On 7 December 2021, Mr JC lodged a further s 195A Ministerial Intervention request with the Department, seeking to be granted a further BVE.
 43. On 17 December 2021, Mr JC was found to meet the guidelines for a referral under s 48B of the Migration Act. His case was referred to the Minister, but returned unsigned to the Department in May 2022 following the federal election.
 44. A submission to the Minister for consideration under ss 46A and 48B to allow Mr JC to make a further Protection visa application and BVE application was made on 5 December 2022.
 45. The Minister did intervene to allow Mr JC to lodge another protection visa application, which he did on 10 February 2023.

46. On 28 March 2023, Mr JC was granted a BVE associated with his protection visa application.
47. From 10 August 2018 when he was detained, to 4 May 2021 when he was released, Mr JC spent approximately two years and nine months in a closed immigration detention centre.

4 Legislative framework

4.1 Functions of the Commission

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

4.2 What is an 'act' or 'practice'

51. 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.
52. 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.
53. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.³

4.3 What is a human right?

54. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
55. 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.

5 Arbitrary detention

56. Mr JC complains about the period (10 August 2018 to 4 May 2021) he was detained in an IDC. This requires consideration to be given to whether his detention was arbitrary contrary to article 9(1) of the ICCPR.

5.1 Law on article 9 of the ICCPR

57. 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 detention⁴
- (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 system⁵
- (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 predictability⁶
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁷

58. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁸

59. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.⁹

60. The United Nations Working Group on Arbitrary Detention has expressed the view that the use of administrative detention for national security purposes is not compatible with international human rights law where detention continues for long periods or for an unlimited period without effective judicial oversight.¹⁰ A similar view has been expressed by the UN HR Committee, which has said:

if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law ... information of the reasons must be given ... and court control of the

detention must be available ... as well as compensation in the case of a breach ...¹¹

61. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.¹²
62. A short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, closed detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.¹³
63. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, closed immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth) in order to avoid being arbitrary.¹⁴
64. Accordingly, where alternative places or modes of detention that impose a lesser restriction on a person's liberty are reasonably available, and in the absence of particular reasons specific to the individual, prolonged detention in an immigration detention centre may be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.
65. It is therefore necessary to consider whether the detention of Mr JC in a closed immigration facility can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

6 Findings

6.1 Act or practice of the Commonwealth?

66. When Mr JC's BVE ceased, he became an unlawful non-citizen, meaning the Migration Act required that he be detained.
67. However, there are several powers that the Minister can exercise, including to

grant a visa, or to allow detention in a less restrictive manner than in a closed immigration detention centre.

68. Section 195A of the Migration Act confers upon the Minister, a discretionary non-compellable power to grant a visa to a person in immigration detention, subject to any conditions necessary to consider their specific circumstances.
69. The Minister also has the power under s 197AB of the Migration Act, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention, if he thinks that it is in the public interest to do so. A 'specified place' may be a place in the community. The residence determination may be made subject to other conditions such as reporting requirements.
70. The Minister issues guidelines to explain (a) when officers of the Department should refer a case to the Minister so they can consider exercising their discretionary power, and (b) the circumstances in which the Minister may wish to consider exercising the discretionary power to grant a visa to a person in immigration detention.
71. On 25 February 2019, over six months after Mr JC was detained, the Department initiated an assessment of Mr JC's case against the Minister's s 195A guidelines.
72. In information provided to the Commission on 30 September 2020, the Department stated that, 'due to an internal processing error, assessment of Mr JC's case against the Minister's guidelines did not commence until July 2019'.
73. Approximately six months later, on 16 January 2020, the Department determined that Mr JC met the s 195A guidelines for referral to the Minister.
74. After making that determination, it took the Department over seven months to refer Mr JC's case, on 24 August 2020, to the then Assistant Minister for Customs, Community Safety and Multicultural Affairs. At this point, Mr JC had been detained for over two years.
75. On 4 May 2021, the Minister decided to intervene in Mr JC's case and granted Mr JC a Humanitarian Stay (Temporary) (Subclass 449) visa and a BVE, pursuant to a further submission referred to the Minister by the Department on 29 April 2021.
76. In addition, during the two years and nine months of Mr JC's detention, the Department did not consider at any time his individual circumstances against the Minister's s 197AB guidelines for possible referral to the Minister for consideration for community detention.

77. Accordingly, I consider the following ‘acts’ of the Commonwealth as relevant to this inquiry:

- (a) The failure by the Department to refer Mr JC’s case to the Minister prior to 24 August 2020, for the Minister to consider exercising his discretionary power to grant Mr JC a visa.
- (b) The failure by the Department to assess Mr JC’s case against the Minister’s s 197AB guidelines at any time during his detention, for possible referral to the Minister to consider exercising his discretionary power to allow Mr JC to reside outside a closed immigration detention centre.

6.2 The Department’s delay in referring Mr JC’s case to the Minister under s 195A and the Department’s failure to assess Mr JC’s case against the s 197AB guidelines

78. As set out above, under section 195A of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under s 189 of the Act.

79. On 18 August 2017, the Hon Peter Dutton MP, Minister for Home Affairs, reissued guidelines to explain the circumstances in which he may wish to consider exercising his power under s 195A of the Act. These guidelines remain currently in use by the Department. Circumstances in which the Department may refer a person’s case to the Minister include when:

- (a) the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia, but removal is not reasonably practicable for reasons that may include, but are not limited to, cases where:
 - i. the person’s identity or nationality has not been positively established despite the person’s cooperation in trying to establish identity and/or nationality
 - ii. the person’s country of origin refuses to recognise the person as a national
 - iii. the person’s country of origin refuses to accept their return or to issue a travel document to facilitate their return
 - iv. it is not possible to return the person to their country of origin because of ongoing conflict and/or policy regarding involuntary removals.

- (b) there are other compelling or compassionate circumstances which justify the consideration of the use of the Minister's public interest powers and there is no other intervention power available to grant a visa to the person.
80. The guidelines state that when assessing cases that may be referred to the Minister to consider exercising his intervention powers, the Department is expected to balance the considerations for referral against any adverse information about the person, for example:
- (a) whether the person poses a risk to another individual or group within Australia, including risks of a health or security nature
 - (b) whether the person has a criminal history, both in Australia or offshore, including criminal charges and convictions
 - (c) the person's behaviour in immigration detention and/or the community
 - (d) where the person is the subject of a criminal or national security related allegation.
81. Mr JC arrived in Australia without documentation. Since arrival, he has consistently claimed to be a citizen of Iraq. The Department has stated that identity assessments conducted by the Department and the RRT identified inconsistencies in Mr JC's claims. However, on 16 January 2016, an identity assessment undertaken by the Department found him likely to be an Iraqi citizen.
82. 26 October 2018, Mr JC signed a Request for Removal from Australia form. On 6 November 2018, the Department approached the Consulate-General of the Republic of Iraq in Sydney to obtain a travel document for Mr JC. On 13 November 2018, the consulate advised it was unable to progress the matter, as they require Mr JC to provide documents in support of his identity. On 13 March 2019, Mr JC withdrew his request for removal.
83. As Mr JC had no matters before the Department, tribunals or the courts, the Department considered him to be on an involuntary removal pathway.
84. However, in its letter to the Commission dated 30 September 2020, the Department stated that the Iraqi Government does not accept involuntary removals, and therefore the Department is unable to effect Mr JC's removal.
85. These circumstances clearly fall within the above outlined criteria in the Minister's guidelines warranting referral to the Minister to consider exercising his power to grant a visa.
86. In particular, the Department identified that Mr JC's removal from Australia was not reasonably practicable as:

- (a) his country of origin, in this case Iraq, refused to issue a travel document to facilitate his return; and
- (b) the Iraqi Government has a policy of not accepting involuntary removals.
87. The Department's response to my preliminary view refers to the section 195A guidelines which state that 'people with no outstanding immigration matters who are not cooperating with efforts to effect their departure from Australia' should not be referred to the Minister. This direction contradicts the direction within the same document that cases can be referred to the Minister where 'it is not possible to return the person to their country of origin because of ... policy regarding involuntary removals'.
88. By mid-November 2018, the Department was aware that the Iraqi Government would not issue a travel document to facilitate Mr JC's return to Iraq and Mr JC's removal from Australia was not reasonably practicable. Approximately three months later, on 25 February 2019, the Department initiated an assessment of Mr JC's case against the Minister's s 195A guidelines. It then took 18 months for a submission to be referred to the Minister for his consideration of Mr JC's case.
89. The Department has stated that 'due to an internal processing error' there was a six-month delay from when the Department initiated an assessment of Mr JC's case against the Minister's 195A guidelines, to when assessment of his case in fact commenced.
90. In information provided to the Commission on 2 June 2022, the Department further stated that:
- Ministerial Intervention processing slowed between March and June 2020, while the Department focused its efforts on the Government's COVID-19 response and diverted resources to critical functions. Since returning to more normal activity in July 2020, the Department has been focussing on cases of priority, as discussed with the offices of the Minister for Home Affairs and the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs. Mr [JC]'s case was progressed in line with those priorities.
91. While I understand that the Department's Ministerial Intervention processes slowed for a period during the COVID-19 pandemic, the Department has not provided an explanation for why Mr JC's case had not already been referred to the Minister prior to processes slowing, especially given that the Department knew by mid-November 2018 that Mr JC could not be removed from Australia. Mr JC's unwillingness to cooperate with removal efforts does not provide an answer in circumstances where there were relevant factors weighing in favour

of referral to the Minister and the guidelines provide contradictory advice to the Department on this point. In my view, the Department has not provided sufficient explanation for the time taken for it to refer Mr JC's case to the Minister.

92. The Department has provided no information to suggest that closed detention was necessary, for example, to prevent flight or for community safety. In fact, the Department's submission to the Minister states that:

Mr [JC] is not removal ready, is of low risk of harm to the community and of medium risk of not engaging with the Department.

This submission concludes that:

Considering all factors and in particular CPAT's [the Community Protection Assessment Tool used by the Department to assess a person's removal readiness, risk to the community and engagement with status resolution processes] recommendation to grant Mr [JC] a BVE and the fact that his case was twice considered favourably by the Minister in the past, his case meets the s 195A guidelines for referral to the Minister.

93. As stated above, a short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, in this case, when it became clear to the Department that there was no reasonable prospect to remove Mr JC from Australia, time efficient consideration should have been given to less restrictive alternatives to closed immigration detention.

94. In response to my preliminary view, the Department stated:

[Ministerial intervention] is not a right. There is no requirement for a case to be assessed against the section 195A or section 197AB guidelines or referred to a Minister.

...

The Department conducts formal monthly reviews of all persons in immigration detention. The case reviews are conducted to ensure placement is appropriate and that cases are progressing towards a status resolution outcome. In conducting monthly reviews, SROs must consider any new information or new barriers to case progression. The section 195A guidelines generally specify that any case where there are no outstanding immigration matters and an individual is not cooperating with removal processes, should not be referred to the Minister for consideration. This was reflective of Mr [JC]'s circumstances between August 2018 and May 2021, despite his case being referred to the Minister during this period.

Between 10 August 2018 and 28 May 2021, SROs reviewed Mr [JC]'s case 36 times. The reviews did not identify any circumstances that warranted a change of Mr [JC]'s current placement or a referral for assessment against the section 197AB guidelines.

95. The reviews referred to in this response consider whether there are any circumstances that indicate that a detainee cannot be appropriately managed within a detention centre environment, and focus on whether there have been any changes of note since the last review conducted. They do not focus on the necessity or proportionality of continuing to detain the individual on the basis of particular reasons specific to the individual, and in light of the available alternatives to closed detention. They are for that reason not an adequate safeguard against arbitrary detention.
96. The Department's delay in referring Mr JC's case to the Minister resulted in his continued detention totalling approximately two years and nine months from when he was detained. I find that Mr JC's detention from when the Department became aware that there were no reasonable prospects of removing him from Australia, was more than was necessary, and was disproportionate in the circumstances.
97. I consider that the failure by the Department to refer Mr JC's case to the Minister prior to 24 August 2020 resulted in his detention being 'arbitrary', contrary to article 9 of the ICCPR.
98. In addition, the Department failed to assess Mr JC's circumstances against the Minister's s 197AB guidelines at any time during his detention, for possible referral to the Minister to consider exercising his discretion under s 197AB of the Migration Act to allow Mr JC to reside in a less restrictive form of detention outside a closed immigration detention centre.
99. This is despite the fact that the s 197AB guidelines state that the Minister will consider cases where there are 'unique or exceptional circumstances'. The phrase 'unique or exceptional circumstances' is not defined in any of the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest. In those guidelines, one of the relevant factors to an assessment of 'unique or exceptional circumstances' is whether there are circumstances that may bring Australia's obligations as a party to the ICCPR into consideration.
100. Approximately three months into Mr JC's detention, the Department was aware that his removal from Australia was not practicable. In these circumstances, Mr JC's continued detention brought Australia's obligations as a party to the ICCPR into consideration. Therefore, there was scope to bring his

case within the Minister's s 197AB guidelines for referral to the Minister.

101. I consider that the failure by the Department to assess Mr JC's case against the Minister's s 197AB guidelines at any time during his detention, for possible referral to the Minister to consider exercising his discretion under s 197AB of the Migration Act to allow Mr JC to reside outside a closed immigration detention centre resulted in his detention being 'arbitrary', contrary to article 9 of the ICCPR.
102. For the reasons set out above, I find that Mr JC's detention from at least November 2018 was arbitrary, contrary to article 9 of the ICCPR.

7 Recommendations

103. 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.¹⁵ The Commission may include any recommendations for preventing a repetition of the act or a continuation of the practice.¹⁶ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.¹⁷

7.1 Alternatives to held detention

104. As previously highlighted by the Commission, the detention review process currently conducted by the Department considers whether there are circumstances that indicate that a detainee cannot be appropriately managed within a detention centre environment. They do not consider whether detention is reasonable, necessary or proportionate on the basis of particular reasons specific to the individual, and in light of the available alternatives to closed detention. The Commission has expressed concern that this process does not adequately safeguard against arbitrary detention.¹⁸
105. In August 2022, the Department conducted a stakeholder briefing about its Alternatives to Held Detention program. It subsequently published a briefing note and slide deck in relation to that briefing.¹⁹ These documents described a range of important initiatives that were being explored by the Department, including:
 - **Risk assessment tools:** reviewing current tools and developing a revised risk assessment framework and tools that enable a dynamic and nuanced assessment of risk across the status resolution continuum

- **An ‘independent panel’:** establishing a qualified independent panel of experts to conduct a more nuanced assessment of a detainee’s risk, including risks related to their physical and mental health, and provide advice about community-based placement for detainees with complex circumstances and residual risk
- **Increasing community based placements:** in particular, by focusing on detainees who pose a low to medium risk to the community, and managing residual risk through the imposition of bail-like conditions and the provision of post-release support services
- **A ‘step-down’ model:** considering transfer from held detention to a residence determination as part of a transition to living in the community.

106. Those initiatives were prompted by two reviews:

- the Independent Detention Case Review conducted by Robert Cornall AO for the Department in March 2020²⁰
- the Commission’s report to the Attorney-General titled *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141 in February 2021.

107. The Commission welcomes these initiatives which reflect and build on recommendations it has made in a number of previous reports including the one identified above. Implementation of these initiatives would increase the prospect that decisions to administratively detain an individual are limited to circumstances where detention is reasonable, necessary and proportionate on the basis of particular reasons specific to the individual, and in light of the available alternatives to closed detention.

108. The Commission encourages further work to be undertaken by the Department in each of the areas identified in the Alternatives to Held Detention program.

Recommendation 1

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated

- the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement
- increasing community-based placements for low and medium risk detainees, through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

7.2 Referrals for ministerial consideration

109. Following the High Court's recent judgment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, it appears that there will need to be amendments made to the guidelines issued by the Minister to the Department about the exercise of ministerial intervention powers, including under s 195A and s 197AB. In particular, it is no longer open to the Minister to give the Department the ability *not* to refer cases on the basis that the Department has formed the view that the cases do not have 'unique or exceptional circumstances' or that it is otherwise not in the public interest for the Minister to exercise these powers.
110. Any revised guidelines issued by the Minister should contain clear, objective criteria for referral.²¹ It also appears from the documents published by the Department as part of the Alternatives to Held Detention program, identified above, that some intractable cases will only be able to be resolved by the Minister. As a result, there is a real need to ensure that these cases are brought to the Minister's attention so that decisions can be made by the Minister about the potential exercise of their personal intervention powers.
111. The Commission understands from discussions with the Department that it has recently taken steps, in conjunction with the Minister, to ensure that the cases of long term and vulnerable detainees are referred to the Minister for consideration, even if they may not meet previously issued guidelines in relation to referral.
112. The cohorts of people identified in submission MS22-002407 dated 31 October 2022, released through freedom of information laws, as being referred to the Minister for intervention are:
- detainees assessed as low risk of harm to the community through the Community Protection Assessment Tool
 - detainees in respect of whom a protection finding has been made, have no ongoing immigration matters and where it is currently not reasonably practicable to effect their removal to third countries

- detainees who are confirmed to be stateless and have no identified right to reside in another country
- detainees in Tier 4 health related specialised held detention placements and/or with complex care needs
- detainees who have been in immigration detention for five years or more (where not already included in any of the above cohorts)
- detainees who are the subject of a Residence Determination (for more than 6 months).

113. The Commission welcomes these steps, which it understands has led to the exercise of intervention powers in a significant number of cases. While it is hoped that these interventions will have a positive impact on the number of people subject to prolonged, and potentially arbitrary, detention, the Commission reiterates previous recommendations it has made for amendment of the guidelines for referral to the Minister to ensure that the cases of all detainees whose detention has become protracted or may continue for a significant period are referred to the Minister for consideration given the temporary nature of this measure.²²

Recommendation 2

The Commission recommends that the Minister's s 195A and s 197AB guidelines should be amended to provide that:

- all people in closed immigration detention are eligible for referral under ss 195A and 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period.

8 The Department's response to my findings and recommendations

114. On 13 July 2023, I provided the Department with a notice of my findings and recommendations.
115. On 19 October 2023, the Department provided the following response to my findings and recommendations:

The Department of Home Affairs (the Department) values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings identified in this

report and the recommendations made by the President of the Commission. In particular, the Department welcomes the President's comments on the Department's progress on initiatives to the Alternatives to Held Detention (ATHD) program and the steps undertaken by the Department and the Minister to ensure that cases of long-term and vulnerable detainees are referred to the Minister for consideration.

The Department does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, Mr JC's rights under articles 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

The Department does not agree that it failed to refer Mr JC's case for Ministerial consideration under section 195A of the *Migration Act 1958* (the Act) prior to 24 August 2020 with the effect of breaching Mr JC's rights under article 9(1) of the ICCPR.

The Department does not agree that it failed to assess Mr JC's case against the section 197AB guidelines at any time during his detention with the effect of breaching his rights under article 9(1) of the ICCPR. Mr JC was lawfully detained as an unlawful non-citizen under section 189 of the Act. At no point did Mr JC's detention become arbitrary.

Alternatives to held detention

Recommendation 1 – Partially Agree

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- *the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated*
- *the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement*
- *increasing community-based placements for low and medium risk detainees, through necessary conditions and support services • utilising residence determinations as part of a step-down model of reintegration into the community.*

The Department is progressing the ATHD program to better support the use of community-based placements for individuals at risk of facing prolonged detention. Under the ATHD program, the Department is considering:

- establishing an independent assessment capability to advise on risk mitigation (including support needs) for detainees being considered for a community placement.

- a step-down model using residence determination or visa grant with tailored support services and conditions.

The Department previously considered developing an internal dynamic risk assessment tool as part of ATHD. However, current thinking has progressed towards a revised approach for a future model, which seeks to leverage off existing risk assessment capability within the Criminal Justice System.

Development of longer-term options for ATHD may require changes to legislative and policy settings (and would be subject to policy authority from Government).

The Department established a Detention Status Resolution Review project to refer agreed cohorts of detainees for possible Ministerial intervention with the authority of the Minister for Immigration, Citizenship and Multicultural Affairs. As at 31 August 2023, the Department had referred 149 detainees for Ministerial intervention consideration under sections 195A and/or 197AB of the Act, resulting in a number of community placements where the Minister considered it in the public interest to intervene. Consistent with this authority, the Department continues to progress cases for Portfolio Ministers' consideration.

Referrals for ministerial consideration

Recommendation 2 – Partially Agree

The Commission recommends that the Minister's sections 195A and 197AB guidelines should be amended to provide that:

- *all people in closed immigration detention are eligible for referral under sections 195A and 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period.*

The Department is currently considering the implications of the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 for ministerial intervention. Further information about the Department's approach will be made available in due course.

The Department partially agrees to this recommendation, as the Department is not able to amend the Ministerial Intervention guidelines. It is at the discretion of the Minister what criteria they determine should be included in any new Ministerial Intervention guidelines/instructions.

The Department will provide the Commission's recommendations for the Minister's consideration when briefing the Minister on options to review the sections 195A and 197AB Ministerial Intervention guidelines.

Table 1 – Summary of Department’s response to recommendations

Recommendation number	Department’s response
1	Partially agree
2	Partially agree

116. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

November 2023

Endnotes

- ¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ² *Al-Kateb v Goodwin* (2004) 219 CLR 562.
- ³ See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Note in particular 212–3 and 214–5.
- ⁴ UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, *Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); UN Human Rights Committee, *Communication No 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) (*C v Australia*); UN Human Rights Committee, *Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (2003) (*Baban v Australia*).
- ⁵ UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014) [18]; UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).
- ⁶ *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee, *Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) (*Van Alphen v The Netherlands*); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) (*Spakmo v Norway*).
- ⁷ UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014); *A v Australia*, 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*, UN Doc CCPR/C/76/D/900/1999.
- ⁸ *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- ⁹ *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communication No 1255,1256,1259,1260,1266,1268,1270,1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (2007) (*Shams & Ors v Australia*); *Baban v Australia*, CCPR/C/78/D/1014/2001; UN Human Rights Committee, *Communication No 1050/2002*, 87th sess, CCPR/C/87/D/1050/2002 (2006) (*D and E and their two children v Australia*).
- ¹⁰ Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].
- ¹¹ UN Human Rights Committee, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons)*, 60th sess, UN Doc HRI/GEN/1/Rev.1 (1982) [4]. See also UN Commission on Human Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc E/CN.4/826/Rev.1 (1962) [783]–[787].
- ¹² UN Human Rights Committee, *Communication No 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (2004) (*Mansour Ahani v Canada*) [10.2].
- ¹³ UN Human Rights Committee, *Communication No 794/1998*, 74th sess, UN Doc CCPR/C/74/D/794/1998 (2002) (*Jalloh v the Netherlands*); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001.
- ¹⁴ UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6];

Van Alphen v the Netherlands, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999.

¹⁵ AHRC Act, s 29(2)(a).

¹⁶ AHRC Act, s 29(2)(b).

¹⁷ AHRC Act, s 29(2)(c).

¹⁸ Australian Human Rights Commission, *Ms RC v Commonwealth (Department of Home Affairs)* [2022] AusHRC 144, at [104].

¹⁹ Department of Home Affairs, *Alternatives to Held Detention Program, stakeholder meeting – briefing notes and presentation*, 8 August 2022, at <https://www.homeaffairs.gov.au/foi/files/2022/fa-220901228-document-released.PDF>.

²⁰ A redacted copy of this report was provided to the Commission by the Department. A copy has also been released on the Department of Home Affairs disclosure log: Department of Home Affairs, *Independent Detention Case Review*, March 2020, at <https://www.homeaffairs.gov.au/foi/files/2023/fa-230300029-document-released.PDF>.

²¹ *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [17] (Kiefel CJ, Gageler and Gleeson JJ) and [99] (Gordon J), cf [219] (Steward J).

²² *AZ v Commonwealth (Department of Home Affairs)* [2018] AusHRC 122, [58] at <https://humanrights.gov.au/our-work/legal/publications/az-v-commonwealth-department-home-affairs-2018>; *QA v Commonwealth (Department of Home Affairs)* [2021] AusHRC 140, [189] at <https://humanrights.gov.au/our-work/legal/publications/qa-v-commonwealth-department-home-affairs-2021>; *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, [576]–[578] at <https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>.