



Australian  
Human Rights  
Commission

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# Mansoor and Mr IA v Commonwealth (DIBP)

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[2014] AusHRC 71

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ISSN 1837-1183

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**Design and layout** Dancinggirl Designs

**Printing** Masterprint Pty Limited

#### **Electronic format**

This publication can be found in electronic format on the website of the Australian Human Rights Commission:  
[www.humanrights.gov.au/publications/index.html](http://www.humanrights.gov.au/publications/index.html).

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**Mansoor and Mr IA v  
Commonwealth (Department  
of Immigration and Border  
Protection)**

Report into arbitrary detention

[2014] AusHRC 71

**Australian Human Rights Commission 2014**



**Australian  
Human Rights  
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**Australian  
Human Rights  
Commission**

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May 2014

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

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into a complaint made on behalf of Mr Amir Morad Mansoor and a complaint made by Mr IA.

I find that the failure of the former Minister for Immigration and Border Protection (the Minister) to place Mr Mansoor and Mr IA into community detention or another less restrictive form of detention was inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

I find that the practice of the former Minister not to consider individuals who are facing criminal charges for community detention was contrary to article 9(1) of the ICCPR.

I do not find that the transfer of Mr IA to the Metropolitan Remand and Reception Centre at Silverwater Correctional Centre constituted a breach of articles 9(1) or 10(1) of the ICCPR.

By letters dated 3 and 10 December 2013 the Hon Scott Morrison MP, Minister for Immigration and Border Protection, and the Department of Immigration and Border Protection (Department) provided responses to my findings and recommendations. I have set out the responses of the Minister and the Department in their entirety in part 11 of my report.

Please find enclosed a copy of my report.

Yours sincerely

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs  
**President**  
Australian Human Rights Commission

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# 1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission and the reasons for those findings following an inquiry by the Commission into a complaint made on behalf of Mr Amir Morad Mansoor and a complaint made by Mr IA.
2. Mr Mansoor and Mr IA allege that their treatment by the Commonwealth of Australia involved acts or practices inconsistent with or contrary to human rights.

## 2 Summary of findings

3. I find that the failure of the Minister for Immigration and Border Protection (the Minister) to place Mr Mansoor and Mr IA into community detention or another less restrictive form of detention was inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).
4. I find that the practice of the former Minister for Immigration and Border Protection not to consider individuals who are facing criminal charges for community detention was contrary to article 9(1) of the ICCPR.
5. I do not find that the transfer of Mr IA to the Metropolitan Remand and Reception Centre at Silverwater Correctional Centre constituted a breach of articles 9(1) or 10(1) of the ICCPR.

## 3 Summary of recommendations

6. In light of my findings regarding the acts and practices of the Commonwealth, I recommend that the Minister consider alternatives to closed detention once the complainants complete their custodial sentence. I further recommend that the Department of Immigration and Border Protection (Department) amend its policies in the ways identified in section 10.2 of this report.

## 4 The complaint made on behalf of Mr Mansoor

### 4.1 Background

7. A written complaint was made to the Commission on behalf of Mr Mansoor dated 19 March 2012 alleging Mr Mansoor's detention by the Commonwealth was arbitrary within the meaning of article 9(1) of the ICCPR.
8. Both parties have had the opportunity to respond to my preliminary view of 5 April 2013 which set out the acts or practices raised by the complaint that appeared to be inconsistent with or contrary to human rights.

## 4.2 Findings of fact

9. I consider the following statements about the circumstances which gave rise to Mr Mansoor's complaint to be uncontentious.
10. Mr Mansoor is a stateless Kurd born in Iran who arrived on Christmas Island as an irregular maritime arrival on 31 January 2010.
11. On 10 May 2010, Mr Mansoor was found not to be a refugee as a result of the Refugee Status Assessment process.
12. On 17 July 2010, Mr Mansoor was transferred to Villawood Immigration Detention Centre (VIDC).
13. On 5 February 2011, an Independent Merits Review (IMR) also found Mr Mansoor not to be a refugee.
14. Mr Mansoor sought judicial review of the IMR decision on 3 March 2011. On 22 July 2011, the Federal Magistrates Court found the decision to be affected by jurisdictional error.
15. On 7 March 2012, the IMR again found Mr Mansoor not to be a refugee. Mr Mansoor sought judicial review and the decision was upheld in the Federal Magistrates Court on 4 December 2012.
16. On 12 January 2012, the Australian Federal Police charged Mr Mansoor for his alleged involvement in riots at VIDC in April 2011. Mr Mansoor was taken into police custody.
17. On 10 March 2012, Mr Mansoor was granted bail and returned to VIDC.
18. On 5 April 2013, Mr Mansoor was convicted of affray and was sentenced to 17 months' imprisonment.

# 5 The complaint by Mr IA

## 5.1 Background

19. Mr IA made a written complaint to the Commission dated 8 November 2011, alleging that his detention by the Commonwealth was arbitrary within the meaning of article 9(1) of the ICCPR. Mr IA also alleges that his detention at Silverwater Correctional Centre was in breach of articles 9(1) and 10 of the ICCPR.
20. Mr IA and the Commonwealth have had the opportunity to respond to my preliminary view of 20 May 2013 which set out the acts or practices raised by the complaint that appeared to be inconsistent with or contrary to human rights.

## 5.2 Findings of fact

21. I consider the following statements about the circumstances which gave rise to Mr IA's complaint to be uncontentious.
22. Mr IA is a national of Afghanistan who arrived on Christmas Island as an irregular maritime arrival on 11 February 2010.
23. On 26 June 2010, Mr IA was found not to be a refugee as a result of the Refugee Status Assessment process.

24. On 10 September 2010, Mr IA was transferred to VIDC.
25. On 15 February 2011, an IMR also found Mr IA not to be a refugee.
26. Mr IA sought judicial review of the IMR decision on 30 March 2011. On 27 October 2011, the Federal Magistrates Court upheld the decision of the IMR.
27. In April 2011, Mr IA was allegedly involved in riots at VIDC.
28. From 22 April 2011 until 11 May 2011 Mr IA was detained in the MRRC at Silverwater Correctional Centre as he was identified as a person of interest to the AFP.
29. On 11 May 2011, Mr IA was transferred back to VIDC.
30. On 12 January 2012, Mr IA was taken into AFP custody and charged with riot, affray and destroy or damage property. On 29 January 2012, Mr IA was granted bail and transferred back to VIDC on 4 February 2012.
31. In April 2013, Mr IA was convicted of affray and sentenced to 17 months imprisonment.

## 6 The Commission's human rights inquiry and complaints function

32. Section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) gives the Commission the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right.
33. Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.

### 6.1 The Commission can inquire into acts or practices of the Commonwealth

34. The expressions 'act' and 'practice' are defined in section 3(1) of the AHRC Act to include an act done or a practice engaged in 'by or on behalf of the Commonwealth', or under an enactment.
35. Section 3(3) of the AHRC Act also provides that a reference to, or the doing of, an act includes a reference to a refusal or failure to do an act.
36. An 'act' or 'practice' only invokes the human rights complaints jurisdiction of the Commission where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.<sup>1</sup>
37. Whilst on Christmas Island, the complainants were detained under section 189(3) of the *Migration Act 1958* (Cth) (Migration Act). At the time the complainants were detained, section 189(3) of the Migration Act stated that 'if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person'. There was no requirement for the Commonwealth to detain the complainants whilst they were on Christmas Island.



38. When the complainants were transferred from Christmas Island to the mainland, they were detained under section 189(1) of the Migration Act. While section 189(1) of the Migration Act requires the detention of unlawful non-citizens, it does not require that unlawful non-citizens are detained in an immigration detention facility.
39. Section 197AB of the Migration Act states:
- If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a **residence determination**) to the effect that one or more specified persons to whom this subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1).
40. Further, the definition of ‘immigration detention’ includes ‘being held by, or on behalf of, an officer in another place approved by the Minister in writing’.<sup>2</sup> Accordingly, the complainants could have been placed in community detention or the Minister could have approved a place in the community as a place of detention.

## 6.2 ‘Human rights’ relevant to this complaint

41. The expression ‘human rights’ is defined in section 3 of the AHRC Act and includes the rights and freedoms recognised in the ICCPR, which is set out in Schedule 2 to the AHRC Act.
42. The articles of the ICCPR that are of particular relevance to this complaint are:
- Article 9(1) (prohibition on arbitrary detention); and
  - Article 10(1) (humane treatment of people deprived of their liberty).
43. My function in investigating complaints of breaches of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with the human rights defined and protected by the ICCPR.
44. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of the international instruments and by international jurisprudence about their interpretation.

### (a) Article 9(1) of the ICCPR

45. 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.
46. The requirement that detention not be ‘arbitrary’ is separate and distinct from the requirement that detention be lawful.<sup>3</sup>
47. In order to avoid the characterisation of arbitrariness, detention should not continue beyond the period for which a state party can provide appropriate justification.<sup>4</sup>
48. In *A v Australia*,<sup>5</sup> the United Nations Human Rights Committee (UNHRC) said:
- [T]he Committee recalls that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.<sup>6</sup>

49. The UNHRC further stated:

... the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which justify detention for a period. Without such factors, detention may be considered arbitrary, even if entry was illegal.<sup>7</sup>

50. Moreover, detention which is otherwise lawful may still be arbitrary where there are less invasive means of achieving compliance with immigration policies.

51. In *C v Australia*,<sup>8</sup> the UNHRC found that the detention was arbitrary because:

[t]he State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition.<sup>9</sup>

## (b) Article 10(1) of the ICCPR

52. Article 10(1) provides:

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

53. Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons.<sup>10</sup> However, a complainant must demonstrate an additional exacerbating factor beyond the usual incidents of detention.<sup>11</sup>

54. In *Brough v Australia*, the UNHRC stated:

Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.<sup>12</sup>

55. The content of article 10(1) has also been developed with the assistance of a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty, including the Standard Minimum Rules for the Treatment of Prisoners<sup>13</sup> (Standard Minimum Rules) and the Body of Principles for the Protection of all Persons under Any Form of Detention<sup>14</sup> (Body of Principles).

56. 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(1).<sup>15</sup> The UNHRC has also indicated that compliance with the Standard Minimum Rules and the Body of Principles is the minimum requirement for compliance with the obligations imposed by the ICCPR that people in detention are to be treated humanely under article 10(1).<sup>16</sup>

# 7 Forming my opinion

57. In forming an opinion as to whether any act or practice was inconsistent with or contrary to any human right, I have carefully considered all of the information provided to me by the parties in connection with this matter.

## 8 Arbitrary detention

### 8.1 Failure to detain the complainants in the least restrictive manner possible

58. The information before the Commission suggests that the Commonwealth first considered placing the complainants in a less restrictive form of detention in August 2011. In relation to Mr Mansoor, the Department advises that:
- On 2 August 2011, Mr Mansoor's case was referred for assessment against the guidelines for community detention placement.
  - On 30 November 2011, Mr Mansoor was found to meet the guidelines for consideration under community detention.
  - On 7 February 2012, the Minister advised that he would not approve community detention for clients who are facing criminal charges.
  - On 12 June 2012, an assessment of Mr Mansoor's circumstances was completed and he was found not to meet the community detention guidelines due to his criminal charges.
59. In relation to Mr IA, the Department advises that:
- On 11 August 2011, Mr IA was referred to the Community Detention Branch for consideration of community detention.
  - On 19 January 2012, Mr IA's community detention referral was transferred to the Complex Case Resolution Section for consideration as Mr IA was a person of interest to the AFP. On the same day, Mr IA was assessed as not meeting the guidelines for referral as he had been transferred to criminal custody.
  - On 20 March 2012, Mr IA was referred to the Complex Case Resolution Section as he had been granted bail. On 24 April 2012, he was found not to meet the community detention guidelines.
60. In April 2011, the complainants were allegedly involved in riots at VIDC.
61. On 12 January 2012, the complainants were taken into AFP custody and charged with criminal offences in relation to their alleged involvement in the riots.
62. On 10 March 2012, Mr Mansoor was granted bail and returned to immigration detention. The following bail conditions were imposed:
1. Reside at such place as may be determined by the Minister for Immigration.
- If they are to be housed in the community then the following conditions are to apply:
2. They are to notify the Court of their residential address within 24 hours of being released into the community.
  3. Report to the police station closest to their residence every Monday, Wednesday and Friday between 8:00am and 8:00pm.
  4. Not apply for any international travel documents.
  5. Not come within half a kilometre of any international departure points.
  6. Not depart Australia.

7. An appropriate person is to enter into agreement to forfeit \$500 on breach of bail.

8. The accused is to enter into an agreement to forfeit \$1000 on breach of bail.

63. On 29 January 2012, Mr IA was granted bail and transferred back to VIDC on 4 February 2012.

64. It is of significant concern that the first time the Department considered the complainants for community detention was in August 2011, 18 months after they had been in detention. This delay is inconsistent with the Commonwealth's obligation to detain the complainants in the least restrictive manner possible.

65. Mr Mansoor was found to meet the guidelines for community detention on 30 November 2011. However, as a result of the Minister's direction not to consider individuals who are facing criminal charges for community detention, Mr Mansoor continued to be held in closed detention at VIDC.

66. On 23 April 2012, a Department officer completed a 'checklist for consideration of referral for section 197AB residence determination' for Mr IA. In response to the question 'are there any health (physical or mental) issues that cannot be managed in a detention centre' the officer answered 'yes' and noted the following:

Mr IA has disclosed a history of torture and trauma. A New South Wales Service for the Treatment and Rehabilitation of Torture Survivors (STARTTS)(sic) Report, dated 4 November 2011, states that Mr IA exhibits symptoms of Post-Traumatic Stress Disorder (PTSD), depression and anxiety. The report also states that, given Mr IA's symptoms have been exacerbated as a consequence of the extended duration of his detention, he would benefit from being released into the community. The report concludes that: 'In the event of Mr IA's continued detention, which is perceived by him to be unsafe, the severity of his symptoms are likely to increase and the success of any future treatment is likely to be limited'.

67. The officer concluded that despite concerns about Mr IA's mental health and his detention for more than two years, 'on balance' he did not meet the community detention guidelines for referral to the Minister.

68. On the material before me I do not consider the complainants' criminal charges and subsequent convictions justified their administrative detention in an immigration detention centre. The Commonwealth has not explained why the complainants could not have resided in the community or in a less restrictive form of detention (if necessary, with appropriate conditions imposed to mitigate any identified risks) while their immigration status was resolved.

69. I note in particular that Mr Mansoor was granted bail on 7 March 2012 and Mr IA was granted bail on 29 January 2012.

70. I find that the failure to place the complainants in community detention or another less restrictive form of detention was arbitrary and inconsistent with their right to liberty in article 9(1) of the ICCPR.

71. I have read Mr Mansoor's psychological report by Ms Afsaneh Jolan that diagnoses him with major depression and post-traumatic stress disorder. The Department has been provided with this report.

72. I have also read Mr IA's psychological report prepared by Ms Larisa Zilenkov dated 26 March 2012. Mr IA is diagnosed with having symptoms of anxiety, major depression and post-traumatic stress disorder. The Department is aware of Mr IA's mental health concerns and acknowledges these issues could not be managed in a detention centre.

73. It causes extreme concern that the Commonwealth continued to detain the complainants despite knowledge of their mental state.

74. While the complainants have not raised article 7 of the ICCPR which provides for freedom from torture or cruel, inhuman or degrading treatment, I draw the Commonwealth's attention to the findings of the UNHRC in *C v Australia*.<sup>17</sup> In relation to that communication, the UNHRC concluded that the continued detention of the complainant in immigration detention (in total for over two years), when the Australian Government was aware that his detention was contributing to his development of a psychiatric illness, constituted a violation of article 7 of the ICCPR.<sup>18</sup>

## 8.2 Policy not to consider individuals for community detention who are considered to be a person of interest to the AFP or facing criminal charges

75. In February 2012, the former Minister advised the Department that he would not consider individuals for community detention who are considered to be a person of interest to the AFP or facing criminal charges. I am concerned that as a result of this policy the individual circumstances of detainees who are of interest to the AFP or who have criminal charges are not being taken into account in assessing whether community based detention (or some other less restrictive form of detention than detention in an immigration detention facility) is appropriate even in situations where bail has been granted.
76. I find that the practice identified is contrary to article 9(1) of the ICCPR in that it results in ongoing detention in immigration detention facilities of individuals who are of interest to the AFP or facing criminal charges without an adequate consideration of their individual circumstances, the extent to which they pose any particular risk to the Australian community, and the extent to which that risk could be mitigated.

# 9 Detention at Silverwater Correctional Facility

77. Mr IA alleges that his detention at the MRRC at Silverwater from 22 April 2011 until 11 May 2011 breached articles 9 and 10 of the ICCPR. However, Mr IA has not provided any particulars to substantiate his allegations.
78. The Department states that Mr IA was temporarily transferred to Silverwater Correctional Facility as part of a request made to the NSW Department of Corrections to temporarily house a number of detainees who were considered persons of interest in relation to their possible involvement in the April 2011 riots. A letter from the Department to the NSW Department of Corrections dated 28 April 2011 evidences that the request was also made to assist the Department manage the ongoing good order of VIDC. Mr IA has not provided any information as to how the Department could have managed the good order of VIDC in a less restrictive way.
79. In April 2012, the Commonwealth Ombudsman published a report of an investigation into the transfer of 22 detainees from VIDC to the MRRC on 22 April 2011.<sup>19</sup> The report found that once the detainees were transferred to the correctional facility the Department did not comply with certain administrative procedures set out in the Procedures Advice Manual 3. The report did not find any error in the decision to transfer the detainees from VIDC to the MRRC.<sup>20</sup>

We acknowledge that at the time DIAC decided to transfer the 22 detainees to the MRRC, Villawood IDC was in a state of considerable unrest. The physical safety of detainees, DIAC, Serco and International Health and Medical Services staff, as well as emergency services and AFP officers, was under threat. Fires were not yet under control and a significant number of detainees was [sic] still protesting.

We make no criticism of the actions of any officers undertaking their duties in this situation and accept that the decision to transfer the detainees from Villawood IDC to the MRRC was an operational one made in good faith by DIAC on the advice of the AFP.

80. There is insufficient evidence before me to find that, in transferring Mr IA to the MRRC, the Commonwealth breached articles 9 and 10 of the ICCPR.

## 10 Recommendations

81. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.<sup>21</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>22</sup>
82. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
  - the taking of other action to remedy or reduce the loss or damage suffered by a person.<sup>23</sup>

### 10.1 Recommendation that alternatives to closed detention be considered

83. Mr Mansoor requested that I recommend that he be released into community detention or be granted a bridging visa.
84. Similarly, Mr IA requested that I recommend that consideration be given to his application for a bridging visa.
85. I recommend that the Minister consider the grant of a bridging visa or release into community detention when the complainants complete their custodial sentence. The complainants should not be returned to closed immigration detention unless it is necessary, reasonable and proportionate.
86. I further recommend that the Department should amend its policies in the ways outlined below.

### 10.2 Recommended policy changes

87. I recommend that the current Minister advise the Department that he will consider individuals for community detention who are persons of interest to the AFP or facing criminal charges. This will allow the individual circumstances of detainees to be taken into account in assessing whether community based detention (or some other less restrictive form of detention than detention in an immigration detention facility) is appropriate.

88. The need to detain in an immigration detention facility should be assessed on a case-by-case basis taking into consideration individual circumstances. That assessment should be conducted when a person is taken into immigration detention or as soon as possible thereafter. A person should only be held in an immigration detention facility if they pose a flight risk or are assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved.
89. The Department should conduct regular reviews of detention for all people in immigration detention facilities. This review should focus on whether continued detention in an immigration detention facility is necessary, reasonable and proportionate in each individual's specific circumstances.
90. The guidelines relating to the Minister's residence determination power should be amended to provide that unless the Department is satisfied that a person in an immigration detention facility is a flight risk, or poses an unacceptable risk to the Australian community which cannot be addressed through the imposition of conditions on community detention, the Department should refer all persons to the Minister for consideration of making a residence determination. The Department should make the referral as soon as practicable and in no circumstances later than 90 days after the individual is placed in an immigration detention facility.

## 11 Commonwealth's response to findings and recommendations

91. On 18 July 2013, I provided a notice to the Department under section 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to the complaints dealt with in this report.
92. By letter dated 3 December 2013, the Hon Scott Morrison MP, Minister for Immigration and Border Protection, provided a response to my findings that the failure of the Minister to place Mr Mansoor and Mr IA into community detention, or another less restrictive form of detention, was inconsistent with the prohibition on arbitrary detention in article 9(1) of the ICCPR. I set out his response in full:

I note the findings of the AHRC in this case.

I am aware that you have previously been provided with a comprehensive history of all considerations in Mr Mansoor and Mr IA's cases under sections 195A and 197AB of the *Migration Act 1958* (the Act), and that you note that both powers are non-delegable and non-compellable.

I am unable to speak on behalf of my predecessors; however I note that any decisions made under section 195A or section 197AB of the Act may take into account the consideration of many factors, including a detainee's immigration pathway, behaviour in detention, risk to the Australian community and connection to the Australian community.

Specifically, with regard to Mr Mansoor and Mr IA, their criminal history and imprisonment as a result of their involvement in the riots at the Villawood Immigration Detention Centre in April 2011 would have been relevant in considering risk to the Australian community.

Ultimately, decisions are made at the discretion of the Minister, and are a reflection of what is deemed to be in the public interest at that time.

93. By letter dated 10 December 2013, the Department provided a response to my finding that the practice of the then Minister to not consider individuals who are facing criminal charges for community detention was contrary to article 9(1) of the ICCPR. I set out the response in full:

The Department notes the findings of the AHRC in this case.

The Department reaffirms its position that this practice was at the personal discretion of the then Minister in determining what is in the public interest. The Department is required to act in accordance with Ministerial direction.

94. The Department also noted my finding that the transfer of Mr IA to the Metropolitan Remand and Reception Centre at Silverwater Correctional Centre did not constitute a breach of articles 9(1) or 10(1) of the ICCPR. The Department made no further statement in relation to this finding.

95. In relation to my recommendation that the Minister consider alternatives to closed detention once the complainants complete their custodial sentence, the Department provided the following response:

The Department notes the recommendations of the AHRC in this case.

The Department can advise that Mr Mansoor and Mr IA were returned to held immigration detention on completion of their custodial sentence, given their status as unlawful non-citizens.

Detainees in held immigration detention are assessed on an ongoing basis in accordance with case management principles and review practices adopted by the Department. As such, Mr Mansoor and Mr IA's circumstances will be regularly assessed by the Department in accordance with these practices. As part of the Department's ongoing review, should it be determined that Mr Mansoor or Mr IA's circumstances fall within the section 195A or 197AB guidelines, their cases will be referred to the Minister for consideration of alternative management options.

As you are aware, the Minister's public interest powers under the Act are non-delegable and non-compellable. This means that the Minister does not have a duty to exercise his public interest powers. Whilst the Minister may intervene where it is in the public interest to do so, it is for the Minister personally to determine what this constitutes.

96. In relation to my recommendation that the Department amend its policies in the ways identified in section 10.2 of this report, the Department provided the following response:

The Department notes the recommendations of the AHRC in this case and will address each recommendation identified in section 10.2 of your report separately.

**A. The current Minister advise the Department that he will consider individuals for community detention who are persons of interest to the Australian Federal police or facing criminal charges. This will allow the individual circumstances of detainees to be taken into account in assessing whether community based detention (or some other less restrictive form of detention than detention in an immigration detention facility) is appropriate.**

Whilst the Minister may intervene where he considers the individual circumstances of a detainee to be compelling and where it is in the public interest to do so, it is for the Minister personally to determine what this constitutes. The Minister's public interest powers under section 195A and 197AB are non-delegable and non-compellable, meaning that the Minister does not have a duty to exercise or consider exercising his Ministerial intervention power.

The Department is required to act in accordance with Ministerial direction.



**B. The need to detain in an immigration detention facility should be assessed on a case-by-case basis taking into consideration individual circumstances. That assessment should be conducted when a person is taken into immigration detention or as soon as possible thereafter. A person should only be held in an immigration detention facility if they pose a flight risk or are assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved.**

The Department notes and agrees with this recommendation. Further, it is the Department's position that placement decisions are already made on an individual basis.

Section 189 of the Act provides that unlawful non-citizens are subject to mandatory detention. Australian Government policy requires that Illegal Maritime Arrivals (IMAs) remain in immigration detention pending mandatory checks regarding identity, health, security and character. Further, the Department is unable to grant IMAs a temporary visa due the nature of their arrival as they are not an *eligible non-citizen* as per section 72 of the Act. As such, placement into the community can only occur through the Minister's personal intervention under either section 195A or section 197AB. The Minister's public interest powers under section 195A and section 197AB are non-delegable and non-compellable, meaning that the Minister does not have a duty to exercise or consider his Ministerial intervention power.

As you have been advised previously, Mr Mansoor and Mr IA's cases have each been considered under the Minister's guidelines for placement into the community. On the basis of their individual circumstances, including involvement in criminal conduct, they were considered to not meet these guidelines.

**C. The Department should conduct regular reviews of detention for all people in immigration detention facilities. This review should focus on whether continued detention in an immigration detention facility is necessary, reasonable and proportionate in each individual's specific circumstances.**

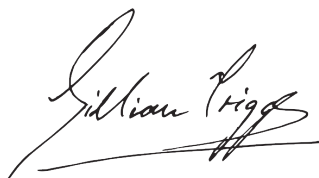
Departmental case managers conduct regular case reviews for all detainees in immigration detention facilities. These reviews consider a number of factors including whether detention continues to be appropriate, whether the right level of case management intervention is being applied and re-consideration of the detainee's detention placement (taking into account health and well-being, family structure, community support, availability of accommodation and any security factors). As part of this ongoing review, if it is determined that a detainee's circumstances fall within the section 195A or section 197AB guidelines, their case will be referred to the Minister for consideration of alternate management options.

**D. The guidelines relating to the Minister's residence determination power should be amended to provide that, unless the Department is satisfied that a person in an immigration detention facility is a flight risk or poses an unacceptable risk to the Australian community that cannot be addressed through the imposition of conditions on community detention, the Department should refer all persons to the Minister for consideration of making a residence determination. The Department should make the referral as soon as practicable and in no circumstances later than 90 days after the individual is placed in an immigration detention facility.**

Ministerial intervention guidelines are periodically reviewed to ensure they are consistent with the Minister's wishes for the use of his non-compellable and non-delegable powers. The current guidelines outline a set of vulnerability indicators against which the Department assesses individual detainee cases.

The guidelines on the Minister's Residence Determination power under section 197AB and section 197AD of the Act, were revised in May 2013 and endorsed by the then Minister.

97. I report accordingly to the Attorney-General.



Gillian Triggs  
**President**  
Australian Human Rights Commission

May 2014

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- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.  
2 *Migration Act 1958* (Cth) s 5.  
3 In *Van Alphen v the Netherlands*, Communication no 305/1988, UN Doc CCPR/C/39/D/305/1988 [5.8], the UNHRC said '[A]rbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime'.  
4 *C v Australia* Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999 [8.2], *D and E v Australia* Communication No 1050/2002 UN Doc CCPR/C/87/D/1050/2002 [7.2], *Omar Sharif Baban v Australia* Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001 [7.2], *Bakhtiyari v Australia* Communication No 1069/2002 UN doc CCPR/C/79/D/1069/2002 [9.2].  
5 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993.  
6 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 [9.2].  
7 Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993 [9.4].  
8 Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999.  
9 *C v Australia* Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999 [8.2], See also *D and E v Australia* Communication No 1050/2002 UN Doc CCPR/C/87/D/1050/2002 [7.2], *Omar Sharif Baban v Australia* Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001, *Bakhtiyari v Australia* Communication No 1069/2002 UN Doc CCPR/C/79/D/1069/2002 [9.2].  
10 United Nations Human Rights Committee, General Comment 21, Article 10 (Forty-Forth session, 1992), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 153.  
11 *Jensen v Australia* Communication No 762/1997 UN Doc CCPR/C/71/D/762/1997.  
12 Communication no 1184/03 CCPR/C/86/D/1184/2003.  
13 The Standard Minimum Rules were approved by the UN Economic and Social Council in 1957. They were subsequently adopted by the UN General Assembly in resolutions 2858 of 1971 and 3144 of 1983: U.N. Doc.A/COMF/611, Annex 1.  
14 The Body of Principles were adopted by General Assembly resolution 43/173 of 9 December 1988.  
15 United Nations, Official Records of the General Assembly, Thirteenth Session, Third Committee, 16 September to 8 December 1958, pages 160-173 and 227-241.  
16 Human Rights Committee General Comment No 21 (1992), [5]. See also *Mukong v Cameroon* (1994) Communication No 458/1991, UN Doc CCPR/C/51/458/1991 [9.3].  
17 Human Rights Committee, *C v Australia*, note 9, para 8.4.  
18 Human Rights Committee, *C v Australia*, note 9, para 8.4.  
19 Commonwealth Ombudsman, *Department of Immigration and Citizenship Detention Arrangements – the transfer of 22 detainees from Villawood Immigration Detention Centre to the Metropolitan Remand and Reception Centre Silverwater*, Report No 02/2012 (April 2012).  
20 Commonwealth Ombudsman, above, 3.2-3.3.  
21 AHRC Act s 29(2)(a).  
22 AHRC Act s 29(2)(b).  
23 AHRC Act s 29(2)(c).

## Further Information

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