



Australian
Human Rights
Commission

**Ms AR on behalf of
Mr AS, Master AT
and Miss AU v
Commonwealth of
Australia (DIBP)**

[2016] AusHRC 110

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

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

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**Ms AR on behalf of Mr AS,
Master AT and Miss AU v
Commonwealth of Australia
(Department of Immigration
and Border Protection)**

[2016] AusHRC 110

Report into protection from sexual
abuse, arbitrary detention and
interference with family

Australian Human Rights Commission 2016



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November 2016

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

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Ms AR on behalf of herself, her husband Mr AS, and their children Master AT and Miss AU against the Commonwealth of Australia, Department of Immigration and Border Protection (department).

I have found that, while in immigration detention on Christmas Island, Ms AR made an urgent request for medical assistance in relation to a possible sexual assault on her 4 year old daughter which was not acted upon for 3 days after the alleged incident took place. This delay was contrary to Miss AU's rights under article 19 of the *Convention on the Rights of the Child* (CRC).

I have found that the initial failure to assess Ms AR and her family for community detention for approximately 7 months from the alleged sexual assault, and the subsequent delay in putting a submission to the Minister for an additional 6 months resulted in the family's detention being arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 37(b) of the CRC. Further, there was a failure to take into account Miss AU's best interests as a primary consideration, contrary to article 3 of the CRC.

I have found that the continued detention of Mr AS is arbitrary, contrary to article 9 of the ICCPR and also amounts to an arbitrary interference with his family, contrary to articles 17 and 23 of the ICCPR.

In light of my findings I recommended that the department promptly make a further submission to the Minister for Immigration and Border Protection for him to consider exercising his power under section 195A of the *Migration Act 1958* (Cth) to grant Mr AS a bridging visa, subject to any conditions as may be necessary. The department accepted this recommendation.

Australian Human Rights Commission

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

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

I recommended that the Commonwealth pay to Ms AR an appropriate amount of compensation to reflect the family's loss of liberty and the emotional distress caused to her and her family as a result of the delay in providing medical assistance to Miss AU. The department did not accept this recommendation but noted that it would be open to Ms AR to make a claim for compensation under the Scheme for Compensation for Detriment Caused by Defective Administration.

I also recommended that the department develop (and require Serco to develop) detailed policies and procedures to respond quickly to reports or information about child sexual abuse; and that the department review the efficiency and effectiveness of the current system for providing medical assistance to people in immigration detention. The department accepted each of these recommendations.

The department provided a response to my findings and recommendations on 16 September 2016. I have set out the department's response in part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

Gillian Triggs
President
Australian Human Rights Commission

1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint by Ms AR on behalf of herself, her husband Mr AS, and their children Master AT (now 10 years old) and Miss AU (now 6 years old).
2. Ms AR complains that when her daughter Miss AU was 4 years old she was sexually assaulted while the family was in immigration detention on Christmas Island and that the Department of Immigration and Border Protection (the department) failed to take appropriate measures to protect Miss AU. This allegation raises issues under articles 3, 19 and 37(c) of the *Convention on the Rights of the Child* (CRC).
3. Ms AR complains that the detention of the whole family in immigration detention for 23 months and the continued detention of Mr AS alone since mid-July 2015 was and is arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and articles 3 and 37(b) of the CRC. The continued detention of Mr AS following the release of Ms AR and their children on bridging visas also raises issues under articles 17 and 23 of the ICCPR and article 3 of the CRC about an arbitrary interference with family.
4. Given that the family has claims for asylum that have yet to be determined and given the nature of the alleged sexual assault on Miss AU I consider that the preservation of the anonymity of Ms AR and her family is necessary to protect their privacy and human rights. Accordingly, I have given a direction pursuant to section 14(2) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) and have referred to them throughout this report as Ms AR, Mr AS, Master AT and Miss AU.
5. An inquiry was undertaken pursuant to section 11(1)(f) of the AHRC Act.
6. On the basis of this inquiry, I make the following findings:
 - (a) I find that Ms AR made an urgent request for medical assistance in relation to a possible sexual assault on her 4 year old daughter which was not acted upon for 3 days after the alleged incident took place.
 - (b) I find that Ms AR made a request to Serco Australia Pty Ltd (Serco), the organisation contracted by the Commonwealth to manage the immigration detention centres in Australia, for an internal review of the delay in providing medical assistance to her daughter, that Serco referred the request for an internal review to the department, but that neither the department nor Serco conducted any substantial investigation into her complaint.

- (c) I find that the initial delay in arranging medical attention for Miss AU following the alleged sexual assault was contrary to her rights under article 19 of the CRC. There was a duty to take all appropriate administrative measures to protect children in detention from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Although the department had put in place some preventative measures, in this instance they were not effective to provide the necessary immediate support for Miss AU and fell short of what was required to immediately identify an issue of serious concern and effectively refer that issue for medical assessment.
- (d) I find that from the point at which medical assessment was first undertaken, through to Miss AU's assessment by an experienced paediatrician in Perth, the actions taken by the department and its service providers in terms of reporting, referral, investigation, treatment and follow-up were appropriate.
- (e) Whether required by a policy decision of the Minister or whether resulting from a failure by the department to refer the family to the Minister pursuant to the community detention guidelines, I find that the failure to assess Ms AR and her family for community detention from at least 13 May 2014 resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. Further, there was a failure to take into account Miss AU's best interests as a primary consideration, contrary to article 3 of the CRC.
- (f) I find that the delay by the department in putting a submission to the Minister for more than 6 months from 5 December 2014 for consideration of community detention for Ms AR and her family resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC.
- (g) I find that the continued detention of Mr AS is arbitrary, contrary to article 9 of the ICCPR and also amounts to an arbitrary interference with his family, contrary to articles 17 and 23 of the ICCPR.

7. I also express serious concerns about the conduct of the department in the course of the Commission's inquiry into this complaint. The Commission asked the department to produce a copy of the medical request form which Ms AR said that she was required to lodge the day after the alleged sexual assault on her daughter. The department twice denied that any such form existed before eventually producing a copy of the form more than 9 months later. The form is described in paragraph 35 below. This conduct, when combined with my finding in paragraph 6(b) above about the failure by either Serco or the department to conduct a proper internal review into the delay, raises serious questions about the ability of the department to respond internally to complaints about its conduct towards vulnerable detainees.

8. Based on those findings, I make the following recommendations:

- (a) I recommend that the department promptly make a further submission to the Minister for him to consider exercising his power under section 195A of the *Migration Act 1958* (Cth) (Migration Act) to grant Mr AS a bridging visa, subject to any conditions as may be necessary.
- (b) I recommend that the Commonwealth pay to MsAR an appropriate amount of compensation to reflect the loss of liberty caused by the family's detention in accordance with the principles outlined in section 6.2 below.
- (c) I recommend that the Commonwealth pay to Ms AR an appropriate amount of compensation to reflect the emotional distress caused to her and her family as a result of the delay in providing medical assistance to Miss AU and the failure to properly investigate this delay following her complaint to Serco.
- (d) I recommend that the department develop (and require Serco to develop) detailed policies and procedures to respond quickly to reports or information about child sexual abuse. These policies should also deal with the initial identification of potential instances of child sexual assault, particularly in an environment in which detainees may not have English as a first language.
- (e) I recommend that the department review the efficiency and effectiveness of the current system for providing medical assistance to people in immigration detention in light of the current Australian National Audit Office performance audit of health care services delivery in onshore immigration detention and my findings in the course of inquiring into the present complaint by Ms AR. This review should consider:
 - the advice given to detainees about how they can access medical assistance (both the policy about what advice is to be given and the day to day experience of how this policy is reflected in practice);
 - the system for dealing with urgent requests for medical assistance;
 - the system of requiring detainees to fill in medical request forms in order to access primary health care;
 - the system for processing medical request forms, including how regularly forms are reviewed and the timing of subsequent appointments;
 - the resourcing allocated to the provision of doctors to detainees and how this interacts with the timeliness of appointments.

2 Legislative Framework

2.1 Functions of the Commission

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

2.2 Scope of ‘act’ and ‘practice’

13. The terms ‘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 an authority of the Commonwealth or under an enactment.
14. 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.
15. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken;² that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

2.3 Protection from sexual abuse

16. The Commonwealth has an obligation to protect children in immigration detention from sexual abuse. Article 19(1) of the CRC provides that:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
17. In considering the nature of the measures required to be taken, article 19(2) of the CRC relevantly provides that:

Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment
18. More generally, the Commonwealth has a duty to ensure that children have 'such protection and care as is necessary' for their wellbeing.³ This requires the Commonwealth to ensure:

that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.⁴
19. A number of competent authorities have established standards for the care and protection of children. In particular, the United Nations has adopted Rules for the Protection of Juveniles Deprived of their Liberty (the 'Rules for Protection of Juveniles').⁵ These rules relevantly provide:
 28. The detention of juveniles should only take place under conditions that take full account of their particular needs ... and which ensure their protection from harmful influences and risk situations. ...
 87. In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles, in particular, as follows: ...
 - (d) All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation, and should take immediate action to secure medical attention whenever required.

20. Domestically, a number of authoritative bodies have established best practice principles for creating child-safe environments and organisations. These bodies include the Community and Disability Services Ministers' Conference,⁶ the Australian Children's Commissioners and Guardians (ACCG)⁷ and the Royal Commission into Institutional Responses to Child Sexual Abuse.⁸ Some of these principles will be considered in more detail below.
21. Finally, article 37(c) of the CRC relevantly provides that:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

2.4 Arbitrary detention

22. 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.
23. Article 37(b) of the CRC provides:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.
24. Similarly, section 4AA of the Migration Act confirms that children should only be detained as a measure of last resort.
25. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
 - (a) 'detention' includes immigration detention;⁹
 - (b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system;¹⁰
 - (c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;¹¹ and
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.¹²

26. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee found detention for a period of 2 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.¹³ Similarly, the Human Rights Committee considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was ‘considerably in excess of what is necessary’.¹⁴
27. The Human Rights Committee has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than 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.¹⁵
28. Relevant jurisprudence of the Human Rights Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:¹⁶

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

3 Background

3.1 Alleged sexual assault

30. Ms AR and her family are originally from Vietnam. They arrived in Australia by boat at Christmas Island on 24 August 2013.
31. Ms AR and her family were initially detained on Christmas Island at Lilac/Aqua Alternative Place of Detention. She says that after about 8 months they were moved to block G for about a week and were then moved to Construction Camp at Phosphate Hill. She says that at Construction Camp the family were allocated adjoining rooms with a double bunk bed in each but the whole family slept in the same room because it was the only one with air conditioning. Ms AR estimates that there were around 500 people detained at Construction Camp.
32. On or about 4 May 2014, Ms AR's daughter Miss AU, who was then 4 years old, was allegedly the victim of a sexual assault. In a signed statement that Ms AR gave to the Australian Federal Police (AFP) on 24 May 2014 around 3 weeks after the incident, she described the incident in the following way:

About three weeks ago when we were still in ['Construction Camp' in Phosphate Hill on Christmas Island], I remember a change in [AU's] behaviour, she was continually crying at night and telling me she was in pain and sore.

I remember one of those nights she didn't have any dinner and went to bed much earlier than usual. I remember that she had trouble passing her urine and ended up wetting her bed later in her sleep around midnight. She was screaming in pain and kept holding onto her vagina.

She was telling me her 'buom' is sore. Buom means butterfly in Vietnamese and is what I taught my daughter to call her vagina.

When she had woken up after wetting the bed I took her to the bathroom to wash her vagina, when I tried to do this again [AU] told me she was in pain and would not let me touch her vagina. She continuously kept pushing my hands away when I tried to check her which she doesn't normally do.

I took [AU] back to her bed so I could check her vagina to see if everything was ok. When I looked at her vagina I noticed it was swollen and red, I also noticed there were scratch marks around her vagina, they weren't bleeding but definitely looked like she had been scratched. I also noticed her vagina looked more opened than usual.

I asked [AU] what had happened and she just kept saying to me 'they did it, they made me in pain'.

[AU] continued to cry that night telling me how much pain she was in and kept covering her vagina with her hand.

After a little while [AU] fell asleep however she kept waking through the night and screaming and we didn't know if it was from the pain or nightmares. She kept telling me she didn't want to be alone and was clinging to myself and my husband.

[AU] never had problems with bed wetting or sleep before this incident so I knew something was wrong.

The next day I tried to see the Doctor but was told I had to put in a request form and it took three days before they finally saw [AU] and I.

Over these days [AU] became very quiet and was continually clinging to [AS] and I. She was having trouble sleeping and still waking up and crying at night. We also noticed she was no longer an active or outgoing girl.

When we saw the Doctor I remember it was a female Doctor and there was also an interpreter present.

I remember that the Doctor looked at [AU's] vagina and told me that it looked abnormal and took some swabs and urine samples to do tests on. The Doctor told me we would have the results in one week.

About two days later, a Vietnamese officer came to tell us we were getting transferred to the mainland (Perth) where there were more facilities and to do better tests on her.

33. The Commission asked the department to provide copies of any video surveillance or closed circuit television footage of the alleged incident. In response, the department said:

CCTV footage was reviewed with a back date of five days prior to the alleged incident, but no incidents of concern were evident.
34. As set out in her statement to the AFP, Ms AR said that she tried to see a doctor so that Miss AU could be examined but she was told that she had to fill in a request form and that it ultimately took 3 days before she could get an appointment.
35. Ms AR's signed statement to the AFP is consistent with the documentary evidence. On 5 May 2014 Ms AR filled in a Client Medical Request Form and asked for urgent medical assistance for her daughter. On the form Ms AR filled in the date, she filled in her daughter's name and boat ID number in the space asking for client details, she identified the compound they were detained in, and she signed the form and printed her own name. Under the heading 'What are you requesting?' she wrote:

excuse me my daughter need meet doctor gynecology hurry please.

36. The department says that this medical request form was not reviewed until the afternoon of the next day, 6 May 2014. The department has explained that:
- Requests to access medical services are made via the completion of a Medical Request Form by the Detainee. All medical request forms are collected daily and reviewed by a Nurse. The Nurse will then make an assessment based on the nature of the request and the Detainee's medical history to determine whom the appointment should be booked with and when.
37. The department describes the assessment undertaken by the nurse as follows:
- In [Miss AU's] case, her medical request form was reviewed by a Nurse on 6 May 2014. The Nurse assessed the information on the form alongside her medical records and noted that she was considered to be a healthy child with no medical issues of concern on her file. An appointment was booked for her to attend with her mother less than 48 hours later with the Doctor.
38. The department has not produced any record in support of the submission that the nurse noted that Miss AU 'was considered to be a healthy child with no medical issues of concern on her file'. Nor is it clear that this review actually occurred on 6 May 2014. The documentary evidence, and the department's previous submissions (see paragraph 98 below), suggest that the review did not occur until 8 May 2014.
39. The only record of the assessment by the nurse produced by the department is contained in a medical appointments schedule for Miss AU. The schedule includes a note made on 8 May 2014 at 2.20pm which says:
- CC. MRF ? Daughter of requesting client needs gynaecology R/V? Hard to understand request.
40. On 8 May 2014 at 3.30pm, Miss AU was seen by a general practitioner working for International Health and Medical Services (IHMS), the contractor engaged by the Commonwealth to provide medical services to people in immigration detention. In her report, the GP noted that Miss AU presented complaining of labial pain over the past 3 days and dysuria for 1-2 days. She had been waking at night, screaming.
41. Following a physical examination, the assessment of the GP was in the following terms:
- Damage to hymen ? consistent with blunt-force penetrating trauma. ([I] have put a query next to my assessment as I have not worked formally in the area of sexual abuse examination of children for over 15 years and do not wish to over-interpret my findings). I think this child is at risk of sexual abuse and should have an evidential interview & formal forensic exam.
42. The same day, following the examination, the GP called the duty Child Protection Paediatrician at Princess Margaret Hospital in Perth to arrange a referral to them for further evaluation. The matter was also referred to the AFP to investigate.

43. On 10 May 2014, Ms AR and her family were transferred to Perth Immigration Residential Housing and detained there.
44. On 13 May 2014, Miss AU had an appointment with the Child Protection Unit at Princess Margaret Hospital in Perth. She was examined by a Paediatric Senior Registrar in the presence of a Senior Social Worker and Ms AR. The Registrar confirmed physical signs consistent with a penetrative injury although a finding of sexual assault could not be conclusively made. The Registrar recorded her opinion as follows:

The ano-genital examination demonstrated a hymenal notch from the 8 o'clock to 10 o'clock position. This finding could represent a healed hymenal laceration from previous penetrative injury or be a normal anatomical variation. The mild erythema extending from [Miss AU's] external genitalia to her perianal region is consistent with vulvovaginitis.

Vulvovaginitis is inflammation or irritation of the vagina and vulva. There are a multitude of causes for this condition including infection, poor toileting hygiene, soaps, tight clothing and obesity. The presence of vulvovaginitis is not diagnostic of sexual abuse.

This information has been shared with the Australian Federal Police and the Department for Child Protection and Family Support. A Mandatory Report was filed.

45. Urine tests showed no evidence of gonorrhoea or chlamydia and blood tests showed no evidence of hepatitis B or C, HIV or syphilis.
46. On 14 May 2014, a strategy meeting took place which included representatives of the Child Protection Unit at the hospital, the Department of Child Protection and Family Support (WA), the ChildFIRST Assessment and Interview Team (CAIT), the Department of Immigration and the Australian Federal Police. The meeting noted a request for CAIT to interview Miss AU to ascertain if any sexual abuse had occurred, with information to be passed on to the AFP for investigation.
47. On 24 May 2014, Ms AR gave a written statement to the AFP about the incident, an extract of which is reproduced above.
48. Ms AR described the impact of this incident on her family in a handwritten statement to the Commission in Vietnamese which was translated into English. Ms AR notes that her daughter still has nightmares and that she 'wakes up a few times every night feeling distressed and miserable'. As to the impact on the rest of the family, she says:

Our whole world has been upside down on that dark day. My husband developed serious depression; our 8 year old son also developed the symptoms of anxiety. I feel so devastated and sad but I am a little better than all other family members, I needed to be strong for the sake of my daughter. We know too well that we will be traumatised for the rest of our lives.

49. Miss AU and her family were referred to Life Resolutions Psychology in Perth for counselling.
50. A case review by the department on 8 August 2014 stated that 'return to Christmas Island is not considered appropriate'. The case review the following month confirmed that this was because of the alleged incident involving Miss AU.
51. On 28 August 2014, Ms AR and her family were transferred to the Bladin immigration detention facility in Darwin.
52. The AFP finalised their investigation on the basis that they were unable to identify an offender and reported this to the department on 15 July 2014. The conclusion was reported to Ms AR and Mr AS by way of a letter from police on or about 29 September 2014 that was read to the family by an interpreter. The police apologised for the delay in communicating the results of the investigation sooner. The police said that if Miss AU had any further comments about the incident then police could take this information and make further inquiries, but that based on information currently available to them the possibility of identifying a suspect was extremely limited.
53. An IHMS Special Needs Health Assessment evaluated whether Miss AU's health conditions or issues were likely to be exacerbated by remaining in a detention centre environment. It said:

IHMS Psychiatrist commented on 30 Sep 2014 that [Miss AU] had presented with ongoing anxiety issues secondary to stresses of detention and past alleged sexual assault. This issue exacerbated by her family move from Perth to Darwin and difficulty settling into a new larger centre. The anxiety issues seemed to have resurfaced for [Miss AU] with nightmares, bedwetting and increased degree of insecurity evident.
54. Initially, Ms AR was glad that her family had not been returned to Christmas Island. However, by October 2014, they were informed that people detained in Christmas Island would also be transferred to Bladin. In her statement to the Commission, Ms AR said:

[N]ow the government transferred people from Christmas Island to Bladin as it is said that the Christmas Island detention centre is about to be closed.

Since we got this news we have been worrying because amongst those people from Christmas Island there could be people who have harmed my little daughter. Thinking of living with those people makes us terrified and insecure because it is very difficult to control and supervise my daughter 24 hours a day. Despite what happened to her she is still a kid and she is running around and playing with peers innocently in a very big centre where anything can happen to her.

55. The Commission invited the department to comment on this issue. The department said:

The departmental security liaison officers ensure that all detainees' allegations and incidents are checked prior to any transfer to ensure that placement in a centre and the population of the centre is appropriate. This includes consideration of people that should be kept separate due to allegations or ongoing investigations.

If [Ms AR's] family were able to identify the detainee involved in the alleged sexual assault then this matter would be taken into consideration if the detainee was considered for placement in the same facility as [Ms AR's] family.

56. On 21 February 2015, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, announced that Bladin was scheduled to close.¹⁷ On 26 February 2015, Ms AR and her family were transferred to the Wickham Point immigration detention facility, also in Darwin.
57. In mid-July 2015, Ms AR and her two children were released into the Perth community on bridging visas. Mr AS was transferred to immigration detention in Perth.

3.2 Alternatives to detention

58. On 19 July 2013, just over a month before Ms AR and her family arrived in Australia, the then Prime Minister Kevin Rudd announced that people who arrive in Australia by boat after that date would be subject to offshore processing and had no prospect of being resettled in Australia.¹⁸ After the federal election on 7 September 2013, this position was initially continued by the incoming government. On 25 September 2014, the then Minister for Immigration and Border Protection, the Hon Scott Morrison MP, announced that this position would change following the passage of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth) (Asylum Legacy Caseload Bill).¹⁹ After the passage of that Bill, asylum seekers who arrived in Australia by boat on or prior to 31 December 2013 and who had not already been transferred to Nauru or Manus Island would have their claims for protection assessed in Australia. Ms AR and her family fell into this category.
59. It appears that, as a result of governmental policy, Ms AR and her family were not referred by the department to the Minister for consideration of the exercise of his powers to grant a residence determination. In each of the family's monthly case reviews from when they arrived until October 2014, it was noted that the family 'arrived after July 19, 2013 and as a result have had no case progression under the Australian Government's "No Advantage" policy'. The department says that in these circumstances, the family did not meet the guidelines for referral to the Minister.

60. In October 2014, Mr AS's case review noted that 'the family may be affected by the new IMA measures announced on 25/09/2014 for [illegal maritime arrivals] who arrived before January 1, 2014. The implementation of these measures are however, dependent on the Bill being passed'.
61. In December 2014, Mr AS's case review noted that 'Due to the introduction of the Resolving the Asylum Legacy Caseload (RALC) Bill on 4/12/2014, [Mr AS] and his family may be eligible for consideration of placement in the Australian community whilst they undergo a protection assessment process. They await an invitation to lodge an application for a temporary visa'. The Asylum Legacy Caseload Bill passed both Houses of Parliament on 5 December 2014 and received assent on 15 December 2014.
62. On 5 February 2015, the Hon Peter Dutton MP, Minister for Immigration and Border Protection, considered a submission from the department about whether to grant a temporary visa to Mr AS under section 195A of the Migration Act. The Minister decided not to consider exercising his powers under section 195A.
63. Mr AS was one of 8 people in immigration detention referred for consideration as part of the same submission. Each of the people referred to had either been involved in incidents while in immigration detention, had identity concerns or had been subject to alleged or actual criminal charges. It appears that in Mr AS's case his identity had not been conclusively established and he had allegedly been involved in criminal conduct before arriving in Australia. The department did not provide the Commission with details of these allegations. The submission noted that none of the people referred to were of interest to relevant authorities, nor did they represent a direct or indirect risk to security. In Mr AS's case, he had not been involved in any major behavioural incidents in held detention and he had agreed to abide by the department's Code of Behaviour if released into the community.
64. The submission noted that Mr AS was detained with his wife and two minor children, then aged eight and four. It did not refer to the sexual assault allegations in relation to Miss AU. There does not appear to have been any specific consideration in the submission of the best interests of the children or the impact of any decision not to grant a visa on the children's interests. The submission noted that: 'If you choose not to intervene with respect to the IMAs on this submission then they will remain in held detention. For those with family members, the family group will also remain in held detention'.
65. On 9 February 2015, Ms AR and Mr AS met with their case manager who informed them that the Minister had decided not to intervene in their case under section 195A of the Migration Act.

66. In early April 2015, Ms AR's case manager met with her and suggested that she and her two children could be released into the community while her husband remained in immigration detention while further checks were carried out.
67. On 26 June 2015, the Minister agreed to consider intervening under section 195A of the Migration Act to grant a bridging visa with work rights to Ms AR and her two children, with Mr AS remaining in held immigration detention.
68. In this second submission, the department included a significant amount of additional information not present in the first submission about the rights of Master AT and Miss AU. It said:
- While any countervailing considerations may in practice outweigh 'the best interests of the child', the Department considers that the best interests of [Mr AS and Ms AR's] minor children are a key factor in this case.
- Additionally, the Department notes that it is Government policy that in most circumstances children will not be held in immigration detention centres and it is a priority for the Government to release children from held immigration detention.
69. The department noted that Ms AR had made a complaint to the Commission about the family's detention, alleging a breach of their human rights. It said that one factor to be balanced in considering whether to intervene was that the department 'may be subject to public scrutiny and criticism from external review bodies regarding the continued placement of [Mr AS and Ms AR's] children in held immigration detention'.
70. The other factors to be considered included:
- The family have remained in held immigration detention for more than 21 months.
 - The family have not yet had their protection claims assessed.
 - Departmental systems indicate Miss AU may have been the victim of a sexual assault incident. However, the AFP's investigation was finalised with no charges laid.
 - The family's identities have not been conclusively established.
71. Two other factors to be considered were redacted in the version of the submission provided to the Commission.
72. Once the Minister agreed to intervene to grant bridging visas to Ms AR and her two children, they were subsequently released into the Perth community.

4 Consideration

4.1 Sexual assault allegations

73. The first issue I consider is whether the Commonwealth took all appropriate measures to protect Miss AU from sexual abuse.

(a) Preventative measures

74. Immigration detention is a dangerous place for children. Data provided by the department to the Commission in the course of the *Forgotten Children* inquiry showed that from January 2013 to March 2014, there were 233 reported assaults involving children in immigration detention, or approximately 15 per month. In the same period, there were 33 reported incidents of sexual assault in immigration detention, or approximately 2 per month, the majority of which involved children.²⁰
75. The Commission asked the department to outline the preventative measures undertaken by the department and Serco to ensure that children are protected from all forms of physical and mental violence, injury or abuse while they are detained.
76. The department says that it ensures that its contracted service providers adhere to strict guidelines and that their staff complete required training prior to working with children in immigration detention. All staff working with children must undergo police checks and a working with children clearance.
77. Serco and other service providers are required to abide by child protection legislation. This includes a requirement to report any concerns in relation to domestic violence or suspected child abuse.
78. Serco maintains closed circuit television (CCTV) coverage of general areas of facilities including some open recreational areas, but not individual bedrooms for privacy reasons. The department says that Serco staff actively engage with detainees on a daily basis and report any anomalies to management. Serco employs Intelligence Officers who gather information and administers a complaints management system for detainees. The department says that Serco takes all complaints seriously by investigating and responding within contractual timeframes.
79. The department says that in facilities that have family groups, Serco allocates Personal Officers to family groups to act as the first point of contact for the family. Detainees are also allocated a case manager from the department with whom they can raise or discuss issues of concern.

80. The department provided the Commission with its 'Minors in detention Policy'. The policy is just over one page and sets out certain key immigration detention values as follows:

Consistent with the Government's Key Immigration Detention Values:

- a minor is to be detained only as a measure of last resort for the shortest practicable time and in the least restrictive form appropriate to a minor's circumstances
- a minor is not to be detained in an immigration detention centre (IDC) for accommodation or processing purposes under any circumstances
- a clear plan for resolution of the minor's immigration status must be in place and be actively progressed by the case manager and
- the family unit, where possible and appropriate, must be maintained.

81. The policy sets out the terms of the Commonwealth's obligations under article 19 of the CRC and other articles of the CRC. The policy does not describe how the obligations under article 19 are to be achieved. The policy does not contain any detail on how to respond to allegations of child sexual assault.

82. The Commission understands from previous inquiries that IHMS has a policy for dealing with suspected instances of child abuse or neglect (IHMS Procedure 3.11.3 *Child Protection and Mandatory Reporting*). The Commission asked for a copy of this policy and any other policy of the department or relevant service providers, current at the time of the complaint or since that time, which deal with responding to allegations of child abuse or neglect. In response, the department noted the terms of the request and provided a copy of the IHMS policy which was in effect from August 2013 and has been revised a number of times since.

83. The IHMS policy covers situations in which IHMS staff working in Australian immigration detention facilities and offshore processing centres suspect that there might be abuse occurring, or that abuse has occurred since the child's arrival in Australia or an offshore processing centre. It provides direction to IHMS staff on how to respond and outlines the legal responsibilities of health professionals in the case of suspected child abuse or neglect. These legal responsibilities include mandatory reporting to relevant child protection agencies. The policy notes that 'any concerns of suspected child abuse or neglect must be reported to the child protection agency immediately' and that 'the report must be made without delay (before the end of the shift)'.

84. It appears from the department's response that neither the department nor Serco had or have specific policies dealing with responding to allegations of child abuse or neglect. For example, no policies have been produced which provide any guidance to Serco staff when detainees seek medical assistance in relation to an alleged sexual assault or an incident which reasonably could be suspected to involve a sexual assault.

(b) Delay in medical attention

85. In this case there was a delay for 3 days, after an urgent medical request was made in relation to a gynaecological issue affecting a 4 year old girl, before that girl was able to see a doctor.
86. The Royal Commission into Institutional Responses to Child Sexual Abuse commenced work in January 2013. The Commission's interim report on 30 June 2014 distilled key elements of an effective response to individual reports of abuse, based on evidence provided to it by that stage. The elements emphasised were to:
- introduce and follow policies and procedures
 - respond quickly to reports or information about child sexual abuse
 - prioritise the child's best interests (for example, with referrals to support services)
 - ensure the safety of the victim and other children (for example, by removing the accused person from contact with children while the allegations are investigated)
 - notify police and other authorities, and cooperate fully with any investigations
 - inform and support parents, carers and staff (for example, with debriefings and counselling)
 - record reports or information about abuse and any actions taken in response
 - treat all parties consistently and fairly
 - take disciplinary action against perpetrators if reports are substantiated.²¹
87. As noted above, the Rules for Protection of Juveniles provide that personnel of detention facilities should take immediate action to secure medical attention in relation to reported sexual assault. The Royal Commission into Institutional Responses to Child Sexual Abuse has emphasised the need for institutions to 'respond quickly and fully to individual reports'.²²
88. Ms AR said in her statement to police that she tried to see a doctor once her daughter had reported sexual abuse to her, but that she was told she had to put in a request form and that it took 3 days before she and her daughter were finally able to see a doctor. Once the results of the police investigation were eventually reported to her on 29 September 2014, she made a complaint to Serco which again emphasised that there was a delay of 3 days before her daughter was able to see a doctor. As described in more detail below, there is no evidence that there was any substantial investigation by either Serco or the department of her complaint.

89. The Commission is aware from its inspections of immigration detention facilities, most recently at Wickham Point in October 2015, that in some centres in order to obtain medical assistance it is necessary for detainees to fill out a form. These forms are then assessed once a day and prioritised by IHMS. There can be significant delays in access to primary health care through this process.
90. It is important to record that the Commission asked the department to produce a copy of Ms AR's medical request form, that the department twice denied that any such form existed and submitted that the time taken to arrange medical assistance was not contrary to Miss AU's rights under the CRC, before the department eventually produced a copy of the form more than 9 months after the initial request.
91. On 7 September 2015, the Commission asked for: '[a] copy of the request form completed by Ms AR on or about 5 or 6 May 2014 asking to see a doctor, and any other record of this request'. In response the department said: 'The only medical request form on file for [Ms AR] around this time is dated 24 April 2014. She requested an appointment with the medical clinic for flu like symptoms. There is no request for an appointment on 5 or 6 May 2014'. This response was wrong.
92. On 8 December 2015, I provided the department with a document setting out my preliminary view on the complaints made by Ms AR. That preliminary view assessed the other evidence available to the Commission which indicated that a request for medical assistance had been made by Ms AR on 5 May 2014. My preliminary view was that the evidence provided to the Commission was consistent with a request for medical assessment being made but not acted upon for 3 days after the alleged incident took place. This evidence included:
- the notes from the IHMS GP at the time of the initial consultation on 8 May 2014;
 - the notes from the doctor at the Child Protection Unit of Princess Margaret Hospital on 13 May 2014;
 - the signed statement given by Ms AR to the Australian Federal Police on 24 May 2014 around 3 weeks after the incident;
 - the translation of the complaint by Ms AR to Serco on 2 October 2014, following Ms AR being informed on 29 September 2014 that the police investigation had been closed.

93. The notes from the IHMS doctor who saw Miss AU on 8 May 2014 state that Miss AU had been complaining of labial pain over the past 3 days and that she had had dysuria for 1-2 days.
94. The report of the examination of Miss AU on 13 May 2014 at the Child Protection Unit at Princess Margaret Hospital also records the complaint by Ms AR that she made a doctor's appointment the day after the incident, but was only able to be seen by a doctor 3 days later.
95. In the signed statement given by Ms AR to the Australian Federal Police on 24 May 2014 she said: 'I tried to see the Doctor but was told I had to put in a request form and it took 3 days before they finally saw [AU] and I'.
96. In the translation of the complaint by Ms AR to Serco on 2 October 2014, she said:
- I am very disappointed about the manner of the person who gave us incorrect information which covered up the bad behaviour about the person who harmed my daughter. ... They didn't check my daughter immediately and I had to send a request form, so they came to check my daughter after 3 days and then let us go urgently to Perth on the mainland.
97. At the time of issuing the preliminary view, I observed that a conclusion that a request for medical assessment had been made but not acted upon for 3 days after the alleged incident took place was more plausible than a conclusion that Ms AR delayed seeking medical attention for her 4 year old daughter for 3 days.
98. The department waited for almost 5 months before providing a response to the Commission's preliminary view. In that response, the department said:
- The Department has no record of a request for appointment being made prior to 08 May 2014. Our records indicate that there was a request for an appointment made on 08 May 2014 at 2:20pm. The records indicate that the reason for the request is unclear but is of a gynecological nature. [Miss AU] was seen by a doctor at 3:30pm the same day. As such the Department maintains that the period of time taken to arrange medical attention for [Miss AU] following a request from [Miss AU's] mother was not contrary to her rights under the CRC.
- The Department advises that it will not be taking any further action in relation to this preliminary view at this time.
99. Again, the response by the department was wrong. Miss AU was not seen within 70 minutes of making a request for an appointment. She was seen 3 days after her mother made a request for urgent assistance for a medical issue of a gynaecological nature. The department's response as set out above in fact suggests that her medical request form may not even have been reviewed for 3 days.

100. Following the department's response to my preliminary view, the Commission sought a copy of the record referred to by the department which indicated that the request for an appointment was first made on 8 May 2014 at 2.20pm. It took the department 6 weeks to respond to this request. When it did respond, the department acknowledged for the first time that Ms AR had in fact made a request for medical assistance on 5 May 2014. It provided a copy of the request form and a copy of the appointments schedule. The appointments schedule shows an assessment of the medical request form at 2.20pm on 8 May 2014 and an appointment with a GP at 3.30pm on 8 May 2014. Although the appointments schedule referred explicitly to the contents of the medical request form, when the department responded to my preliminary view it did not produce a copy of the medical request form. Nor did the department tell the Commission at that time that the appointments schedule referred to a document that the department had previously claimed did not exist.
101. Even after finally producing the medical request form, following the further request by the Commission for documents, the department did not acknowledge that there had been a delay in providing medical assistance. Instead, the department suggested that Ms AR could have approached IHMS directly in advance of her appointment if she felt an earlier appointment was required. This is precisely what Ms AR said that she initially attempted to do before being advised to fill in a form.

(c) Failure to adequately investigate the delay in providing medical assistance

102. Despite complaints made by Ms AR about the delay in providing medical assistance, there is no evidence that any substantial investigation was undertaken into this delay by either the department or by Serco.
103. A one page Serco document titled 'post incident review' was created on 16 May 2014, 8 days after Miss AU was eventually able to see a doctor. The document says that Serco was first informed of the incident at 5.20pm on 8 May 2014 (shortly after Miss AU had been seen by IHMS). The document says: 'The detainee involved informed IHMS around 48 hours post incident taking place'. This statement is wrong. Ms AR had submitted a medical request form seeking urgent medical assistance the day after the incident took place and was not provided with medical assistance for 3 days.
104. There is no discussion anywhere in the Serco report of the delay in providing medical assistance. Instead, the report concludes that: 'Staff were proactive in identifying all issues pertaining to this incident. Staff followed all procedures correctly and all contractual requirements were met'.

105. In light of the documentary evidence, there are real questions about whether Serco staff were in fact 'proactive in identifying all issues pertaining to this incident'. Certainly it does not appear that any officer was proactive in identifying whether the urgent request for medical assistance was something that should have been dealt with immediately rather than by way of a medical request form.
106. On 2 October 2014, after she was informed of the conclusion of the police investigation, Ms AR made a complaint to Serco. The English translation of this complaint read in part:
- I am very disappointed about the manner of the person who gave us incorrect information which covered up the bad behaviour about the person who harmed my daughter. ... They didn't check my daughter immediately and I had to send a request form, so they came to check my daughter after 3 days and then let us go urgently to Perth on the mainland. ...
- I think that everything should be better if they investigate and the doctor assists us. Now my daughter and our family are trying to overcome our anxiety, however it is difficult.
107. On 8 October 2014, Serco provided the following response to Ms AR's complaint:
- In relation to your complaint dated 2 October 2014, I wish to advise you that, due to your complaint requiring translation, there were delays in responding to you.
- We now advise that your complaint has been handled in the following way:
- Redirected as a complaint to:
Immigration
for them to action
- We again thank you for using the Serco Complaint Management System. We consider your complaint to be resolved; however, should you be dissatisfied with our handling of the complaint please feel free to contact the Global Feedback Unit during business hours on 13 31 77.
108. Clearly Ms AR's complaint had not been resolved.
109. The Commission has made multiple requests for documents relating to Ms AR's request for medical assistance on 5 May 2014. There is nothing in any of the material provided by the department to suggest that any further steps were taken either by Serco or by the department to inquire into Ms AR's complaint of 2 October 2014 that there was a delay in providing her daughter with medical assistance. Indeed, for more than 9 months of the Commission's inquiry into this complaint the department denied that any delay occurred.

110. Within 3 weeks of receiving the response from Serco set out above, Ms AR made a complaint to the Commission. It is only as a result of her persistence in complaining to IHMS, to doctors at Princess Margaret Hospital, to the AFP, to Serco and finally to the Commission that she has been shown to have been both truthful and rightly aggrieved all along.

(d) Assessment

111. I find that Ms AR made an urgent request for medical assistance in relation to a possible sexual assault on her 4 year old daughter which was not acted upon for 3 days after the alleged incident took place.

112. I find that Ms AR made a request to Serco for an internal review of the delay in providing medical assistance to her daughter, that Serco referred the request for an internal review to the department, but that neither the department nor Serco conducted any substantial investigation into her complaint.

113. The delay in providing medical assistance to Miss AU in relation to an alleged sexual assault raises issues about the ability of officers working within the detention centre environment to identify serious medical issues that require urgent attention. Prompt and effective responses are important when dealing with allegations of sexual assault so that victims can be adequately supported. Delays in obtaining medical attention are also likely to make it more difficult to obtain physical evidence of an assault and to identify potential offenders.

114. Australia's Children's Commissioners and Guardians have developed principles for child safety in organisations. They provide that child safe organisations should make their staff aware of their reporting responsibilities and the importance of prompt notification. Child safe organisations should include in their policies for handling disclosures and allegations of harm guidelines detailing:

- how to respond to a child if they make a disclosure about harm;
- the immediate actions the organisation will take;
- who the disclosure or allegation needs to be reported to (what authority) and how the report will be made.²³

115. The need for effective procedures to quickly identify serious medical issues is heightened in an environment where most people do not speak English as a first language.

116. The Royal Commission into Institutional Responses to Child Sexual Abuse found that the responses of many institutions have been inadequate. Many institutions either do not have policies and procedures for responding to reports or information about abuse, or do not implement the policies and procedures that they do have.²⁴ It appears from the response of the department to the Commission's preliminary view in this matter that it did not and does not have relevant policies and procedures in place.

117. As the Royal Commission has noted, effective responses to allegations of child abuse can be key to holding perpetrators and institutions accountable and to preventing future abuse. Ineffective responses can allow abuse to continue, compound the harm of the abuse, impede justice and undermine abuse prevention.²⁵
118. I find that the initial delay in arranging medical attention for Miss AU following the alleged sexual assault was contrary to her rights under article 19 of the CRC. There was a duty to take all appropriate administrative measures to protect children in detention from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Although the department had put in place some preventative measures, in this instance they were not effective to provide the necessary immediate support for Miss AU and fell short of what was required to immediately identify an issue of serious concern and effectively refer that issue for medical assessment.
119. I find that from the point at which medical assessment was first undertaken, through to Miss AU's assessment by an experienced paediatrician in Perth, the actions taken by the department and its service providers in terms of reporting, referral, investigation, treatment and follow-up were appropriate.

4.2 Alternatives to detention

120. The second issue I consider is whether the family was detained arbitrarily. In assessing this issue, the act of the Commonwealth to which I have given consideration is the failure by the department to make a submission to the Minister that he consider making a residence determination in favour of the family.
121. For the reasons set out below, I find that this act was inconsistent with or contrary to the rights of each of the family members under article 9 of the ICCPR and the rights of Master AT and Miss AU under articles 3 and 37(b) of the CRC.
122. As noted above, lawful immigration detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system. Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, and where detention in an immigration detention centre is not demonstrably necessary, prolonged detention in an immigration detention centre may be disproportionate to the goals said to justify the detention.

(e) Relevant guidelines

123. Ms AR claims that it was open to the Minister for Immigration to permit her family to live in the community subject to a ‘residence determination’. This is often referred to as community detention. Section 197AB of the Migration Act permits the Minister, where he thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A ‘specified place’ may be a place in the community.
124. On 30 May 2013, the Hon Brendan O’Connor MP, then Minister for Immigration and Citizenship, published guidelines to explain the circumstances in which he may wish to consider exercising his powers under section 197AB to make a residence determination.²⁶ These guidelines were in operation when Ms AR and her family arrived in Australia in August 2013 and up until new guidelines were issued on 18 February 2014.
125. The 2013 guidelines contained provisions about cases that should be referred to the Minister for consideration of community detention arrangements. In particular, they provided:

8 Cases to be referred for my consideration

In accordance with the principle in section 4AA of the Act that a minor shall only be detained as a measure of last resort, where detention of a child is required under the Act, it should, when and wherever possible, take place in the community under a residence determination rather than under traditional detention arrangements. ...

It is also my expectation that the principle of family unity be maintained (including accompanying guardians or carers for a minor) unless there are significant circumstances that would warrant a residence determination being made which would split a family unit.

126. The 2013 guidelines were issued prior to then Prime Minister Rudd’s announcement on 19 July 2013 that asylum seekers arriving after that date would be subject to offshore processing and would not be resettled in Australia. Following a change of government in September 2013, replacement guidelines were issued by the Hon Scott Morrison MP, then Minister for Immigration and Border Protection, on 18 February 2014. The 2014 guidelines relevantly provided:²⁷

8 Cases to be referred for my consideration

In accordance with the principle in section 4AA of the Act that a minor shall only be detained as a measure of last resort, where detention of a child is required under the Act, it should, when and wherever possible, take place in the community under a Residence Determination rather than under traditional detention arrangements.

It is my expectation that the principle of family unity be maintained (including accompanying guardians or carers for a minor) unless there are significant circumstances that would warrant a Residence Determination being made which would split a family unit.

For these reasons, priority cases that are to be referred to me are detainees who arrived in Australia before 19 July 2013 and to whom the following circumstances apply:

- unaccompanied minors; or
- minor children aged 10 years and under and their accompanying family members.

...

I will also consider the following additional types of cases appropriate to consider where:

- there are unique or exceptional circumstances;

...

127. The phrase 'unique or exceptional circumstances' is not defined in the guidelines, but the same phrase is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.²⁸ In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:

- circumstances that may bring Australia's obligations as a party to the ICCPR into consideration;
- circumstances that may bring Australia's obligations as a party to the CRC into consideration;
- the length of time the person has been present in Australia (including time spent in detention); and
- compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person.

128. The 2014 guidelines also provided:

10 Cases generally not to be referred for my consideration under section 197AB

I would not expect the department to refer to me for consideration of Residence Determination under section 197AB of the Act a specified person or persons in any of the following circumstances, unless there are exceptional reasons or I have requested it:

- where a person arrived after 19 July 2013; ...

129. That is, the Minister had decided that, in the absence of exceptional reasons, people who were subject to removal to a regional processing country because they arrived after 19 July 2013 would not be eligible for community detention prior to their removal.
130. On 25 September 2014, the Minister announced that ‘upon passage of the [Asylum Legacy Caseload Bill and another Bill] the government will agree to process IMAs currently on Christmas Island and the mainland who arrived last year and who have not been transferred to Nauru or Manus Island, as part of the legacy caseload’.²⁹ As noted above, the department interpreted this to mean that once the relevant legislation was passed, ‘[Mr AS] and his family may be eligible for consideration of placement in the Australian community whilst they undergo a protection assessment process’. The Asylum Legacy Caseload Bill passed both Houses of Parliament on 5 December 2014 and received assent on 15 December 2014.
131. On 29 March 2015, the Hon Peter Dutton MP, Minister for Immigration and Border Protection, issued replacement guidelines.³⁰ These guidelines changed the arrival date of asylum seekers that was relevant to whether they were to be considered for a residence determination from 19 July 2013 to 1 January 2014. The 2015 guidelines relevantly provided:

8 Cases to be referred for my consideration under section 197AB

In accordance with the principle in section 4AA of the Act that a minor shall only be detained as a measure of last resort, where detention of a child is required under the Act, it should, when and wherever possible, take place in the community under a Residence Determination rather than under traditional detention arrangements.

It is my expectation that the principle of family unity be maintained (including accompanying guardians or carers for a minor) unless there are significant circumstances that would warrant a Residence Determination being made which would split a family unit.

For these reasons, priority cases that are to be referred to me are detainees who arrived in Australia before 1 January 2014 and to whom the following circumstances apply:

- unaccompanied minors.

...

I will also consider cases where:

- there are unique or exceptional circumstances;

...

10 Cases generally not to be referred for my consideration under section 197AB

I would not expect the department to refer to me for consideration of Residence Determination under section 197AB of the Act a specified person or persons in any of the following circumstances, unless there are exceptional reasons or I have requested it:

- where a person arrived after 1 January 2014; ...

132. In addition to the power to make a residence determination under section 197AB, the Minister also has a discretionary non-compellable power under section 195A to grant a visa to a person in detention, again subject to any conditions necessary to take into account their specific circumstances.

(f) Assessment

133. The starting point for assessment in this case is the principle that detention of children should be used only as a measure of last resort and for the shortest appropriate period of time. This is a requirement not only of international law pursuant to article 37(b) of the CRC, but also a requirement of domestic law pursuant to section 4AA of the Migration Act.
134. Section 4AA(2) of the Migration Act provides that the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination. The clear objective of section 4AA is to move children and their families out of held detention and into community detention or onto a visa as soon as possible.
135. It is in the best interests of children who are in a closed detention environment for them to be removed from such an environment as quickly as possible. If there are countervailing reasons for keeping families in closed detention, these need to be clearly articulated and balanced against the best interests of the children. In any such exercise, the best interests of children need to be the subject of active consideration and given weight as a primary consideration.
136. In terms of the question of consideration of community detention, there are two relevant time periods to consider in relation to this complaint:
- The first period lasted for more than 15 months, from the family's arrival in Australia on 24 August 2013 until the passage of the Asylum Legacy Caseload Bill on 5 December 2014. During this period, relevant Ministers for Immigration had decided that families such as Ms AR and her family would not be eligible for community detention, unless there were exceptional circumstances.

- The second period lasted for more than 6 months, from 5 December 2014 until a referral to the Minister was made on 17 June 2015 for him to consider issuing bridging visas to the family. During this period, Ms AR and her family fell within the definition in the guidelines of 'priority cases' which were to be referred to the Minister for consideration of community detention.

First period

137. During the course of the first period, Ms AR and her family were detained on Christmas Island in closed immigration detention facilities for more than 8 months before the alleged sexual assault on Miss AU. The Commission assessed the impact of immigration detention on Christmas Island during this period as part of its report titled *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014*. The Commission found that at various times children detained on Christmas Island were not in a position to fully enjoy the following rights under the CRC as a result of their living conditions in detention:
- the right to enjoy 'to the maximum extent possible' the right to development (article 6(2))
 - the right to the highest attainable standard of health (article 24(1))
 - the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (article 27(1))
 - the right to be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age (article 37(c)).³¹
138. Significantly, the Minister gave evidence to the Commission in person during the course of that inquiry that while offshore processing in Nauru and Manus Island was intended as a deterrent to people seeking to come to Australia by boat, the detention of people in immigration detention facilities in Australia was not intended as a deterrent.³²
139. Ms AR and her family were liable to be taken from Australia to Nauru but were not taken there. Instead they were held for a protracted period on Christmas Island without the opportunity to apply for a community detention placement. Had they arrived in Australia 6 weeks earlier, they would have been prioritised for a community detention placement under policies in place at the time. According to the Minister their detention was not intended to deter other arrivals, it was merely a consequence of the policy decision (not in fact implemented) to ultimately send them to a regional processing country.³³

140. Following the alleged sexual assault of Miss AU in early May 2014, the family was transferred to Perth and were receiving counselling there. The AFP confirmed in mid-July 2014 that they were unable to identify an offender. The department had determined by August 2014 that it was not appropriate to return the family to Christmas Island given the alleged sexual assault. Although an offender was not ultimately identified, once it was clear that there was physical evidence consistent with a sexual assault in immigration detention it would have been appropriate for the department to refer the family to the Minister for consideration of a community detention placement. It is not clear why this did not occur. The case reviews suggest that the department considered that such a referral would not be possible given the government's policy position. However, the circumstances of the family could properly be described as 'exceptional'.
141. In response to my preliminary view in this matter, the department said that:
- There is no definition [in the 18 February 2014 Ministerial guidelines] about what would constitute an exceptional reason. In the absence of this definition, and in the context of that time, the Ministerial Guidelines to not refer post 19 July 2013 cases was strictly applied.
142. This submission suggests that the department took the view, in light of Government policy, that there were no circumstances that could meet the definition of 'exceptional circumstances'. That is, regardless of the degree of risk of sexual assault faced by Miss AU in immigration detention, there was no prospect of the department making a referral to the Minister for him to consider moving the family into community detention.
143. The department says that there would be a different outcome if the same circumstances occurred today:
- In today's context, the Government has expressed its commitment to moving children out of held detention wherever possible, including children from regional processing centres receiving medical treatment in Australia. Accordingly, the family would be referred for Ministerial consideration for placement in community detention.
144. However, applying the policy at the time, instead of providing the Minister with a submission about community detention the department transferred the family to Bladin immigration detention facility in Darwin. An IHMS psychiatrist assessed that this decision exacerbated Miss AU's ongoing anxiety issues resulting from detention and the alleged sexual assault. Following the move to Darwin, Miss AU's anxiety issues resurfaced with nightmares, bedwetting and increased degree of insecurity evident.
145. Despite the fact that the department had determined that it was not appropriate to return the family to Christmas Island, they were kept at Bladin when other detainees from Christmas Island, potentially including any offender, were moved to Bladin.

146. I find that, whether required by a policy decision of the Minister or whether resulting from a failure by the department to refer the family to the Minister pursuant to the community detention guidelines, the failure to assess Ms AR and her family for community detention from at least 13 May 2014 resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. I find that there was a failure to take into account Miss AU's best interests as a primary consideration, contrary to article 3 of the CRC. The department has provided no information to suggest that closed detention was necessary, for example to prevent flight or for community safety. In light of the alleged sexual assault of Miss AU, serious consideration should have been given immediately to less restrictive alternatives to closed detention.

Second period

147. During the second period, the policy position was clearer. From 5 December 2014, the family was considered to be part of the 'legacy caseload'. The community detention guidelines applicable at the time were the 2014 guidelines of Minister Morrison. According to those guidelines, minor children aged 10 years and under and their accompanying family members were 'priority cases' that should be referred to the Minister for consideration of community detention.
148. However, the first referral made to the Minister in relation to any member of the family was a submission considered by the Minister on 5 February 2015 and was limited to whether Mr AS should be granted a temporary visa under section 195A of the Migration Act. This submission did not make any recommendations about either visas or community detention for Ms AR or her children. It did not refer to the sexual assault allegations in relation to Miss AU. There does not appear to have been any specific consideration in the submission of the best interests of the children or the impact of any decision not to grant a visa on the children's interests other than noting that if a visa was not granted to Mr AS the children would remain in detention. The Minister decided not to consider exercising his powers under section 195A in relation to Mr AS.
149. The first time that a submission dealing with the whole family was put to the Minister was on 17 June 2015.
150. I find that the delay by the department in putting a submission to the Minister for more than 6 months from 5 December 2014 for consideration of community detention for Ms AR and her family resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC.

5 Continuing detention of Mr AS

151. When the family made their original complaint to the Commission, they were all detained in the Bladin immigration detention facility in Darwin.
152. In early April 2015, Ms AR's case manager met with her and suggested that she and her two children could be released into the community while her husband remained in immigration detention while further checks were carried out. The submission provided by the department to the Minister on 17 June 2015 noted that '[Mr AS] and his family advised they would consider being separated'.
153. The Minister agreed to lift the bar under section 46A of the Migration Act to allow the whole family to lodge applications for temporary protection visas (TPVs). He agreed to intervene to grant MsAR and her two children bridging visas while their applications for TPVs were considered. He did not agree to a bridging visa for Mr AS.
154. In mid-July 2015, Ms AR and her two children were released into the Perth community on bridging visas after almost 2 years of being in immigration detention. Around the same time, Mr AS was transferred from Wickham Point to immigration detention in Perth.
155. The continuing detention of Mr AS raises issues under article 9 of the ICCPR. Given that the rest of his family has been released from detention, the continuing detention of Mr AS also raises issues under articles 17 and 23 of the ICCPR, dealing with arbitrary interference with family, and article 3 of the CRC dealing with the best interests of Mr AS's children.
156. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
157. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
158. I find that the continued detention of Mr AS involves an 'interference' with his family. Although Ms AR and Mr AS have made the choice for Ms AR and her two children to be released into the community, the same choice is not available in relation to Mr AS. The interference is lawful, in the sense that it is permitted by the Migration Act. Whether this interference amounts to an arbitrary interference is likely to be determined on the same basis as the question of whether Mr AS's detention is arbitrary.

159. The Minister has considered Mr AS's case twice. The first time was on 5 February 2015 as part of a group of eight individuals who had either been involved in incidents while in immigration detention, had identity concerns or had been subject to alleged or actual criminal charges. It appears that Mr AS fell into this group because his identity had not been confirmed and there were allegations that he had engaged in criminal conduct outside Australia. The second time the Minister considered Mr AS's case was on 26 June 2015 as part of a submission dealing only with his family. On each occasion, the Minister refused to consider exercising his discretionary powers to grant Mr AS a visa so that he could be released from detention. As noted above, the Minister has lifted the bar under section 46A of the Migration Act to allow Mr AS to lodge an application for a Temporary Protection Visa or a Safe Haven Enterprise Visa. He will continue to be detained while any application is processed.
160. When considering whether to grant a bridging visa to a person or to place them into community detention, it is appropriate to weigh the individual's right to liberty against the risk that the person may pose to the Australian community if they were released from immigration detention. In Mr AS's case, the fact that his family has been released into the community is also a strong factor favouring his release. As the current Minister's community detention guidelines say:
- It is my expectation that the principle of family unity be maintained (including accompanying guardians or carers for a minor) unless there are significant circumstances that would warrant a Residence Determination being made which would split a family unit.³⁴
161. As noted above, the United Nations Human Rights Committee has summarised the position at international law in relation to article 9 of the ICCPR.
- Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.

162. The version of the submissions to the Minister that were provided to the Commission, dealing with the possible exercise of the Minister's public interest powers in favour of Mr AS, have been redacted in places. As a result, the Commission does not have details of the identity concerns in relation to Mr AS or details about his alleged criminal conduct outside of Australia.
163. The submissions do make clear that Mr AS has not been involved in any major behavioural incidents while in detention, that he is not of interest to any relevant authorities in Australia, that he does not represent a direct or indirect risk to security and that he has agreed to abide by the department's Code of Behaviour if he was granted a bridging visa and released into the community with his family. Based on these findings, it is difficult to see what risk he poses to the Australian community that could not be managed either on a bridging visa or in community detention.
164. In my preliminary view, I invited the department to indicate:
- what further checks are being carried out in relation to Mr AS?
 - what, if any, risk does he pose to the Australian community?
 - if he poses a risk to the Australian community, could this risk be mitigated if he were to be granted a bridging visa or placed into community detention?
165. In response, the department said:
- The Department is currently conducting further offshore checks in relation to [Mr AS] as part of the assessment of his claims for protection.
- The Department is not able to provide a direct answer to the remaining questions regarding [Mr AS]. There is some information which has been provided to the Minister when considering [Mr AS's] case which the Department is unable to disclose to the AHRC as it is information held and owned by another Government agency.
166. The department has not submitted that Mr AS poses any risk to the Australian community. In fact, it has made an assessment that he does not represent either a direct or indirect risk to security. Based on the information available to me, I find that the continued detention of Mr AS is arbitrary, contrary to article 9 of the ICCPR. In those circumstances, I find that his detention also amounts to an arbitrary interference with his family, contrary to articles 17 and 23 of the ICCPR.

6 Findings and recommendations

167. On the basis of my inquiry, I make the following findings:

- (a) I find that Ms AR made an urgent request for medical assistance in relation to a possible sexual assault on her 4 year old daughter which was not acted upon for 3 days after the alleged incident took place.
- (b) I find that Ms AR made a request to Serco Australia Pty Ltd, the organisation contracted by the Commonwealth to manage the immigration detention centres in Australia, for an internal review of the delay in providing medical assistance to her daughter, that Serco referred the request for an internal review to the department, but that neither the department nor Serco conducted any substantial investigation into her complaint.
- (c) I find that the initial delay in arranging medical attention for Miss AU following the alleged sexual assault was contrary to her rights under article 19 of the CRC. There was a duty to take all appropriate administrative measures to protect children in detention from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Although the department had put in place some preventative measures, in this instance they were not effective to provide the necessary immediate support for Miss AU and fell short of what was required to immediately identify an issue of serious concern and effectively refer that issue for medical assessment.
- (d) I find that from the point at which medical assessment was first undertaken, through to Miss AU's assessment by an experienced paediatrician in Perth, the actions taken by the department and its service providers in terms of reporting, referral, investigation, treatment and follow-up were appropriate.
- (e) Whether required by a policy decision of the Minister or whether resulting from a failure by the department to refer the family to the Minister pursuant to the community detention guidelines, I find that the failure to assess Ms AR and her family for community detention from at least 13 May 2014 resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. Further, there was a failure to take into account Miss AU's best interests as a primary consideration, contrary to article 3 of the CRC.
- (f) I find that the delay by the department in putting a submission to the Minister for more than 6 months from 5 December 2014 for consideration of community detention for Ms AR and her family resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC.

(g) I find that the continued detention of Mr AS is arbitrary, contrary to article 9 of the ICCPR and also amounts to an arbitrary interference with his family, contrary to articles 17 and 23 of the ICCPR.

168. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.³⁵ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice, or for the taking of action to remedy or reduce loss or damage suffered by a person as a result of the act or practice.³⁶

6.1 Referral to Minister to consider bridging visa for Mr AS

169. The Minister has twice considered whether to grant Mr AS a visa under section 195A of the Migration Act which would have allowed him to be released from detention. The first time was on 5 February 2015 in the context of a submission considering seven other detainees with identity concerns or alleged or actual criminal charges against them. The second time was on 26 June 2015 when the rest of his family was granted bridging visas under section 195A.

170. Clause 6.4 of the guidelines issued to the department in relation to section 195A make it clear that the department can make multiple requests for the Minister to consider the exercise of his powers under section 195A.³⁷ In Mr AS's case, it has been more than 11 months since the last submission during which time he has remained in detention separated from his family.

171. Since the last submission, relevant changed circumstances include the facts that his family has been released from detention, the Minister has lifted the bar allowing Mr AS to make an application for a protection visa, and I have made findings about Mr AS's detention in the course of this report.

172. The department has found that Mr AS has not been involved in any major behavioural incidents while in detention, that he is not of interest to any relevant authorities in Australia, that he does not represent a direct or indirect risk to security and that he has agreed to abide by the department's Code of Behaviour if he was granted a bridging visa and released into the community with his family. Based on these findings, it is difficult to see what risk he poses to the Australian community that could not be managed either on a bridging visa or in community detention.

Recommendation 1

173. I recommend that the department promptly make a further submission to the Minister for him to consider exercising his power under section 195A of the Migration Act to grant MrAS a bridging visa, subject to any conditions as may be necessary.

6.2 Compensation

174. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
175. However, in considering the assessment of a recommendation for compensation under section 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.³⁸
176. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.³⁹

(a) Compensation for arbitrary detention

177. I have considered whether to recommend compensation for Ms AR and her family being arbitrarily detained in contravention of article 9(1) of the ICCPR.
178. The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR. This is because an action for false imprisonment cannot succeed where there is lawful authority for the detention, whereas a breach of article 9(1) of the ICCPR will be made out where it can be established that the detention was arbitrary, irrespective of legality.
179. Notwithstanding this important distinction, the damages awarded in false imprisonment cases provide an appropriate guide for the award of compensation for the breach of article 9(1) of the ICCPR. This is because the damages that are available in false imprisonment matters provide an indication of how the courts have considered it appropriate to compensate for loss of liberty.
180. The principal heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).⁴⁰

181. In the case of *Fernando v Commonwealth of Australia (No 5)*,⁴¹ Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Siopis J referred to the case of *Nye v State of New South Wales*:⁴²

The *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach recognised by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.⁴³

182. Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).⁴⁴ In that case at first instance,⁴⁵ the New South Wales District Court awarded the plaintiff, Mr Taylor, the sum of \$116,000 in damages in respect of wrongful imprisonment, consequent upon his detention following the cancellation of his permanent residency visa on character grounds.
183. Mr Taylor was detained for two separate periods. The first was for 161 days and the second was for 155 days. In that case, because Mr Taylor's convictions were in relation to sexual offences against children, Mr Taylor was detained in a state prison under a 'strict protection' regime and not in an immigration detention centre. The detention regime to which Mr Taylor was subjected was described as a 'particularly harsh one'.
184. The Court also took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.⁴⁶
185. On appeal, in the New South Wales Court of Appeal, Spigelman CJ considered the adequacy of the damages awarded to Mr Taylor and observed that the quantum of damages was low, but not so low as to amount to appellable error.⁴⁷ Spigelman CJ also observed that:

Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as "the initial shock of being arrested" (*Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 at 515). As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.⁴⁸

186. Although in *Fernando v Commonwealth of Australia (No 5)*, Siopis J ultimately accepted the Commonwealth's argument that Mr Fernando was only entitled to nominal damages,⁴⁹ his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando's claim if his findings in respect of the Commonwealth's argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre. Siopis J accepted Mr Fernando's evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando's evidence did not suggest that in immigration detention he was subjected to the harsh 'strict protection' regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of the inmates in the same way that Mr Nye did whilst he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando in respect of his 1,203 days in detention the sum of \$265,000.⁵⁰
187. I have found that MsAR and her children were arbitrarily detained from at least 13 May 2014 (shortly after the alleged sexual assault on Miss AU) until they were eventually granted bridging visas and released from detention in mid-July 2015, a period of approximately 14 months.
188. I have found that MrAS was arbitrarily detained from at least 13 May 2014 and continues to be arbitrarily detained as at the date of this report.
189. I consider that the Commonwealth should pay to MsAR an appropriate amount of compensation to reflect the loss of liberty caused by the family's detention in accordance with the principles outlined above.
190. The information before me including the IHMS Special Needs Health Assessment indicates that continued immigration detention has exacerbated the ongoing anxiety issues faced by Miss AU as a result of her previous detention and the alleged sexual assault on her. This factor should be taken into account in the quantum of compensation awarded.

Recommendation 2

191. I recommend that the Commonwealth pay to MsAR an appropriate amount of compensation to reflect the loss of liberty caused by the family's detention in accordance with the principles outlined above.

(b) Compensation for delay in medical assistance for Miss AU

192. I have also considered whether to recommend compensation for Ms AR and her family as a result of the delay in providing medical assistance to Miss AU, in contravention of article 19 of the CRC.

193. The delay in providing medical assistance may have had an impact on the ability of medical staff to confirm whether sexual abuse occurred and the ability of investigators to identify any perpetrator. As the Royal Commission has noted, delay in providing effective responses to allegations of child abuse can compound the harm of abuse.
194. In this case, delay has caused emotional distress to Ms AR.⁵¹ There is also evidence of the psychological impact that the incident has had on Miss AU and her family which may have been exacerbated by the way in which the complaint was initially handled (see paragraphs 48 and 53 above).

Recommendation 3

195. I recommend that the Commonwealth pay to Ms AR an appropriate amount of compensation to reflect the emotional distress and psychological impact caused to her and her family as a result of the delay in providing medical assistance to Miss AU and the failure to properly investigate this delay following her complaint to Serco.

(c) No requirement to also establish a breach of domestic law

196. In a number of previous inquiries where the Commission has found that acts or practices of the department were inconsistent with or contrary to human rights and recommended that compensation be paid, the department has claimed that claims for compensation 'can only be considered' when there has also been a breach of Australian domestic law. This submission misunderstands the power of the Commission to make recommendations for the payment of compensation and the range of options available to Commonwealth agencies to provide compensation for detriment caused by defective administration.
197. The Commission's inquiry was conducted pursuant to section 11(1)(f) of the AHRC Act. That section gives the Commission the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right. One issue that the Commission considers when conducting such an inquiry is whether some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to the person aggrieved by the act or practice. If there is another more appropriate remedy, the Commission may decide not to inquire into the act or practice (section 20(2)(c)(iv)). Once an inquiry is concluded, if the Commission finds that act or practices were inconsistent with or contrary to human rights, the Commission is specifically empowered to make recommendations for the payment of compensation (section 29(2)(c)(i)). If compensation is recommended, it is compensation: 'to, or in respect of, a person who has suffered loss or damage as a result of the act or practice'.

198. Parliament has determined that the Commission is to have the power to make recommendations for compensation when there has been a breach of human rights. The loss or damage need only be a result of the act or practice that was inconsistent with or contrary to any human right. The power to make such recommendations is not contingent on another breach of domestic law being available. Indeed, the Commission's inquiry function is typically used in situations where there is no other domestic remedy available.
199. Non-corporate Commonwealth entities such as the department are subject to the *Public Governance, Performance and Accountability Act 2013* (Cth) and have four avenues pursuant to which they may consider payments of compensation.⁵² These are:
- settlement of monetary claims against the Commonwealth ('legal liability');⁵³
 - compensation for detriment caused by defective administration;⁵⁴
 - act of grace payments;⁵⁵ and
 - ex gratia payments.⁵⁶
200. The department's previous submissions have focussed on the first of these options and have not properly engaged with the other three.
201. Of the other three, the most relevant for present purposes is the Scheme for Compensation for Detriment caused by Defective Public Administration (CDDA). The CDDA is an administrative scheme that was established by the Australian Government in 1995 and is currently described in Resource Management Guide No. 409 published by the Department of Finance.
202. The CDDA scheme provides a means of compensating people who have suffered because of defective government administration. Importantly, the scheme is intended to compensate those to whom there is no legal obligation to pay compensation. Decisions to compensate under the scheme are approved on the basis that there is a moral rather than a legal obligation to pay compensation.⁵⁷
203. The Commonwealth Ombudsman has produced two detailed reports on compensation schemes in general and the CDDA in particular. One of the key recommendations in the Ombudsman's most recent report is that there is a need for 'less defensive and legalistic approaches to CDDA decision-making by agencies'.⁵⁸ The Ombudsman notes that the CDDA scheme is premised on a distinction between legal and moral claims and that, once a decision is made to evaluate the claim as a CDDA claim rather than as a legal claim, it is inappropriate to retain a legal frame of reference in the further processing of the claim.

204. The CDDA scheme permits payments to be made where an official has caused detriment to a person because of:⁵⁹
- a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the person's circumstances; or
 - an unreasonable failure to institute appropriate administrative procedures to cover the person's circumstances.
205. In the present circumstances, Ms AR and her family are entitled to seek compensation pursuant to the CDDA for the detriment caused to them as a result of:
- the lapse in complying with the community detention guidelines and the unreasonable failure to make a submission to the Minister for consideration of a community detention placement;
 - the delay in providing access to medical treatment following an urgent request for medical assistance in relation to a possible sexual assault on Miss AU, contrary to the department's duty of care to Miss AU;
 - the unreasonable failure to properly investigate Ms AR's complaint that there was a delay in providing her daughter with medical assistance in relation to a possible sexual assault.

6.3 Policies in relation to responding to allegations of child sexual abuse

206. The Royal Commission into Institutional Responses to Child Sexual Abuse found that the responses of many institutions to allegations of child sexual abuse have been inadequate. Many institutions either do not have policies and procedures for responding to reports or information about abuse, or do not implement the policies and procedures that they do have.⁶⁰
207. During the course of my inquiry, the Commission asked for a copy of the IHMS policy for dealing with suspected instances of child abuse or neglect (IHMS Procedure 3.11.3 Child Protection and Mandatory Reporting) and a copy was provided by the department. The Commission also asked for a copy of any other policy of the department or relevant service providers, current at the time of the complaint or since that time, which deal with responding to allegations of child abuse or neglect. No other policy documents of this nature were produced. It appears from the department's response that neither the department nor Serco had or have specific policies dealing with responding to allegations of child abuse or neglect.

208. The Royal Commission into Institutional Responses to Child Sexual Abuse commenced work in January 2013. The Commission's interim report on 30 June 2014 distilled key elements of an effective response to individual reports of abuse, based on evidence provided to it by that stage. The elements emphasised were to:

- introduce and follow policies and procedures
- respond quickly to reports or information about child sexual abuse
- prioritise the child's best interests (for example, with referrals to support services)
- ensure the safety of the victim and other children (for example, by removing the accused person from contact with children while the allegations are investigated)
- notify police and other authorities, and cooperate fully with any investigations
- inform and support parents, carers and staff (for example, with debriefings and counselling)
- record reports or information about abuse and any actions taken in response
- treat all parties consistently and fairly
- take disciplinary action against perpetrators if reports are substantiated.⁶¹

Recommendation 4

209. I recommend that the department develop (and require Serco to develop) detailed policies and procedures to respond quickly to reports or information about child sexual abuse. These policies should also deal with the initial identification of potential instances of child sexual assault, particularly in an environment in which detainees may not have English as a first language.

6.4 Review of delivery of health care in immigration detention

210. Evidence obtained by the Commission as a result of speaking with people in immigration detention and people responsible for the operation of immigration detention centres shows that the current process for seeking medical assistance results in long delays in accessing primary health care.

211. The facts of the present complaint show that a review of this system is necessary. In particular, it is necessary to more effectively identify requests for medical assistance that are urgent and require immediate attention.

212. The Commission notes that the Australian National Audit Office (ANAO) has recently conducted a performance audit of health care services delivery in onshore immigration detention. The ANAO published its report on 1 September 2016 (after the conclusion of the Commission's inquiry).

Recommendation 5

213. I recommend that the department review the efficiency and effectiveness of the current system for providing medical assistance to people in immigration detention in light of the current Australian National Audit Office performance audit of health care services delivery in onshore immigration detention and my findings in the course of inquiring into the present complaint by Ms AR. This review should consider:

- the advice given to detainees about how they can access medical assistance (both the policy about what advice is to be given and the day to day experience of how this policy is reflected in practice);
- the system for dealing with urgent requests for medical assistance;
- the system of requiring detainees to fill in medical request forms in order to access primary health care;
- the system for processing medical request forms, including how regularly forms are reviewed and the timing of subsequent appointments;
- the resourcing allocated to the provision of doctors to detainees and how this interacts with the timeliness of appointments.

7 Department's response to my findings and recommendations

214. By letter dated 16 September 2016, the Secretary of the department provided a response to my findings and recommendations. The response was in the following terms:

I note your findings and recommendations in relation to this matter. I take the safety and welfare of persons in held and community detention very seriously, specifically the safety and welfare of children and vulnerable people. It is for this reason that I established the Child Protection Panel to review and make recommendations to the Department's response to reported incidents of child abuse, neglect and exploitation.

I have considered your recommendations very carefully. Attachment A sets out the actions that are being taken by the Department as a result of that consideration.

...

Recommendation 1

That the department promptly make a further submission to the Minister for him to consider exercising his power under section 195A of the Migration Act to grant Mr AS a bridging visa, subject to any conditions as may be necessary.

Departmental response

The Department accepts recommendation 1.

The Department advises that Mr AS' case will be referred to the Minister for his consideration of exercising his power under section 195A of the Act, to grant Mr AS a bridging visa. The Department notes that the Minister cannot be compelled to intervene in Mr AS' case. The Department will include the AHRC's views and findings for the Minister's consideration.

Recommendation 2

That the Commonwealth pay to Ms AR an appropriate amount of compensation to reflect the loss of liberty caused by the family's detention in accordance with the principles outlined in section 6.2.

Departmental response

The Department notes the recommendations of the AHRC.

After careful consideration of the findings in your report, the Department considers that the family's continued placement in a detention centre was appropriate, lawful and in accordance with Ministerial Guidelines. On this basis, the Department is respectfully of the view that payment of compensation to Ms AR and her family would not be appropriate in this case.

Although there are limited circumstances in which the Commonwealth may pay compensation on a discretionary basis, Resource Management Guide No. 409 generally limits such payments to situations where a person has suffered some form of financial detriment or injury arising out of defective administration on the part of the Commonwealth, or otherwise experienced an anomalous, inequitable or unintended outcome as a result of application of the Commonwealth legislation or policy. On the basis of the current information, the Department is not satisfied that there is a proper basis for the payment of discretionary compensation at this time.

Recommendation 3

That the Commonwealth pay to Ms AR an appropriate amount of compensation to reflect the emotional distress caused to her and her family as a result of the delay in providing medical assistance to Miss AU and the failure to properly investigate this delay following her complaint to Serco.

Departmental response

The Department notes the recommendations of the AHRC.

In this instance, the Department is respectfully of the view that payment of compensation to Ms AR and her family would not be appropriate in this case.

There are limited circumstances in which the Commonwealth may pay compensation on a discretionary basis, and it is open, for Ms AR to lodge an application for compensation under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme).

Further information about the CDDA Scheme is available on the Department's website at <https://www.border.gov.au/about/contact/provide-feedback/compliments-complaints-suggestions/claiming-compensation-from-us>. An invitation to apply for compensation does not constitute an admission of liability, nor does it guarantee that compensation will be paid.

Recommendation 4

That the department develop (and require Serco to develop) detailed policies and procedures to respond quickly to reports or information about child sexual abuse. These policies should also deal with the initial identification of potential instances of child sexual assault, particularly in an environment in which detainees may not have English as a first language.

Departmental response

The Department accepts recommendation 4.

The Department is continually working to improve its policies and practices around the reporting, management and response to incidents of child abuse and to provide appropriate training and leadership to staff and service providers.

The Department established the Child Protection Panel (the Panel) in March 2015 to provide independent advice on issues pertaining to the wellbeing and protection of children in immigration detention and in regional processing centres, and assurance that a comprehensive and contemporary framework for the Department relating to the protection of children was in place.

The Panel reviewed the Department's response to reported incidents of child abuse, neglect and exploitation which occurred in these environments between 1 January 2008 and 30 June 2015. In the course of this review, the Panel engaged with the Department on various systemic issues and the Department has been working in tandem to address the Panel's concerns.

The Panel has submitted its final report to the Department and the Department is considering the findings and recommendations of the report. The report will be publicly released later this year.

The Department will reconvene the Panel in mid-2017 to review the Department's implementation of the report recommendations.

The Department has recently developed a Child Safeguarding Framework. The Framework was developed to fully articulate the Department's role in safeguarding children in its care and explicitly calls out the requirements of service providers (including Serco) in how they manage allegations and reports related to children. The policies and procedures under this framework ensure that all service providers and staff are required to immediately mandatorily report any allegation of child abuse to State Child Welfare Authorities. The policies and supporting documents are designed to meet a range of child safeguarding and wellbeing aims, including to:

- increase understanding of, and improve support relating to, child protection and wellbeing for staff, carers and children
- increase accessibility of child safeguarding policies and protocols for all families, carers and children, taking into consideration their individual needs
- manage child protection incidents, allegations and complaints in a timely and effective manner
- ensure appropriate support is provided, while preserving the self-respect, dignity and wellbeing of the child
- identify, mitigate, prevent, manage, report and follow-up on abuse and risks of abuse to children
- encourage best practice and improve consistency across the Department
- prioritise child-safe recruitment and selection practices.

Additionally the Department will be undertaking a review of this specific case to identify the reasons for any delay in reporting or provision of medical assistance to a child in our care.

Recommendation 5

That the department review the efficiency and effectiveness of the current system for providing medical assistance to people in immigration detention in light of the current Australian National Audit Office performance audit of health care services delivery in onshore immigration detention and my findings in the course of inquiring into the present complaint by Ms AR. This review should consider:

- *the advice given to detainees about how they can access medical assistance (both the policy about what advice is to be given and the day to day experience of how this policy is reflected in practice);*
- *the system for dealing with urgent requests for medical assistance;*
- *the system of requiring detainees to fill in medical request forms in order to access primary health care;*
- *the system for processing medical request forms, including how regularly forms are reviewed and the timing of subsequent appointments;*
- *the resourcing allocated to the provision of doctors to detainees and how this interacts with the timeliness of appointments.*

Departmental response

The Department accepts recommendation 5.

Since this case was first raised, a new Health Services and Policy Division has been established within the Department. As part of these new arrangements, a fortnightly Clinical Case Management conference with IHMS medical directors and senior staff within the Department has been established. This measure is designed to provide stronger clinical and administrative oversight of all actual and potential cases of clinical concern.

A monthly Quality and Risk Committee, including IHMS medical and nursing Directors and senior managers from within the Department has also been established. This Committee met for the first time in July; the next meeting is scheduled for the 24th August. It reviews clinical performance data relating to:

- Waiting times for appointments
- Complaints and other feedback from patients
- Recommendations from any root cause analyses conducted
- Infection rates
- Referral rates
- Morbidity and mortality data
- Incident reporting
- Medication management
- Challenging behaviour incidents and management
- Quality improvement initiatives.

Finally, the Department has initiated a robust auditing process of detainee complaints relating to the provision of health services delivery. This auditing process is conducted on site at each facility by the Department Service Delivery teams. As part of the process, the contracted health service provider is required to provide the Department with weekly data of received detainee complaints along with acknowledgement and resolution letters to detainees. This improved process enables the Department to have greater oversight of complaints being made by detainees to the health service provider and provides the ability for the Department to analyse emerging trends as well as ensuring that the health service provider is managing and resolving detainee complaints in a timely manner.

A Health Requests policy is currently being drafted, which will incorporate health related complaints and concerns raised by detainees.

215. I report accordingly to the Attorney-General.

Gillian Triggs
President
Australian Human Rights Commission
November 2016

- 1 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act. The CRC is an international instrument that has been declared under s 47 for the purposes of the AHRC Act.
- 2 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 3 CRC, article 3(2).
- 4 CRC, article 3(3).
- 5 The Rules for Protection of Juveniles were adopted by the UN General Assembly in resolution 45/113 of 14 December 1990: UN Doc A/RES/45/113.
- 6 Community and Disability Services Ministers' Conference, *Creating Safe Environments For Children – Organisations, Employees and Volunteers, National Framework* (July 2005). At <http://www.cyp.vic.gov.au/childsafetycommissioner/publications/childsafepubs.htm> (viewed 4 December 2015).
- 7 Australian Children's Commissioners and Guardians, *Principles for Child Safety in Organisations* (2013). At <http://www.cyp.vic.gov.au/downloads/accg-principles-for-child-safety-in-organisations.pdf> (viewed 4 December 2015).
- 8 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (30 June 2014), Chapter 5, 'What we are learning about responding to child sexual abuse', p 167. At <http://www.childabuseroyalcommission.gov.au/getattachment/7014dd2f-3832-465e-9345-6e3f94dd40eb/Volume-1> (viewed 4 December 2015).
- 9 UNHRC, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).
- 10 UNHRC, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- 11 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UNHRC in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
- 12 *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
- 13 United Nations Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).
- 14 United Nations Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
- 15 United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Shams & Ors v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007); *Baban v Australia*, Communication No. 1014/2001, CCPR/C/78/D/1014/2001 (2003); *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006).
- 16 United Nations Human Rights Committee, General Comment 35 (2014), Article 9: Liberty and security of person, UN Doc CCPR/C/GC/35 at [18].
- 17 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, 'Government closes Darwin's Bladin detention facility' Media Release, 21 February 2015. At <http://www.minister.border.gov.au/peterdutton/2015/Pages/government-closes-bladin-detention-facility.aspx> (viewed 4 December 2015).
- 18 The Hon Kevin Rudd MP, Prime Minister, 'Transcript of broadcast on the Regional Resettlement Arrangement between Australia and PNG' Media Release, 19 July 2013. At <http://pandora.nla.gov.au/pan/79983/20130830-1433/www.pm.gov.au/press-office/transcript-broadcast-regional-resettlement-arrangement-between-australia-and-png.html> (viewed 4 December 2015).
- 19 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Restoring TPVs to resolve Labor's legacy caseload' Media Release, 25 September 2014. At <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm218127.htm> (viewed 4 December 2015).
- 20 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), p 62. At <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children> (viewed 4 December 2015).
- 21 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (30 June 2014), Chapter 5, 'What we are learning about responding to child sexual abuse', p 167.

- 22 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (30 June 2014), Chapter 5, 'What we are learning about responding to child sexual abuse', p 167.
- 23 Australian Children's Commissioners and Guardians, *Principles for Child Safety in Organisations* (2013), 6 [9].
- 24 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (30 June 2014), Chapter 5, 'What we are learning about responding to child sexual abuse', p 173.
- 25 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (30 June 2014), Chapter 5, 'What we are learning about responding to child sexual abuse', pp 154 and 166.
- 26 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *Minister's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 30 May 2013. The guidelines are incorporated into the department's Procedures Advice Manual.
- 27 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 18 February 2014. The guidelines are incorporated into the department's Procedures Advice Manual.
- 28 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s 345, s 351, s 417 and s 501J)*, 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the department's Procedures Advice Manual.
- 29 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Restoring TPVs to resolve labor's legacy caseload' *Media Release*, 25 September 2014. At <http://pandora.nla.gov.au/pan/143035/20141002-0006/www.minister.immi.gov.au/media/sm/2014/sm218127.htm> (viewed 4 December 2015).
- 30 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the department's Procedures Advice Manual.
- 31 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), pp 30-31, see also pp 74-77 and 98-101. At <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children> (viewed 4 December 2015).
- 32 The Hon Scott Morrison MP, Fourth Public Hearing of the National Inquiry into Children in Immigration Detention, Canberra, 22 August 2014, pp 30-31. At <https://www.humanrights.gov.au/sites/default/files/Hon%20Scott%20Morrison%20Mr%20Bowles.pdf> (viewed 4 December 2015).
- 33 The Hon Scott Morrison MP, Fourth Public Hearing of the National Inquiry into Children in Immigration Detention, Canberra, 22 August 2014, p 24.
- 34 The Hon Peter Dutton MP, *Minister for Immigration and Border Protection, Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 29 March 2015, p 4.
- 35 AHRC Act s 29(2)(a).
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- 37 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Guidelines on minister's detention intervention power (s 195A of the Migration Act 1958)*, 24 March 2012. The guidelines are incorporated into the department's Procedures Advice Manual.
- 38 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 39 *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 40 *Cassel & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].
- 41 [2013] FCA 901.
- 42 [2003] NSWSC 1212.
- 43 [2013] FCA 901, [121].
- 44 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 45 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 46 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)), [140].
- 47 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 48 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 49 The court awarded nominal damages of one dollar for the unlawful detention of Mr Fernando because as a non-citizen, once he committed a serious crime, he was always liable to have his visa cancelled: *Fernando v Commonwealth of Australia* (No 5) [2013] FCA901 [98]-[99].

- 50 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA901, [139].
- 51 See the definition of 'non-economic loss' in Resource Management Guide No. 409 published by the Department of Finance.
- 52 Commonwealth Ombudsman, *To compensate or not to compensate? Own motion investigation of Commonwealth arrangements for providing financial redress for maladministration* (1999), pp 31-35. At http://www.ombudsman.gov.au/data/assets/pdf_file/0022/26239/investigation_1999_02.pdf (viewed 5 July 2016). Commonwealth Ombudsman, *Putting things right: compensating for defective administration* (2009) at [1.10], p 3. At http://www.ombudsman.gov.au/data/assets/pdf_file/0014/26213/investigation_2009_11.pdf (viewed 5 July 2016).
- 53 Pursuant to Appendix C to the Legal Services Directions 2005 (Cth).
- 54 The CDDA scheme is currently described in Resource Management Guide No. 409 published by the Department of Finance. At <https://www.finance.gov.au/resource-management/discretionary-financial-assistance/cdda-scheme/information-for-entity-staff/> (viewed 5 July 2016).
- 55 Pursuant to s 65 of the *Public Governance, Performance and Accountability Act 2013* (Cth). See also Resource Management Guide No. 401 published by the Department of Finance. At <https://www.finance.gov.au/resource-management/discretionary-financial-assistance/act-of-grace-mechanism/information-for-entity-staff/> (viewed 5 July 2016). These claims are managed by the Department of Finance.
- 56 The Commonwealth Ombudsman notes that ex gratia payments require approval by the government and are usually reflected in a specific appropriation. They usually take the form of payment schemes which have guidelines and rules developed for a group of individuals suffering a particular class of losses. This contrasts with the individual nature of most act of grace payments. See Commonwealth Ombudsman, *To compensate or not to compensate? Own motion investigation of Commonwealth arrangements for providing financial redress for maladministration*, Report under s 35A of the Ombudsman Act 1976 (1999), p 34.
- 57 See, for example, the previous description of the CDDA scheme by the Department of Finance and Deregulation in Finance Circular No. 2009/09, *Discretionary Compensation and Waiver of Debt Mechanisms*, Attachment A at [3]. At <https://www.finance.gov.au/archive/archive-of-publications/finance-circulars/2009/09.html> (viewed 5 July 2016).
- 58 Commonwealth Ombudsman, *Putting things right: compensating for defective administration* (2009) pp 1 and 24-27.
- 59 Resource Management Guide No. 409 at [16].
- 60 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (30 June 2014), Chapter 5, 'What we are learning about responding to child sexual abuse', p 173.
- 61 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (30 June 2014), Chapter 5, 'What we are learning about responding to child sexual abuse', p 167.