



Australian
Human Rights
Commission

Yousefi family v Commonwealth of Australia

[2011] AusHRC 46

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**Mr Parvis Yousefi,
Mrs Mehrnoosh Yousefi
and Manoochehr Yousefi v
Commonwealth of Australia
(Department of Immigration
and Citizenship)**

Report into arbitrary detention, the
standard of treatment in detention
and rights of the child in detention

[2011] AusHRC 46

Australian Human Rights Commission 2011



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Commission**



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Commission**

July 2011

The Hon Robert McClelland MP
Attorney General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report of an inquiry into the complaint made pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) by Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi.

I have found that the acts and practices of the Commonwealth breached fundamental human rights protected by the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC) as follows:

- Article 10 of the ICCPR in relation to the forcible removal of Manoochehr Yousefi from Woomera Detention Centre to Baxter Detention Centre;
- Articles 7, 9 and 10 of the ICCPR in relation to the failure to remove Manoochehr Yousefi from the detention centre environment;
- Articles 7, 9 and 10 of the ICCPR in relation to the failure to remove Mr Parvis Yousefi from the detention centre environment;
- Articles 9 and 10 of the ICCPR in relation to the failure to remove Mrs Mehrnoosh Yousefi from the detention centre environment;
- Articles 3(1), 3(2), 19(1), 37(a) and 37(c) of the CRC in relation to the best interests and protection of Manoochehr Yousefi; and
- Articles 24(1) and 28(1) of the CRC in relation to access to appropriate health care and education of Manoochehr Yousefi.

By letter dated 8 July 2011 the Department of Immigration and Citizenship provided its response to my findings and recommendations. I have set out the response of the Department of Immigration and Citizenship in its entirety in part 10 of my report.

Please find enclosed a copy of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C Branson'.

Catherine Branson
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction

1. This is a report setting out the Commission's findings and the reasons for those findings following an inquiry by the Australian Human Rights Commission into a complaint lodged by Mrs Mehrnoosh Yousefi on behalf of herself, her husband Mr Parvis Yousefi and her son Manoochehr Yousefi (the Yousefi family) that her family's treatment in detention by the Department of Immigration and Citizenship (the Department) involved acts or practices inconsistent with or contrary to human rights.

2 Summary

2.1 Summary of findings

2. I have found that the human rights of Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi were breached by the actions of the Department of Immigration and Citizenship (formerly known as the Department of Immigration and Multicultural and Indigenous Affairs).¹

(a) Forcible transfer to Baxter Detention Centre

3. In relation to the forcible transfer of the Yousefi family from Woomera Detention Centre to Baxter Detention Centre, I find that the forcible removal violated article 10 of the *International Covenant on Civil and Political Rights* (ICCPR) in relation to Manoochehr Yousefi.

(b) Failure to remove the Yousefi family from the detention centre environment

4. In relation to the failure to remove the Yousefi family from detention, I find both the:
 - a) practice of insisting the father of a family remain in an immigration detention centre; and
 - b) act of failing to remove the Yousefi family from detention in an immigration detention centre, once the Commonwealth was aware of the deteriorating mental health of the family;
were inconsistent with articles 7, 9 and 10 of the ICCPR in relation to Mr Yousefi and Manoochehr Yousefi and were inconsistent with articles 9 and 10 of the ICCPR in relation to Mrs Yousefi.
5. As a consequence, Mr Yousefi was unjustifiably detained in a detention centre from 24 August 2001 until 15 June 2004 and Mrs Yousefi and Manoochehr were unjustifiably detained in a detention centre from 25 May 2002 until 15 June 2004.
6. I further find that, because of the failure to remove the Yousefi family from detention:
 - a) at various times between 2001 and 2004 the best interests of Manoochehr Yousefi, as a child, were not a primary consideration in all actions concerning him, contrary to article 3(1) of the *Convention on the Rights of the Child* (CRC);
 - b) the Commonwealth failed to take all administrative measures to ensure Manoochehr Yousefi such protection and care as was necessary for his wellbeing, taking into account the rights and duties of his parents (CRC, article 3(2));
 - c) Manoochehr Yousefi was denied the right to be protected from all forms of physical or mental violence (CRC, article 19(1)); and
 - d) the Commonwealth's failure to implement the repeated recommendations by mental health professionals that Manoochehr Yousefi be removed from the detention environment with his parents amounted to:
 - i. cruel, inhuman and degrading treatment of him in detention (CRC, article 37(a)); and
 - ii. a failure to treat him with humanity and respect for his inherent dignity (CRC, article 37(c)).

(c) Manoochehr's inability to access appropriate health care and education

7. I further find that at various times between 2001 and 2004 Manoochehr Yousefi was denied the right to:
- a) enjoy the highest attainable standard of physical and mental health (CRC, article 24(1)); and
 - b) an appropriate education on the basis of equal opportunity (CRC, article 28(1)).

2.2 Summary of recommendations

8. In light of my findings regarding the acts and practices of the Commonwealth I make the following recommendations:
- a) That the Commonwealth provide a formal written apology to Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi for the breaches of their human rights identified in this report.
 - b) In relation to Manoochehr Yousefi, that the respondent pay financial compensation in the amount of \$1 025 000.
 - c) In relation to Mrs Mehrnoosh Yousefi, that the respondent pay financial compensation in the amount of \$675 000.
 - d) Legislation should be enacted to set out minimum standards for conditions and treatment of people in all of Australia's immigration detention facilities, including those located in excised offshore places. The minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.²
 - e) An independent body should be charged with the function of monitoring the provision of health and mental health services in immigration detention. The Australian Government should ensure that adequate resources are allocated to that body to fulfil this function.
 - f) The Department should implement the Residence Determination Guidelines, under which people with significant physical or mental health concerns, people who may have experienced torture or trauma and people whose cases will take a considerable period to substantively resolve are to be referred to the Minister as soon as practicable for consideration of a Community Detention placement.³
 - g) The Department should implement the Residence Determination Guidelines, which require that all children and their accompanying family members or guardians be referred to the Minister for consideration of a Community Detention placement as soon as they are detained.⁴
 - h) The *Migration Act 1958* (Cth) (Migration Act) and other relevant Commonwealth laws should be amended as a matter of urgency to incorporate the following minimum requirements:
 - i. a presumption against the detention of children for immigration purposes;
 - ii. a proscription on children being detained in Immigration Detention Centres;
 - iii. that a court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention;

- iv. that there should be prompt and periodic review by a court of the continuing detention of any child for immigration purposes;
- v. if a child must be taken into immigration detention, as soon as possible after being detained they should be placed in Community Detention under a Residence Determination with any accompanying family members or guardians;
- vi. prescribed minimum standards of treatment for children in immigration detention consistent with the ICCPR, CRC and other relevant international human rights standards such as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; and
- vii. all courts and independent tribunals should be guided by the principle that the detention of children must be a measure of last resort and for the shortest appropriate period of time.

3 Outline of the complaint

3.1 Background

9. On 2 September 2002 and 8 January 2003 the Commission received a complaint from Mrs Yousefi about her family's treatment in detention by the Department. Mrs Yousefi provided further letters dated 27 April 2003 and another undated letter in 2003 which reiterated her initial complaint.
10. Mrs Yousefi's complaint alleges three human rights breaches, namely, that:
 - a) the alleged forcible transfer to Baxter Detention Centre violated articles 7 and 10 of the ICCPR for each member of the Yousefi family (first breach);
 - b) the failure to remove the Yousefi family from the detention centre environment in the particular circumstances of this case violated articles 7, 9 and 10 of the ICCPR for each member of the Yousefi family and articles 3, 19 and 37 of the CRC for Manoochehr (second breach);
 - c) Manoochehr's inability to access appropriate medical care and education while in detention violated articles 24 and 28 of the CRC for Manoochehr (third breach).
11. The complaint was investigated pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
12. The Department was invited to respond to the letters of complaint on 13 December 2002 and 27 March 2003. The Department provided two written responses to the complaint by letters dated 21 February 2003 and 13 June 2003.
13. The complaint by Mrs Yousefi was one of the cases investigated as part of the Commission's national inquiry into children in immigration detention, finalised in 2004.⁵
14. On 19 August 2005, the Department provided further information in relation to the complaint and conciliation of the matter was suspended pending the resolution of Mr Yousefi's common law claim, lodged 20 December 2005 and finalized on 5 December 2007.
15. Once the common law claim by Mr Yousefi was finalised the Commission attempted to conciliate a settlement of the complaint, holding conciliation conferences in September 2008 and April 2009. Both attempts at conciliation failed.
16. Accordingly, in May 2009 the matter was referred to me for consideration of reporting to the Attorney-General.
17. On 30 November 2009 I completed a tentative view which outlined my preliminary findings in relation to the complaint (Tentative View).
18. During the period from 30 November 2009 to 12 April 2011 I sought and was provided with submissions and additional evidence from both parties in response to my Tentative View and to assist me to make final findings.
19. On 13 April 2011 I forwarded an Amended Tentative View to the parties in relation to the transfer of the Yousefi family to Baxter Detention Centre and invited the Commonwealth to make submissions.
20. On 2 May 2011 the Commonwealth advised that it did not wish to make submissions in relation to the Amended Tentative View.

3.2 Common law claim

21. At the outset I note that Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi (the Complainants) have each brought a common law claim against the Department. I note that Mr Yousefi's claim has been settled for an undisclosed sum but that the claims of Manoochehr Yousefi and Mrs Yousefi are ongoing.
22. I have decided not to discontinue this inquiry, or any part of it, because of the fact of the common law claims though I have taken the fact of the settlement of Mr Yousefi's claim into account in my recommendations.
23. In reaching my decision not to discontinue this inquiry, or any part of it, because of the common law claims, I have taken into account that the function of inquiring into an act or practice that may be inconsistent with or contrary to any human right is different from, and includes considerations irrelevant to, the judicial function of determining whether the Commonwealth has acted consistently with Australian law. My function in investigating complaints of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with the human rights as defined in s 3 of the AHRC Act. Complaints of breaches of human rights are, by their nature, different from common law claims.
24. Secondly, I have taken into account that Mrs Yousefi's complaint is about the way her family was treated by the Commonwealth. For this reason, I must consider the impact of the treatment of each member of the family with regard to its impact on all other family members; for the same reason it would not be appropriate for me to disregard the treatment of any family member because of its potential impact on all other family members.

3.3 Findings of fact in relation to the circumstances of complaint

25. I consider the following statements about the circumstances which have given rise to the complaint to be uncontentious:
 - a) The Yousefi family are Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and their son, Manoochehr Yousefi.
 - b) Manoochehr Yousefi was 10 years old when he was first detained.
 - c) The Yousefi family are Iranian nationals who were kept in immigration detention for approximately 3 years.
 - d) The family was first detained in the Woomera Immigration Reception and Processing Centre (Woomera Detention Centre) on 30 April 2001 after arriving in Australia by boat on 20 April 2001.
 - e) In July 2001, the members of the Yousefi family made applications for protection visas. The Minister refused to grant the Yousefi family protection visas in September 2001.
 - f) On 24 August 2001, Mrs Yousefi and Manoochehr Yousefi were placed in the Woomera Residential Housing Project. Mr Yousefi remained in detention at Woomera Detention Centre during this time.
 - g) In May 2002, the Refugee Review Tribunal (RRT) affirmed the Department's decision not to grant the Yousefi family protection visas.
 - h) In May 2002, Family and Youth Services⁶ was notified of the Yousefi family after Mr Yousefi attempted to hang himself twice and Manoochehr threatened self-harm.

- i) On the recommendation of Family and Youth Services that it was preferable to keep the family together, Mrs Yousefi and Manoochehr Yousefi returned to the Woomera Detention Centre after about 9 months of separation from Mr Yousefi on 25 May 2002.
- j) Mr Yousefi was admitted to Glenside Hospital with major depression and psychotic symptoms from 27 June to 4 July 2002.
- k) The Yousefi family's appeal to the Federal Court from the RRT's decision was unsuccessful. This Federal Court decision was handed down in August 2002 and the family did not appeal the decision to the Full Court of the Federal Court.
- l) On 2 January 2003, the family was transferred from Woomera Detention Centre to the Baxter Immigration Detention Centre.
- m) Each member of the Yousefi family was granted a temporary protection visa on 15 June 2004 and released from detention that day.

4 The relevant legal framework

26. Section 11(1)(f) of the AHRC Act gives the Commission the function to inquire into any act or practice that may be inconsistent with or contrary to any human right.
27. Pursuant to s 8(6) of the AHRC Act this inquiry has been conducted by the President of the Commission.
28. For the purposes of s 11, 'human rights' means the rights set out in the ICCPR and the CRC.
29. The phrase 'inconsistent with or contrary to any human right' is not defined or otherwise explained in the Act.
30. A summary of the human rights in the ICCPR and CRC relevant to this inquiry is appended in Appendix 1 to this report. A summary of the jurisprudence in relation to those rights is appended in Appendix 2 to this report.

4.1 'Human rights' relevant to the complaint

31. The Complainants allege that:
 - a) the forcible transfer of the family from Woomera Detention Centre to Baxter Detention Centre violated articles 7 and 10 of the ICCPR for each member of the Yousefi family;
 - b) the failure to remove the Yousefi family from the detention centre environment in the particular circumstances of this case violated articles 7, 9 and 10 of the ICCPR for each member of the Yousefi family and, additionally, articles 3, 19 and 37 of the CRC for Manoochehr Yousefi; and
 - c) Manoochehr Yousefi's inability to access appropriate medical care and education while in detention violated articles 24 and 28 of the CRC.

4.2 The Commission can inquire into acts or practices done by or on behalf of the Commonwealth

32. The AHRC Act relevantly defines 'act' and 'practice' respectively to mean an act done, or practice engaged in, 'by or on behalf of the Commonwealth' or under an enactment. In the AHRC Act a reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.⁷
33. An 'act' or 'practice' only invokes the human rights complaints jurisdiction of the Commission where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.
34. I note at the outset that neither:
 - a) the decision to detain a person where required under s 189 of the Migration Act; nor
 - b) his or her continuing immigration detention until either a visa is granted or he or she is removed under s 196 of the Migration Act;is an 'act' or 'practice' for the purposes of the AHRC Act.⁸

35. However, all 'discretionary' acts of the Commonwealth are 'acts' or 'practices' within the meaning of the AHRC Act. Accordingly, in so far as the complaint relates to discretionary decisions made by the Commonwealth, its officers or agents, about the accommodation and treatment of the Yousefi family, it concerns acts or practices done by or on behalf of the Commonwealth.
36. My findings below are therefore confined to the discretionary acts or practices of the Commonwealth.

4.3 Forming my opinion

37. In forming an opinion as to whether any act or practice was inconsistent with or contrary to any human right I have been guided by the well-known statement of Dixon J in *Briginshaw v Briginshaw*,⁹ as explained by the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*.¹⁰
38. I have had regard to the seriousness of each allegation made, the inherent unlikelihood of an occurrence of the kind alleged and the gravity of the consequences that would flow from any particular finding.
39. I have taken particular care to assess the whole of the evidence and all submissions provided by the parties before reaching a final determination of the issues in dispute in this matter.

5 Alleged breach of human rights in relation to the forcible transfer to Baxter Detention Centre

5.1 Alleged act or practice

40. Mrs Yousefi alleges that on 2 January 2003, the Yousefi family was forcibly transferred from the Woomera Detention Centre to the Baxter Detention Centre without their consent. She states that:

Approximately 30 guard officers in their uniforms rushed into my family's bedroom and asked us if we were ready to go to Baxter Camp. My response was negative. I could not realize anything further except the cry of my 12-year old child and my husband who was beaten under the feet of the officers.
41. In particular, she claims that she 'was dragged on the ground,' Manoochehr 'got a hard blow on the head', '[her] and [her] husband's bodies were quite bruised' and 'during the whole trip [her] husband's hands were tied up'. She also claimed that the officers were laughing at them.
42. The decisions to use force and if so, how much force, and each actual use of force, are discretionary 'acts' for the purposes of the AHRC Act.
43. Further, given the Department had contracted with Australasian Correctional Management (ACM) at the relevant time to provide security and other services to its detention facilities, the acts of the ACM officers are 'acts' performed on behalf of the Department and therefore fall within the Commission's inquiry jurisdiction.

5.2 Response to the complaint

44. In its response to these allegations, the Department claims that it was 'aware that the Yousefi family preferred to remain in the Woomera Detention Centre, but a decision was made that the needs of the family could be better met at the Baxter detention centre'.
45. This decision appears to have largely been a result of the Department deeming Woomera Detention Centre unsuitable for family accommodation due to the destruction of large parts of the compounds during the disturbances and fires over the Christmas 2002 period.
46. The Department also claims that when told of the transfer, Mr and Mrs Yousefi became extremely agitated and refused to comply with the requests to pack their belongings. The ACM officers then deemed it necessary to assist the Yousefi family pack their belongings to achieve the objective of the operation.
47. As a result, 'Mrs Yousefi ran at the officers waving her arms and screaming and; Mr Yousefi commenced a physical attack on the ACM officers present'. The Department states that this necessitated the physical restraining of both Mr and Mrs Yousefi and that Mr Yousefi produced a screwdriver that he had secreted on his person.
48. The Department states that Mr Yousefi was placed in flexi-cuffs to protect the officers participating in the relocation operation and to prevent Mr Yousefi from self-harming. The Department states that Mr Yousefi remained in the flexi-cuffs for about 45 minutes.

49. The Department claims that Mrs Yousefi did not accuse the ACM officers of assaulting her or her son when she spoke to Annabelle O'Brien, Department Manager, Woomera Detention Centre, while waiting on the bus. The Department states that while Annabelle O'Brien did not actually witness the incident, she claims to have 'understood that Mrs Yousefi had fallen to the ground sustaining a graze on her foot'.

5.3 Relevant human rights

50. Mrs Yousefi's complaint about her family's transfer to the Baxter Detention Centre raises for consideration the application of article 7 ('[n]o one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment') and article 10 ('[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person') of the ICCPR.
51. In the case of a detained person, there is an overlap between article 7 and article 10(1) in that inhuman or degrading treatment or punishment under article 7 will also constitute a failure to treat that person with humanity and respect for the inherent dignity of the human person under article 10. The United Nations Human Rights Committee (UNHRC) has indicated that the threshold for establishing a breach of article 7 is higher than the threshold for establishing a breach of article 10.¹¹
52. The assessment of whether the treatment of a person is inconsistent with articles 7 or 10 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim. Accordingly, the assessment of whether the treatment is inconsistent with articles 7 or 10 of the ICCPR is in part a subjective evaluation. Factors such as the victim's age and mental health can aggravate the effect of certain treatment so as to bring that treatment within articles 7 or 10.¹²
53. In relation to article 10(1) the Commission must consider whether the decision to use force and whether the degree of force used was inconsistent with the right of a detained person to be treated with humanity and respect for the inherent dignity of the human person.
54. The UNHRC has indicated that compliance with the Standard Minimum Rules for the Treatment of Prisoners (the Standard Minimum Rules)¹³ and the Body of Principles for the Protection of all Persons under any form of detention (Body of Principles)¹⁴ is the minimum requirement for compliance with the obligation imposed under article 10(1) that detained people be treated humanely.¹⁵
55. Standard Minimum Rule 54(1) describes the circumstances in which force may be used against detainees as follows:
- Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse must use no more than strictly necessary and must report the incident immediately to the director of the institution.

5.4 Was the degree of force used strictly necessary in the circumstances?

56. It is not in dispute that the Complainants were transferred from the Woomera Detention Centre to the Baxter Detention Centre and that they did not consent to this transfer. What is relevant for the purposes of the Commission's inquiry is whether the force used to effect the transfer was lawful and no more than strictly necessary in the circumstances.

(a) Was the transfer lawful?

57. Clearly the need to move detainees from one place of detention to another may arise out of operational necessity. The power to move a detainee from one immigration detention centre to another immigration detention centre can be implied from the operation of s 189 and the scope of the definition of 'immigration detention' set out in s 5 of the Migration Act.

58. Section 189 of the Migration Act requires officers to 'detain' persons whom they know or reasonably suspect to be unlawful non-citizens. Section 5 of the Migration Act defines 'detain' to mean:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

59. Accordingly, the order to the Yousefi family to pack their belongings and board a bus for transportation to the Baxter Detention Centre can be fairly characterised as an 'order based on law'.

(b) Was the force used to effect the transfer lawful and no more than strictly necessary in the circumstances?

60. The medical reports prepared shortly after the Yousefi family arrived in the Baxter Detention Centre establish that the Yousefi family members each sustained injuries during the transfer.

61. Mrs Yousefi had slight abrasions to both her feet and claims to have had pain in her right arm.

62. Mr Yousefi had superficial marks to his forehead and face, five superficial lacerations to stomach area, superficial marks to wrist area and some skin off his toes. It was noted that an initial examination suggested that these injuries were sustained from the flexi-cuffs during the transfer operation.

63. Manoochehr had a slight lump to the right side of his head and complained of pain to his face and wrists. He claimed that he sustained the lump on his head from being 'roughly' handled by ACM officers during the transfer.

64. The Department provided video footage of the transfer of detainees, including the Complainants to the Baxter Detention Centre. As I noted in my Tentative View, the video does not appear to show everything that happened before, during and after the alleged incident and cannot be said to be a complete record. In particular, I note that the video camera could not be pointed at all of the family members all of the time and does not cover what occurred after the family were removed from their donga.

65. Significantly, the video does not completely support either version of events. It does not show:
- a) Mrs Yousefi running at the officers 'waving her arms and screaming';
 - b) Mr Yousefi physically attacking the officers present;
 - c) Mrs Yousefi being dragged along the ground; or
 - d) Manoochehr being struck by an officer.
66. The footage depicts a threatening and distressing scene. The video does show that Mr Yousefi was placed in flexi-cuffs and that both Mrs Yousefi and Manoochehr were forcibly removed from their donga after some struggling from both Mr and Mrs Yousefi. It also shows that, while ACM officers restrained Mr Yousefi, they retrieved a screwdriver.
67. I have noted and accept the submission made by the Complainants that there was:
- a large number of security officers present ... These security personnel are physically large, and were equipped with riot gear including helmets, shields, batons and protective clothing ... The removal from the hut of one child and two physically small and otherwise defenceless adults involved a disproportionate number of security personnel, and can only have been grossly intimidating ...
68. However, I also acknowledge that not all of the security personnel entered the donga and that those who did first removed some of their protective gear.
69. The Complainants also submitted that the allegation of physical assault is not inconsistent with the 'scene set by the video' and the briefing instruction 'I don't want to see any excessive force used, any sort of intimidation behaviour'. I do not place significant weight on these submissions.

5.5 Findings in the Tentative View

70. In my Tentative View I stated that:
- [66] What is relevant for the purposes of the Commission's inquiry is whether the force used to effect the transfer was lawful and no more than reasonably necessary in the circumstances ...
- [85] I appreciate that decisions made about the use of force can be very difficult ones. They are often made quickly, at times of high stress and require a careful balancing between respecting the dignity of the individuals involved, self-defence and preventing self-harm.
- While it seems that the nature of the incident left each of the Yousefi family members with some form of bruising or injury, in my Tentative View, there is insufficient evidence to conclude that the ACM Officers used more force than was necessary.
- In particular, it appears that the use of flexi-cuffs was in response to the finding of a screwdriver on Mr Yousefi and I am not presently satisfied that the use of flexi-cuffs was disproportionate in the circumstances.
- Accordingly, I am of the Tentative View that there is insufficient evidence to establish that the Yousefi family's transfer to the Baxter detention centre breached either Article 7 or Article 10 of the ICCPR for any member of the Yousefi family.
- However, I accept that the incident caused the Yousefi family, particularly Mrs Yousefi, great distress.¹⁶ It appears that the family's transfer to the Baxter Detention Centre could have been carried out in a more sensitive manner given that the Department knew about the Yousefi family's severe mental health problems and their fear of leaving Woomera.¹⁷

5.6 Submissions in response to this finding in the Tentative View

71. On 19 February 2010, the Department advised that it did:
not wish to make any substantive comments in relation to the Complainants submissions in respect of the video of the removal of the Complainants from Woomera Detention Centre to Baxter Detention Centre on 2 January 2003. The Respondent to the complaint does however agree with the Tentative Views of the President expressed at paragraphs 65–89 of the Tentative View.
72. On 30 March 2010 the Complainants made further submissions in relation to the forcible transfer to the Baxter Detention Centre as follows:
It is submitted that the forcible transfer did indeed breach Article 7 and Article 10 of the ICCPR. The circumstances of the removal involved the overbearing exercise of force albeit some of it not physical. The very presence of a large number of riot police to remove three effectively defenceless individuals could not, it is submitted, be regarded as treating detained people humanely as is required by Article 10 and interpreted by the UN Human Rights Committee.
Bearing in mind the UN Standard Minimum Rules, for the Treatment of Prisoners, Rule 54(1) as referred to in paragraph 64 of the President's Tentative Views and that the family did not consent to the transfer, officers who have recourse to force "*must use no more than is strictly necessary...*". Although this rule is in relation to prisoners, the Yousefi family were only detainees, but were subjected to a large number of staff entering what was their "home" fully dressed in riot gear with protective padding.
It is submitted that this overuse of force by the presence and by the number of riot police amounted to a breach of Article 10 of the ICCPR as the family could not be regarded as being treated with humanity and with respect for the inherent dignity of the human person in these circumstances. Further, Article 7 is breached as it is submitted that the actions were both inhumane and degrading treating (sic).
73. On 10 November 2010 I wrote to the Department in the following terms:
The Standard Minimum Rules (and article 10 of the ICCPR) only allow the use of force in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations.
Upon further consideration of the evidence, it appears that Mr Yousefi actively resisted the transfer, Mrs Yousefi possibly actively – but at least passively – resisted the transfer but there is no evidence that Manoochehr resisted the transfer.
To assist the President in reaching a concluded view as to whether the force used to effect the removal of Manoochehr was strictly necessary or permissible please advise, in relation to the circumstances of the transfer:
- What, if any, specific regard was had to Manoochehr's age and documented history of psychological stress as at the date of the transfer;
 - Why was it considered necessary for two adult riot police to physically restrain and remove Manoochehr from the donga;
 - Whether consideration was given to having a translator and psychologist (or other professional mental health worker who was familiar with the Yousefis) present at the time of the transfer to facilitate the transfer.

74. On 24 November 2010 the Department advised that, having regard to the common law proceedings commenced by Manoochehr Yousefi on 26 March 2010 'it would be inappropriate against this background to provide a considered response to the issues raised by the Commission...'
75. On 13 April 2011 I provided an Amended Tentative View to the parties which contained the findings set out in section 5.7 below. On 2 May 2011 the Commonwealth advised that it did not wish to make submissions in relation to the Amended Tentative View.

5.7 Findings in relation to the forcible transfer to Baxter Detention Centre

76. In assessing whether the officers used more force than was strictly necessary to effect the transfer of the Yousefi family, I find that the decision to use force, and the amount of force used, must be considered in the context of the respective age and mental conditions of the Complainants.
77. As indicated in my Tentative View, I appreciate that decisions made about the use of force can be very difficult ones. They are often made quickly, at times of high stress and require a careful balancing between respecting the dignity of the individuals involved, self-defence and preventing self-harm.
78. In relation to Mr and Mrs Yousefi, I find that they both struggled with officers attempting to effect the transfer and that officers located a screwdriver on Mr Yousefi. In particular, it appears that the use of flexi-cuffs on Mr Yousefi was in response to finding a screwdriver secreted on his person. Although I acknowledge the transfer was very distressing and note that the family's transfer to the Baxter Detention Centre could have been carried out in a more sensitive manner given that the Department knew about the Yousefi family's severe mental health problems and their fear of leaving Woomera, I am not satisfied that the use of force by the officers was more than strictly necessary in the circumstances or reached the requisite level of severity to constitute a breach of articles 7 or 10(1) of the ICCPR.
79. In relation to Manoochehr Yousefi, I find that he did not struggle with officers. I find that the use of force against Manoochehr, then 12 years old, was more than strictly necessary in the circumstances and, accordingly, constituted a breach of article 10(1) of the ICCPR.

6 Alleged breach of human rights in relation to the failure to remove the Yousefi family from the detention centre environment

6.1 Alleged acts or practices

80. Mrs Yousefi alleges that the failure to remove the Yousefi family from the detention centre environment in the particular circumstances of this case violated articles 7, 9 and 10 of the ICCPR for each member of the Yousefi family and, additionally, articles 3, 19 and 37 of the CRC for Manoochehr.
81. This aspect of the complaint can be broken into two acts or practices:
- a) the practice of requiring at least the father of a family to be detained in an immigration detention centre; and
 - b) the failure to act to remove the family from immigration detention centres.

(a) The practice of requiring at least the father of a family to be detained in an immigration detention centre

82. While s 196 of the Migration Act requires the Department to keep an unlawful non-citizen in 'immigration detention' until they are removed, deported or granted a visa, s 5 of the Migration Act defines 'immigration detention' to include an alternate place approved in writing by the Minister.
83. Accordingly, the operation of s 189 and s 196 of the Migration Act does not require the Department to detain unlawful non-citizens in immigration detention centres.
84. It was the Department's practice at the time to retain fathers of families in detention centres. However, in this particular case, there is no evidence that any member of the Yousefi family presented any security or other risks to the community nor posed any threat of absconding justifying detention in an immigration detention centre rather than in residential housing.
85. However, only Mrs Yousefi and Manoochehr Yousefi were permitted to enter the residential housing project on 24 August 2001. Further, when Manoochehr and Mr Yousefi's mental health deteriorated, on the advice of Family and Youth Services that the family should be kept together, Mrs Yousefi and Manoochehr were brought back to the immigration detention centre.
86. It was open to the Commonwealth to approve an alternate place of detention for the Yousefi family in the community by at least the date that Mrs Yousefi and Manoochehr entered the residential housing project on 24 August 2001. However, the Department's practice of requiring the father of the family to remain in an immigration detention centre precluded serious consideration being given to approving an alternate place of detention for all members of the Yousefi family.
87. I find that the Department's practice of retaining unlawful non-citizens in detention centres where another place could have been approved by the Minister is a discretionary practice that falls within the Commission's inquiry jurisdiction.

(b) The failure to act to remove the family from immigration detention centres

88. Section 3(3) of the AHRC Act defines an 'act' to include the refusal or failure to do an act and consistent with the Commission's views in *Badraie v Commonwealth (Department of Immigration and Multicultural and Indigenous Affairs)*,¹⁸ the scope of the Commission's jurisdiction is sufficiently broad to cover failures or refusals to act, even where a decision-maker is under no statutory duty to exercise a particular power or function.
89. While s 196 of the Migration Act requires the Department to keep an unlawful non-citizen in 'immigration detention' until they are removed, deported or granted a visa, s 5 of the Migration Act defines 'immigration detention' to include an alternate place approved in writing by the Minister. Accordingly, it cannot be said that the operation of s 189 and s 196 of the Migration Act required the Department to detain unlawful non-citizens in immigration detention centres.
90. It appears that the Minister had at least two courses of action reasonably open to him that would have enabled the Commonwealth to remove the Yousefi family from the detention centre environment:
- a) under s 417 of the Migration Act, the Minister could have substituted a more favourable decision than that of the RRT if the Minister thought it was in the public interest to do so; and
 - b) under s 5 of the Migration Act, the Minister could have approved an alternate place of detention in writing.

(i) Section 417 Migration Act

91. As indicated in the Tentative View the discretion in s 417 of the Migration Act was only available to the Minister in this case after the RRT handed down its decision in February 2002.
92. As discussed in the case of *Secretary, Department of Defence v HREOC, Burgess & Ors*,¹⁹ for the exercise or failure to exercise a statutory discretion to constitute an 'act' under the AHRC Act, it must be lawfully open to the Minister to exercise the discretion in the circumstances of the case. The legal scope of the discretion must be construed with reference to the statutory context in which it appears.²⁰
93. I have considered the Migration Series Instruction Guidelines (MSI) on Ministerial Powers under ss 345, 351, 391, 417, 454 and 501J of the Migration Act which I note are 'instructive but not determinative' of the legal scope of discretion under s 417 of the Migration Act. Part 4 of the Guidelines states that:
- The public interest may be served through the Australian Government responding with care and compassion where an individual's situation involves unique or exceptional circumstances. This will depend on various factors, which must be assessed by reference to the circumstances of the particular case.
94. 'Unique or exceptional circumstances' are defined to include:
- a) circumstances that may bring Australia's obligations under the CRC or the ICCPR into consideration;
 - b) circumstances that the legislation does not anticipate;
 - c) clearly unintended consequences of legislation;
 - d) circumstances where application of relevant legislation leads to unfair or unreasonable results in a particular case; and
 - e) compassionate circumstances regarding the age and/or health and/or psychological state of the person.

95. It would appear open to the Minister to exercise this 'public interest' discretion to intervene in special cases to avoid the Commonwealth acting in a way that breaches its international human rights obligations.
96. The discretion in s 417 of the Migration Act might also be available in extreme or unforeseen circumstances such as medical or other emergencies.
- (ii) *Section 5 of the Migration Act*
97. As also indicated in the Tentative View, the discretion the Minister has under s 5 of the Migration Act to approve an alternate place of detention could have been exercised at any time.
- (iii) *Section 73 of the Migration Act*
98. I also confirm my Tentative View that the Commonwealth additionally had the power to grant an eligible non-citizen a bridging visa under s 73 of the Migration Act. This power could only have been exercised in this case if each member of the Yousefi family satisfied the conditions for the grant of one of the specific bridging visas defined in Regulation 2.20 of the *Migration Regulations 1994* (Cth) (Migration Regulations).
99. Conditions for the grant of a visa under Regulation 2.20(9) include:
- a) the non-citizen's application for a visa decision is not finally determined;
 - b) there is a special need based on health in respect of which a medical specialist appointed by Immigration has certified that the non-citizen cannot properly be cared for in a detention environment; and
 - c) the Minister is satisfied that adequate arrangements have been made for the support of the non-citizen in the community.
100. It appears that the Yousefi family's visa application was finally determined in August 2002. Therefore, the grant of a bridging visa was only an option prior to August 2002. The first report unequivocally recommending that the Yousefi family be removed from the detention centre environment was dated 23 July 2002. There is no evidence that any arrangements for the Yousefi family's support in the community had been made prior to August 2002.
101. It appears that it was open to the Minister to grant a bridging visa to Manoochehr under Regulation 2.20(5) or (7). However, the conditions for the grant of a bridging visa under both Regulation 2.20(5) and 2.20(7) may have required that Manoochehr be separated from his parents.
102. The advice of several mental health professionals was that it was not in Manoochehr's best interests to be separated from his parents.
103. In the Tentative View I invited the parties to make submissions on whether it was open to the Minister to exercise his discretion to grant each member of the Yousefi family a bridging visa in this case but noted that 'subject to considering any further submissions on the possible grant of a bridging visa', I intended to confine this inquiry to the s 417 and s 5 options.
104. On 19 February 2010 the Department provided MSI 225, 386 and 387.
105. On 26 March 2010 the Department provided submissions regarding whether it was open to the Minister to exercise his discretion to grant each member of the Yousefi family a bridging visa under Regulation 2.20 of the Migration Regulations.
106. The Department provided the following summary of its position:
- There is a possibility that it may have been open to the Minister to grant each member of the Yousefi family a Bridging visa E (BVE) subject to the family satisfying all Schedule 1 and Schedule 2 criteria.

It should be noted that, without an application for a BVE from the Yousefi family, there was no legal obligation for officers to have considered the grant of a BVE either by inviting the family to apply or by granting a BVE without application...

107. The Department also noted that, in the absence of a BVE application by the family, officers had two options:
- a) officers could have assessed the family against the BVE validity criteria and, if the family appeared to have met the criteria, invited them to apply;²¹ and
 - b) if an officer determined that the family were 'eligible non-citizens' according to regulation 2.25 the Minister may grant a Bridging E (Class WE) visa.
108. The Department noted that 'if the Complainants were "unwilling" to make an application for a BVE it was open to an officer to grant a BVE without application if he or she were satisfied the family would have met the Schedule 2 criteria' which included signing an undertaking that they would present to the Department should they withdraw their visa application or upon completion of judicial review. The Department further submitted that 'If the family were not willing to apply for a BVE it is considered unlikely that they would sign the...undertaking'.
109. On 31 March 2010, the Complainants provided the following submissions in relation to whether it was open to the Minister to exercise his discretion to grant each member of the Yousefi family a bridging visa under Regulation 2.20 of the Migration Regulations:

It is submitted that Manoochehr Yousefi should have been granted a bridging visa E as he would qualify as a prescribed person according to Sub-regulation 2.20(7) of the Migration Regulations 1994.

The Department asserts that it was unlikely this criteria would be met on the grounds that Manoochehr would fail to meet "the requirement that arrangements had been made for the care and welfare of the non-citizen that are in the best interests of the child and the grant of a visa to the non-citizen would not prejudice the rights and interest of any person who has, or may reasonably be expected to have custody or guardianship, or access to, the non-citizen".

It is submitted the interests of the parents were to see their mentally ill and sometimes suicidal son in a better position and not incarcerated. This is likely to outweigh the immediate risk that parents remain incarcerated while their son is released. Surely their primary interest would be for the welfare of their son by his removal from the odious circumstances of his detention.

There is of course the interplay between the removal of the son and the rights of Mr and Mrs Yousefi for a bridging visa under Sub-regulation 2.20(9) of the Migration Regulations 1994. It has been conceded that there were several periods in which the family would have met the criteria of the bridging visa.

The failure of the family to obtain a bridging visa E was first on the basis that their applications were recorded as 'invalid'. This should be seen in the circumstances of a family incarcerated in a detention centre, not understanding the language or the system for the application and with very few resources available to them to make a valid application.

In the above circumstances it is respectfully submitted that it was open to the Minister to exercise his discretion to grant each member of the Yousefi family a bridging visa under Sub-regulation 2.20 of the Migration Regulations 1994.

(c) Findings as to whether the failure to remove the Yousefi family was an act within the inquiry jurisdiction

110. I find that it was open to the Minister to exercise his ‘public interest’ discretion to intervene pursuant to s 417 of the Migration Act and that the Minister further had discretion pursuant to s 5 of the Migration Act to approve an alternate place of detention for the Complainants. I therefore find that the failure to remove the Yousefi family from the detention centre environment was an act of the Commonwealth.
111. I find that MSIs 225, 386 and 387 confirm that the Minister had a discretion (being a power, but not a duty) to review a tribunal decision and substitute a more favourable decision than that of the Migration Internal Review Office, the Immigration Review Tribunal, the Administrative Appeals Tribunal, the Migration Review Tribunal or RRT if he considered such action to be in the public interest.
112. The circumstances which the Minister could consider include:
- a) circumstances that may bring Australia’s obligations as a signatory to the CROC into consideration (MSI 225; para 4.2.3); and
 - b) circumstances that may bring Australia’s obligations as a signatory to the ICCPR into consideration including ‘the health and psychological state of the person’ (MSI 225; para 4.2.12).
113. Moreover I note that the application can be made by the person seeking intervention, their agents or supporters (MSI 225; 6.4) or in another manner (MSI 225; 6.7).

6.2 Findings as to the effects of immigration detention on the Yousefi family

(a) Effects of detention on Mr Yousefi

114. I find that immigration detention had the following effects on Mr Yousefi:
- a) From at least April 2002 Mr Yousefi’s mental health deteriorated dramatically and he began to exhibit behaviour consistent with a major depressive illness and post-traumatic stress disorder. On 13 April and again on 4 May 2002, he attempted to hang himself.²²
 - b) Between 27 June to 4 July 2002 Mr Yousefi was admitted to Glenside Hospital with major depression and psychotic symptoms.
 - c) During 2003 Mr Yousefi was still displaying symptoms of major depression with paranoid psychotic features and his condition continued to deteriorate.
 - d) Throughout the period of detention, Mr Yousefi exhibited continued thought disorder as well as multiple attempted suicides by hanging and multiple acts of self-harm such as sewing his lips together, food refusal and hunger strikes.
 - e) Mr Yousefi remained isolated in his donga and continued to exhibit symptoms of a major psychotic disorder throughout the 3 years of his detention.

(b) Effects of detention on Manoochehr Yousefi

115. I am satisfied of the following matters concerning the effects of immigration detention on Manoochehr Yousefi:
- a) The devastating effect of immigration detention on Manoochehr Yousefi's mental health was extensively documented in records held by the Department.
 - b) Psychologist, Desa Acaster wrote on 21 October 2002 that 'prior to May 2002, Manoochehr was a happy boy'. The WFOP1.18 Individual Management Plan for Manoochehr states that Manoochehr was:
 - a pleasant, well-educated and well-mannered boy. He had an excellent attendance record at school and was a bright student.
 - c) There was concern for Manoochehr's mental health from as early as 7 May 2002. On 10 May 2002 the Investigation Report on Child Protection Intake noted that Manoochehr had clear signs of severe stress which had worsened over the previous few months. Counselling and a psychiatric assessment were recommended.
 - d) Psychiatric Nurse, John Quarrie wrote on 20 May 2002, that Manoochehr was beginning to show 'behavioural deficits' while separated from his father in the Woomera Residential Housing Project. The assessment notes state that while Mrs Yousefi and Manoochehr were in the residential housing project:
 - Manoochehr exhibited clear signs of stress: his sleep-talking, nightmares and now sleep-walking indicate deep-seated trauma. The current stressors of detention and his parents' depression are clearly causing extreme distress ...²³
 - e) In May 2002, Family and Youth Services was notified after Mr Yousefi attempted to hang himself twice and Manoochehr threatened self-harm. On the recommendation of Family and Youth Services that it was preferable to keep the family together, Mrs Yousefi and Manoochehr Yousefi returned to the Woomera Detention Centre on 25 May 2002.
 - f) On 27 and 28 May Manoochehr Yousefi made cuts to his left forearm with a razor and on 29 May 2002 Manoochehr Yousefi was hospitalised at Woomera Hospital.
 - g) On 6 June 2002 the Report on Child Protection Intake noted that Manoochehr Yousefi demonstrated serious mood and behavioural deterioration, was both self-harming and at ongoing risk of self-harm and was unable to be supported by his parents. The Report recommended an assessment by a child psychiatrist and that Manoochehr Yousefi and at least one parent be released from Woomera Detention Centre.
 - h) Between May 2002 and November 2002, Manoochehr self-harmed by cutting himself on at least 8 occasions and attempted to hang himself twice. The medical incident reports show that Manoochehr's mental health deteriorated further with Manoochehr becoming increasingly violent and aggressive. It appears that, as Mr Yousefi's condition deteriorated, Manoochehr started to adopt the role of the father and protector of the family.²⁴ He sometimes stayed up all night to watch over his parents. He had recurrent nightmares and wet his bed.

- i) Between 10 June 2002 and 18 July 2002 the Department's records document that Manoochehr became frequently violent and aggressive, had nightmares, wet the bed, self-harmed with razors and plastic knives and attempted to hang himself.
- j) Between May 2002 and December 2002 Manoochehr rarely attended school and the family was reported to have withdrawn from outings, and isolated themselves from ACM officers and the other families in the detention centre.
- k) In October 2002 a deterioration in Manoochehr was observed including a number of self-harm attempts and a lack of participation in activities. Departmental records note an allegation by Mrs Yousefi that some adult males in the centre were sexually harassing Manoochehr.
- l) Between 31 July 2002 and 31 December 2002, to the knowledge of Detention Centre staff, Manoochehr lacerated his left forearm, using variously razors, broken light bulbs or plastic knives on at least 10 occasions.
- m) Between 3 January 2003 and 23 February 2003, to the knowledge of Detention Centre staff, Manoochehr lacerated his left forearm, using variously razors, broken light bulbs or plastic knives on 6 occasions.
- n) Between 29 March 2003 and 7 June 2003, to the knowledge of Detention Centre staff, Manoochehr lacerated his left forearm, using variously razors, broken light bulbs or plastic knives on 4 occasions.
- o) Between January 2003 and June 2003 Manoochehr's mental health condition continued to deteriorate in the Baxter Detention Centre and Manoochehr rarely attended school.
- p) On 27 June 2003 the High Risk Assessment Team report noted that Manoochehr was developing borderline personality traits, that self-harm was recurring and that he had episodes of violent and aggressive behaviour.
- q) As at 3 July 2003, Manoochehr was not attending school.
- r) On 4 October 2003 a medical incident report states Family and Youth Services had been contacted regarding allegations that Manoochehr had been approached by a co-detainee asking for sexual favours.
- s) Additionally, Manoochehr was considered to be at immediate high risk of suicide on 27 May 2002, 21 October 2002 and 6 January 2003.
- t) The WFOP1.18 Individual Management Plan records approximately 45 incidents of actual self-harming or threatened self-harming as well as 18 incidents of property damage and/or aggression between 4 May 2002 and 1 December 2003. During this time, Manoochehr was reported to have become increasingly isolated and withdrawn, refusing to participate in school or other activities or to communicate with ACM officers.

(c) Effects of detention on Mrs Yousefi

116. I am satisfied of the following matters concerning the effects of immigration detention on Mrs Yousefi:

- a) On 20 May 2002, Psychiatric Nurse John Quarry noted that Mrs Yousefi was 'stressed' and 'worried' about her husband and son and required 'supportive psycho-therapy'. Professor Norman James diagnosed her as suffering from a depressive illness on 26 July 2002.

- b) On 21 October 2002, Psychologist, Desa Acaster noted that Mrs Yousefi was withdrawing from excursions, had lost 15 kilos in 2 months, her energy and concentration were low and her menstruation was altered.
- c) Between January 2003 and June 2003 Mr Yousefi and Manoochehr's mental health condition continued to deteriorate in the Baxter Detention Centre and Mrs Yousefi suffered extreme stress and concern caring for her family members and watching their conditions worsen.
- d) On 13 April 2004, Dr Jon Jureidini expressed concerns about Mrs Yousefi's mental state, considering the 'stress and strain of her heroic effort to care for her husband and son was catching up with her.'

(d) The mental health experts' repeated recommendations

117. I also find that mental health experts made repeated recommendations in relation to the effect of detention on the family. Particularly I find that:

- a) The Yousefi family were noted as being of concern from as early as May 2002. On 10 May 2002, Jude Maguire, Senior Practitioner, Crisis Response & Child Abuse and David Lawry, Social Worker recommended counselling and psychiatric assessment for Manoochehr as well as allocating a social youth worker to provide long-term services.
- b) On 6 June 2002, it was recommended that Manoochehr and at least one parent be released from detention to facilitate counselling. On 18 June 2002, Psychologist Robin Gracie reports 'previous intervention has been on-going counselling, psychological intervention, medication and time out in hospital'.
- c) The first report unequivocally advising the ACM Manager, Mr David Coulton, that the Yousefi family should be removed from the detention centre environment is that of Dr P Bakhitarian, Fellow in Child Psychiatry and Con Paleologos, Senior Clinical Psychologist, dated 23 July 2002.
- d) Dr Bakhitarian's report of 23 July 2002 describes Manoochehr as:
 - a 12 year old boy who presents with a history of depressed mood in association with neurovegetative changes of insomnia, lethargy, anorexia and poor concentration. He describes feelings of hopelessness and helplessness and he is anhedonic. He has made multiple suicide attempts in the past and he is at significant risk of further suicide attempts.
- e) Dr Bakhtiarian and Mr Paleologos described Manoochehr as 'copying' and learning self-harm behaviours from the other detainees and diagnosed Manoochehr with a major depressive disorder and noted evidence of intrusive thoughts, recurrent nightmares, hyper vigilance and Post Traumatic Stress Disorder secondary to traumatisation in the detention centre. They noted that Manoochehr had made multiple suicide attempts and was at significant risk of further suicide attempts. The report states:
 - We recommend that Manoochehr and his family be removed from the Detention Centre as a matter of urgency. Manoochehr's emotional deprivation and PTSD can not be treated in the detention context, because that environment is contributing to it. Continued detention increases the risk of self-harming behaviour and increased traumatisation. ...

We do not believe that separating the family at this stage would be in their best interests. However we do feel strongly that further detention in the centre would be detrimental to their mental health and may pose significant risk as it could result in serious self-harm attempts.

118. After this report, at least 11 further separate reports from medical and mental health professionals outline their author's extreme concern for the wellbeing of the Yousefi family and recommend that the family be removed from the detention centre environment. Key extracts from these reports are outlined in Appendix 2.
119. The mental health experts that came into contact with the Yousefi family recommended that the whole Yousefi family be moved to community detention together because Mr Yousefi and Manoochehr's mental health problems could not be treated in detention and it would further traumatise the family members to be separated again.²⁵

(e) The Commonwealth's knowledge

120. As is apparent from my findings above, I am satisfied that officers of the Department and ACM were aware of the Yousefi family's problems from at least May 2002.²⁶
121. Each of the above medical reports, the accuracy of which I have no reason to doubt, including the initial report of 23 July 2002 recommending the Yousefi family be removed from the detention centre environment, was addressed to either Department Centre Managers, ACM Managers or to members of the ACM mental health team reporting to these managers.
122. I note that Department Manager Annabelle O'Brien made the following departmental communications about the Yousefi family:
 - a) 14 October 2002 to Assistant Secretary, Jim Williams:

Dr Lockwood and the Psychiatric Nurse as well as the other examining specialists strongly recommend the family be moved from Woomera as a matter of urgency.

Continued detention at Woomera [Detention Centre] will only worsen the condition.

Each family member had displayed extremely serious mental health conditions.

A deterioration in Manoochehr in recent weeks had been noted including a number of self-harm attempts, a lack of participation in activities and allegations that some adult males in the centre are sexually harassing him.

Consider alternative detention either in Psychiatric facility or community placement, with strong network of support.

Family is effectively 'unfit to travel'.

Dr Lockwood believes that remaining in a detention centre environment will not allow for the family to achieve any improvements in their mental health.
 - b) 21 October 2002 to the Detention Operations Director:

Concerns about capacity for family to be managed within current detention environment and that Manoochehr has refused all efforts to go to school or participate in activities.

c) 7 July 2003 to Assistant Secretary, Jim Williams:

The strategies utilized by the Mental Health team to provide ongoing management and health services to this family have been exhausted and there appears to be no interventions left at the disposal of the staff to attempt to rectify this predicament.

123. On 22 October 2002 a minute was sent to the Minister about the Yousefi family. The minute stated that the mental health condition of this family required 'urgent consideration' and advised that 'if the family remains in detention their dysfunction will worsen; a move to another detention facility will maintain the status quo and actual improvement is most likely outside detention'. The minute outlined three options for consideration by the Minister: that the Yousefi family remain in Woomera Detention Centre; that they be transferred to another detention facility; or that they be detained in the community. The minute also noted the possibility of intervention under s 417 of the Migration Act.
124. Anne Dutney, Acting General Manager of Detention Services, followed up this minute with a letter to the Assistant Secretary, dated 5 November 2002. She enclosed 18 previous reports about the Yousefi family's situation and noted the serious concerns ACM held about the safety and welfare of the Yousefi family. She noted that the solutions available to ACM, as the contracted service providers, were unable to provide an effective response.

6.3 Relevant human rights under the ICCPR

125. In the circumstances of this case, the Commonwealth's failure to remove the Yousefi family from the detention centre environment raises for consideration the following human rights under the ICCPR:

- a) Article 9 of the ICCPR; and
- b) Articles 7 and 10 of the ICCPR.

(a) Article 9 of the ICCPR: liberty and freedom from arbitrary detention

126. Article 9(1) of the ICCPR protects the right to liberty and guarantees that 'no one shall be subjected to arbitrary arrest or detention'. Detention includes immigration detention.²⁷
127. Under the ICCPR, 'lawful detentions may be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality'.²⁸ Prolonged detention and even indefinite detention may be lawful where a detainee does not have a visa,²⁹ however, it might still be arbitrary.
128. For this reason the question before the Commission is not whether the detention of the Complainants was lawful, but whether the detention was arbitrary and therefore in breach of article 9.
129. Having regard to the international jurisprudence it is apparent that 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.³⁰ Accordingly, where alternate places of detention that impose a lesser restriction on a person's liberty are reasonably available to the Department, prolonged detention in an immigration detention centre may be disproportionate where detention in an immigration detention centre is not demonstrably necessary.

(i) *Findings as to whether the practice of requiring the father of the Yousefi family to be detained was inconsistent with the rights of each member of the Yousefi family under article 9 of the ICCPR*

130. I find the Department's practice of requiring the father of the family to remain in an immigration detention centre had the consequence of Mr Yousefi unjustifiably remaining in a detention centre from 24 August 2001 until 15 June 2004 and Mrs Yousefi and Manoochehr being unjustifiably detained in a detention centre from 25 May 2002 until 15 June 2004 and was inconsistent with each member of the Yousefi family's right to liberty and freedom from arbitrary detention in article 9 of the ICCPR.
131. The practice precluded any serious consideration being given to approving an alternate place of detention for all members of the Yousefi family.
132. In this particular case, there is no evidence that the Yousefi family or Mr Yousefi presented any security or other risks to the community nor posed any threat of absconding justifying detention in an immigration detention centre rather than in residential housing. However, only Mrs Yousefi and Manoochehr Yousefi were permitted to enter the residential housing project on 24 August 2001.
133. Further, when Manoochehr and Mr Yousefi's mental health deteriorated, on the advice of Family and Youth Services that the family should be kept together, Mrs Yousefi and Manoochehr were brought back to the detention centre.
134. A minute to the Minister dated 22 October 2002 mentioned that the costs of community detention may be high. In my view, any additional cost was not of sufficient significance to justify the continued detention of the Yousefi family in a detention centre.
135. Furthermore, the cost of community detention seems to have escalated because of Mr Yousefi and Manoochehr's mental health needs. The evidence supports the conclusion that these needs were associated with the Yousefi family's prolonged detention in the detention centre environment.
136. It was open to the Commonwealth to approve an alternate place of detention for the Yousefi family in the community by at least the date that Mrs Yousefi and Manoochehr entered the residential housing project on 24 August 2001.
137. The act of failing to remove the Yousefi family from the immigration detention centre environment had serious negative effects on each member of the family.

(ii) *Findings as to whether the failure to remove the Yousefi family from detention was inconsistent with their rights under article 9 of the ICCPR*

138. I find the act of failing to remove the Yousefi family from the immigration detention centres was inconsistent with their right to liberty and freedom from arbitrary detention from at least 23 July 2002. Detention of the family in the Woomera Detention Centre and the Baxter Detention Centre was not the least invasive means of detaining them and was unreasonable and disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.
139. It was open to the Minister to either:
- a) substitute a more favourable decision for the decision of the RRT, from February 2002, and grant visas to the family, as he ultimately did more than two years later; or
 - b) approve an alternative place of detention which was less invasive, more reasonable and more proportionate.

140. The Department was aware of significant factors weighing in favour of the Minister exercising one or both of these discretions. These factors included:
- a) the lack of any evidence that any member of the family presented a security or flight risk sufficient to justify their detention in an immigration centre; and
 - b) in the case of each of Mr Yousefi and Manoochehr, the repeated and urgent advice of no less than twelve mental health professionals was that no mental health intervention could successfully treat them while the family remained in detention.
141. I find that:
- a) The Commonwealth was on notice from at least May 2002 that the advice of mental health professionals was that the family needed to be re-united and removed from the detention centre environment.
 - b) From 23 July 2002 that Department was advised unequivocally that:
 - i. Manoochehr Yousefi and his family should be removed from the Woomera Detention Centre as a matter of urgency;
 - ii. the family's significant mental and health problems could not be treated in the detention context, because that environment was contributing to them; and
 - iii. continued detention increased the risk of self-harming behaviour and increased traumatisation.
 - c) The Department was advised unequivocally from 23 July 2002 that further detention in the Woomera Detention Centre would be detrimental to the mental health of each of the members of the Yousefi family and may pose significant risk including serious self-harm attempts.
142. The legal scope of the discretion in s 417 of the Migration Act can reasonably be construed to include special cases where it would be in the 'public interest' to grant a visa – this includes cases where solutions are required to ensure the Commonwealth avoids breaching someone's human rights³¹ and in circumstances calling for compassion because of the health or psychological state of a person.
143. The extreme dysfunction, mental illness and suffering each member of the Yousefi family experienced in the detention centre environment as documented by the mental health experts constituted extraordinary circumstances warranting the Minister's intervention under s 417 of the Migration Act to remove the Yousefi family from the detention centre environment. The Minister chose not to do so.
144. It is inconceivable, in light of the particular circumstances of the Yousefi family, that there were not alternate places of detention available that would have imposed a lesser restriction on their liberty or less invasive means available to the Department of achieving compliance with the immigration policies. For example, by the imposition of reporting obligations, sureties or other conditions which would take account of the family's deteriorating psychiatric condition and need for intensive support outside of the detention centre environment.
145. The continued detention of the family until June 2004 was patently not demonstrably necessary.

(b) Articles 7 and 10 of the ICCPR: standard of treatment while in detention

146. In the circumstances of this particular case, the continuing detention of the Yousefi family also raises for consideration articles 7 and 10 of the ICCPR.
147. The relevant question, in relation to article 7, is did the continued detention of the Yousefi family in an immigration detention centre from July 2002 to June 2004 amount to cruel, inhuman or degrading treatment or punishment?
148. From 2002, the Commonwealth had the benefit of the decision of the UNHCR in *C v Australia*³² where the UNHCR, in an analogous matter made a finding of 'cruel, inhuman and degrading treatment' under article 7 of the ICCPR where an immigration detainee's prolonged arbitrary detention was reported as contributing to his mental health problems and the authorities were aware of this but delayed releasing the detainee from immigration detention.
149. As noted in Appendix 2, the threshold for establishing a breach of article 10 is lower than for article 7.
150. The relevant question, in relation to article 10, is whether the facts demonstrate a failure to treat a detainee humanely and with respect for their inherent dignity as a human being. Under article 10, the Department is obliged to take positive actions to prevent inhumane treatment of detained persons, such as providing appropriate medical and mental health care facilities.³³ It is incumbent upon a decision maker to examine whether less restrictive detention options are available (such as detention in the community) in cases, like the current one, where it is known that prolonged detention is causing serious and ongoing mental health problems.
- (i) Findings as to whether the failure to remove the Yousefi family from immigration detention was inconsistent with the required standard of treatment while in detention under articles 7 & 10 of the ICCPR*
151. I find that the failure to intervene in this case to remove the Yousefi family from the detention centre environment where such removal was lawful and reasonably available to the Department constituted a breach of article 10 for all members of the family.
152. Denying an effective mental health intervention to Mr Yousefi and Manoochehr and causing distress and worry to Mrs Yousefi in the circumstances of this particular case go beyond the mere fact of deprivation of liberty. The Department's failure to act on the recommendations made in at least 13 separate reports from qualified mental health professionals demonstrates a failure to treat Mr Yousefi, Mrs Yousefi and Manoochehr humanely and with respect for their inherent dignity as human beings. The failure to remove the Yousefi family from the detention centre environment where such removal was lawful and reasonably available to the Department constituted a breach of article 10 for all members of the family.
153. The evidence before me establishes that all of the members of the Yousefi family had adequate access to the mental health interventions available at both the Woomera and Baxter Detention Centres. However, as outlined above, the evidence also establishes that the Commonwealth was aware that no mental health intervention could help Mr Yousefi or Manoochehr while the Yousefi family remained in the detention centre environment – that all strategies were exhausted.³⁴ For example, Dr Jon Juredini writes on 21 May 2003 that 'the Department's decision to continue to detain this family is a decision to deny them mental health intervention.'
154. In summary, the expert opinion of numerous mental health professionals as outlined above was that neither Manoochehr nor Mr Yousefi could be successfully treated while still in detention and that the family should not be separated.

155. The failure to remove the Yousefi family from the detention centre environment where such removal was lawful and reasonably available to the Department also placed Mrs Yousefi under great strain as she bore the burden of caring for her husband and son and watching hopelessly as their condition deteriorated and could not improve in circumstances where she had no power to provide assistance or seek the necessary mental health interventions that specialist medical teams were advising her family needed. It caused her to feel deeply distressed and agitated over a prolonged period and she was diagnosed as suffering from a depressive disorder.³⁵
156. Further, I find an element of reprehensibility and inhumanity in the treatment of Mr Yousefi and Manoochehr Yousefi by the Department sufficient to constitute a breach of article 7. The continued deprivation of the liberty, and arbitrary detention of Mr Yousefi and Manoochehr Yousefi in a detention centre environment in circumstances where they were suffering psychologically and continuing to self-harm was cruel, inhuman and degrading consistent with the majority view in *C v Australia*.

6.4 Relevant human rights under the CRC

157. As Manoochehr was born on 17 July 1990 and was only 10 years old when he was first detained, the failure to remove the Yousefi family from either the Woomera or Baxter Detention Centres raises for particular consideration articles 3, 19 and 37 of the CRC.

(a) Article 3 of the CRC

158. Article 3(1) of the CRC can be summarised as relevantly providing that, in all actions concerning children undertaken by administrative authorities, the best interests of the child shall be a primary consideration.
159. The UNICEF Implementation Handbook for the CRC provides the following commentary on article 3:
- The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests... .
- The child's interests, however, must be the subject of active consideration; it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.³⁶
160. Similarly, Mason CJ and Deane J noted in *Minister for Immigration and Ethnic Affairs v Teoh*,³⁷ that article 3 of the CRC is 'careful to avoid putting the best interests of the child as the primary consideration; it does no more than give those interests first importance along with such other considerations, as may, in the circumstances of a given case, require equal, but not paramount, weight'.³⁸
161. The expert opinion provided in at least 11 reports that I have seen all expressed the view that removing the Yousefi family from the detention centre environment was necessary so that Manoochehr could be successfully treated and receive the care and protection necessary for his wellbeing.
162. The minute about the Yousefi family sent to the Minister on 22 October 2002 does not demonstrate that the best interests of Manoochehr were regarded as a primary consideration or a consideration at all. The writer outlines the 'pros and cons' of three options available for the ongoing management of the Yousefi family. For detention in the community, the 'cons' are noted as including potential significant cost to the Department.

163. The 'pros' do not include any consideration of the likely benefits to Manoochehr's wellbeing nor his best interests in any sense. No 'pros' or 'cons' are listed for the alternative option of intervening under s 417 of the Migration Act. It therefore appears that the best interests of Manoochehr were not put to the Minister to consider as a 'primary' consideration alongside these other important considerations.
164. It appears that the Minister read and noted the contents of this minute. The Minister records his decision on 2 November 2002 that alternative detention with Family and Youth Services and intervention under s 417 of the Migration Act are not to be given further consideration. This note does not give any indication of the kind of balancing exercise undertaken by the Minister.
165. The evidence before me does not show that Manoochehr's best interests were considered as required by article 3 of the CRC – there is no evidence that Manoochehr's best interests were considered as being of equal weight to the other considerations.
166. Furthermore, it appears that the advice of the mental health experts was not considered sufficiently compelling to displace the presumption that the family, or at least Mr Yousefi, should remain in the detention centre environment. By failing to consider removing the family from the detention centre environment, the Department demonstrated that its only primary consideration was keeping Mr Yousefi in a detention centre.
167. I note that at the time the Minister considered that, as a general principle, keeping families together in detention rather than removing only the child was in the child's best interests.³⁹
168. Numerous mental health professionals advised that removing the Yousefi family from detention was in Manoochehr's best interests. None advised that keeping the whole family in detention was in Manoochehr's best interests.
169. In particular, I note that Dr Jon Jureidini's report, dated 19 August 2002 advises that the family should not be separated but on the other hand, 'it is dangerous for Manoochehr to remain in detention'. On this basis, he recommends the removal of the whole family from the detention centre.
- (i) *Finding as to whether the failure to remove the Yousefi family from immigration detention centres was inconsistent with the requirement to have the best interests of the child as a primary consideration under article 3(1) of the CRC*
170. I find the Commonwealth was not acting in the best interests of Manoochehr by keeping the whole family in detention. I am therefore of the view that the failure to remove the Yousefi family from the detention centre earlier than 15 June 2004 was inconsistent with article 3(1) of the CRC.
171. Article 3(2) of the CRC relevantly requires the Commonwealth to take all administrative measures to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents.
172. A child's mental health is directly constitutive of his or her wellbeing. As outlined above, the majority of mental health experts that examined Manoochehr were of the view that he could not be successfully treated in the detention centre environment and that it would be detrimental to separate the Yousefi family.
173. The evidence therefore establishes that removing the Yousefi family from the immigration detention centre environment was 'necessary' for Manoochehr's wellbeing.

174. Failing to remove the whole family from the detention centre environment earlier than 15 June 2004, as this was within the Commonwealth's discretion, was also inconsistent with article 3(2) of the CRC. In reaching this finding I have considered whether keeping the family together in a detention centre accommodated the rights and duties of Manoochehr's parents.
175. Article 3(2) of the CRC subjects the State's obligation to provide the necessary care and protection for the well-being of the child to the rights and duties of parents. However, the State is obliged to provide a 'safety-net' where parents are either unable or unwilling to provide the necessary protection and care or where this is beyond their control.⁴⁰
- (ii) *Finding as to whether the failure to remove the Yousefi family from immigration detention centres was inconsistent with the Commonwealth's obligations in relation to Manoochehr's well-being under article 3(2) of the CRC*
176. Neither Mr Yousefi nor Mrs Yousefi had the power to authorise the family's removal from detention. The evidence supports that this was 'necessary' for Manoochehr's wellbeing. Therefore, I find the Commonwealth's failure to remove the family from the detention centre environment, where only it could effect their removal, was inconsistent with article 3(2).

(b) Article 19 of the CRC

177. Australia is obliged under article 19(1) of the CRC to take all appropriate administrative measures to protect children from all forms of physical or mental violence, abuse or neglect while in the care of parent(s) or any other person who has the care of the child.
178. Article 19(2) explains this obligation by relevantly providing that 'such protective measures should, as appropriate, provide for the prevention of child maltreatment.'
179. I note that 'mental violence' includes humiliation, harassment, verbal abuse, the effects of isolation and other practices that cause or may result in psychological harm.⁴¹
180. The UNICEF Implementation Handbook states that 'protecting children from self-harm, including suicide and attempted suicide, clearly comes within the ambit of article 19'.⁴² The phrase 'any other person who has the care of the child' is sufficiently broad to include all institutional settings⁴³ such as an immigration detention centre.
181. The evidence shows that the Commonwealth was on notice from sometime between May and July 2002 that Manoochehr was severely disturbed and that he was at risk of accidental suicide through self-harm. The Commonwealth was further aware that the procedures available in the detention facility were neither adequate to protect Manoochehr from this danger nor could they facilitate the effective mental health intervention that Manoochehr required.
182. In this regard, I note Dr Lockwood's recorded comments at the case conference held on 11 October 2002 that 'detention amounts to emotional abuse of Manoochehr'.

- (i) *Finding as to whether the failure to remove the Yousefi family from immigration detention centres was inconsistent with the obligation to protect Manoochehr from mental violence under article 19 of the CRC*
183. I find the Department breached article 19 of the CRC because, despite knowledge of the effect of detention on Manoochehr, it failed for approximately two years, to remove the Yousefi family from the detention centre environment.
- (c) Article 37 of the CRC**
184. Article 37 of the CRC provides in summary that:
- (a) no child shall be subject to torture or other cruel, inhuman or degrading treatment or punishment;
 - (b) no child shall be deprived of his or her liberty unlawfully or arbitrarily. The detention 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; and
 - (c) every child 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.
185. The United Nations Committee on the Rights of the Child has indicated that the detailed standards set out in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the UN Rules) are relevant to the interpretation of article 37.⁴⁴
186. I note that the UN Rules require that the detention of a child ‘should always be a disposition of last resort and for the minimum necessary period’⁴⁵ and the Beijing Rules state that any detention should be brief⁴⁶ and should occur only where the child has committed ‘a serious act involving violence’.⁴⁷ The UN Rules and Beijing Rules stress:
- the importance of considering alternatives to detention in an institution;⁴⁸
 - the need to ensure that the conditions of detention and care promote, sustain and protect the health (including mental health) of child detainees;⁴⁹
 - the need to ensure adequate medical care (both preventative and remedial) and to ensure immediate access to adequate medical facilities;⁵⁰
 - the importance of providing appropriate educational and leisure opportunities and providing an environment where child detainees may associate with other children their age;⁵¹ and
 - the treatment of children deprived of their liberty must take into account their age and the needs of child development.
187. There is evidence that ACM officers attempted to engage Manoochehr in recreational and schooling activities, made the services of the mental health team available to Manoochehr and kept Manoochehr on constant observations. However, there is overwhelming evidence that numerous mental health professionals advised ACM and the Department that continued detention was dangerous for Manoochehr and amounted to ‘emotional abuse’.

188. In particular, I note the advice of Psychologist Robin Gracie on 18 June 2002, that:
 [the boy] in particular, requires input which is more appropriate to a child his age which is outside of the role which he has acquired at the detention centre.
189. The evidence establishes that during his time in detention, Manoochehr experienced:
- a) the serious decline of his father's mental health, including changes to his behaviour, inability to care for his basic hygiene needs, self-harm and suicide attempts as well as the gradual emotional breakdown of his mother;
 - b) separation from his father for a period of nine months;
 - c) the taking on of an adult role to care for his seriously disturbed father;
 - d) the breakdown of his family unit;
 - e) uncertainty and negative outcomes on his visa application;
 - f) life in a controlled and closed environment; and
 - g) negative treatment from ACM officers and detainees.
190. In the report dated 23 July 2002, the Department was advised that no mental health interventions would be successful in the detention centre environment and further, that continued detention would increase the risk of self-harming behaviour and increased traumatisation. Almost twelve months later, on 7 July 2003, the Secretary of the Department was advised that ACM had exhausted all mental health interventions available in the detention centre.
191. Between 4 May 2002 and 1 December 2003 the WFOP1.18 Individual Management Plan records approximately 45 incidents of actual self-harming or threatened self-harming as well as 18 incidents of property damage and/or aggression by Manoochehr.
- (i) *Finding as to whether the failure to remove the Yousefi family from immigration detention centres was inconsistent with Manoochehr's right to freedom from cruel inhuman or degrading treatment, deprivation of liberty and arbitrary detention under article 37 of the CRC*
192. I have already made the finding that the continued detention of Mr Yousefi and Manoochehr Yousefi amounted to cruel, inhuman or degrading treatment contrary to article 7 of the ICCPR. I find that this also amounted to cruel, inhuman or degrading treatment of Manoochehr Yousefi contrary to article 37(a) of the CRC.
193. I have already made the finding that the continued detention of the Yousefi family amounted to a failure to treat them with humanity and respect for their inherent dignity contrary to article 10 of the ICCPR. I find that this also amounted to a failure to treat Manoochehr with humanity and respect for his inherent dignity contrary to article 37(c) of the CRC.
194. I find the Department's failure to remove the Yousefi family from the detention centre environment was inconsistent with Manoochehr's rights under articles 7, 9 and 10 of the ICCPR and was inconsistent with Manoochehr's particular rights under article 37 of the CRC.

7 Alleged breach of human rights in relation to Manoochehr's inability to access appropriate medical care and education while in detention

7.1 Medical care

(a) Alleged act or practice

195. Mrs Yousefi complains about the health care that was provided to Manoochehr while in detention, about his 'illness' and his self-harming behaviour.
196. The provision or non-provision of medical care services are 'acts' for the purposes of the AHRC Act.

(b) Article 24 of the CRC: highest attainable standard of health

197. Under article 24 of the CRC, the Commonwealth recognises the right of the child to the enjoyment of the 'highest attainable standard of health' and to facilities for the treatment of illness and rehabilitation of health and the Commonwealth is obliged under article 24 of the CRC 'to strive to ensure that no child is deprived of his or her right of access to such health care services'. Health care services include mental health treatment.
198. From at least 2002 the Department was on notice that Manoochehr's mental health problems could not be successfully treated in the detention context and that the detention centre environment was contributing to those problems.
199. From 23 July 2002 mental health professionals consistently stated that the family should be kept together and all removed from the detention centre environment.
200. Manoochehr did have access to health care services including a staged intervention by the ACM mental health team in August 2002. However, this behavioural management plan did not successfully treat Manoochehr's mental health conditions and on 19 August 2002, Dr Jon Jureidini advised that 'the behavioural management plan will not help self-harm but is likely to exacerbate the problem through accentuating the feeling of loss of control and victimisation'.
201. The extensive evidence of the views of mental health experts regarding Manoochehr's inability to access medical care appropriate to his age and circumstances is set out in full above.
202. The full impact of the failure to remove Manoochehr from the detention centre environment is articulated in the medical report of Dr Wendy Roberts dated 9 July 2010. The damage to Manoochehr from his continued detention is, tragically, what was predicted by mental health experts in 2002.

(c) Findings in relation to Manoochehr's access to appropriate medical care

203. I find the failure to remove the Yousefi family from detention or place them in alternative detention denied Manoochehr the enjoyment of the appropriate standard of mental health services inconsistent with article 24 of the CRC. Failing to remove Manoochehr from the detention centre environment when that environment was contributing to his mental health problems meant that any health care provided to Manoochehr would be fruitless as it would not be sensitive to his particular concerns.

7.2 Education

(a) Alleged act or practice

204. Mrs Yousefi's complaint alleges that Manoochehr can neither 'play nor study.' She writes in her initial complaint of 25 August 2002:

My son is very interested to go to school but the camp children mocking him, they tell him your dad is crazy, even the teachers watched the children beaten (sic) him in the school. (T)he teachers told him, we bring some books for you can study them in your room.

205. The provision or non-provision of education services are 'acts' for the purposes of the AHRC Act.

(b) Article 28 of the CRC: right to education

206. Under article 28 of the CRC, the Commonwealth recognises the right of the child to education 'on the basis of equal opportunity'. It applies equally to all children within Australia. There must be no lesser provision of education for any one group of children, regardless of nationality, immigration status or how they arrived in Australia. Article 28 of the CRC further provides that the Commonwealth take measures to encourage regular attendance at school.
207. The question to which I must direct myself in considering whether there has been a breach of article 28 is whether the Commonwealth took appropriate steps to ensure Manoochehr was provided with education on the basis of equality of opportunity to that provided to children in the Australian community and whether the Department took the necessary measures to encourage Manoochehr to attend school.

(c) Findings in relation to Manoochehr's right to education

208. I find that the Department's efforts to provide Manoochehr with an education for the duration of his immigration detention fell short of what is required by the right to education in article 28 of the CRC.
209. Article 28 of the CRC ultimately required the Department to provide Manoochehr with an education comparable to that provided to students outside of the detention centre environment.
210. The Department's failure to remove the Yousefi family from detention before 15 June 2004 also had the effect of denying Manoochehr an education for a period of approximately 18 months. The Department should have recognised this denial would cause Manoochehr significant ongoing disadvantage when compared with those children living in the Australian community during this time.

211. Children in Australia living in the community are provided with approximately six hours of tuition daily during the school term. The medical records provided by the Department indicate that Manoochehr rarely attended school from at least 23 July 2002 until February 2004.
212. Some efforts were made to provide Manoochehr with an education in the detention centre environment; he had access to some books that he could read in his donga. However, Manoochehr's access to books does not seem to be consistent nor supervised and falls short of an 'education' comparable with that provided to children living in the Australian community.
213. I note particularly, the ACM observation note dated 31 July 2002 which reports that the mental health team encouraged Manoochehr to attend school and tried to persuade him of the importance of schooling. However, Manoochehr informed the mental health team that 'he does not go to school because his mother and father are unwell and he needed to take care of them.'
214. I appreciate that there are difficulties involved in providing access to education to children who refuse to go to school or who are not mentally well enough to attend school inside and outside of detention centres. I also recognise that the parents of children do have a role in ensuring their children attend school. However, the evidence before me suggests, compellingly, that the Department was aware that Manoochehr's refusal to go to school was linked to his own and his parent's mental health decline, his distrust of ACM officers and the victimisation he experienced from other detainees in detention. The family's mental health decline and dysfunction was reportedly linked to and maintained by the detention centre environment. Despite this, there appears to be no evidence that the Department took any steps to consider whether external education could be made available to Manoochehr.⁵²

8 Recommendations

8.1 Power to make recommendations

215. 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.⁵³ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.⁵⁴
216. The Commission may also recommend:
- a) the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - b) the taking of other action to remedy or reduce the loss or damage suffered by a person.⁵⁵

8.2 Submissions from the Complainants and the Department

217. In the Tentative View I advised the parties that I was inclined to recommend that the Minister provide each member of the Yousefi family with a formal apology and that compensation should be paid to:
- a) Mr Yousefi for the period between 24 August 2001 and 15 June 2004, for breaches of articles 7, 9 and 10 of the ICCPR;
 - b) Mrs Yousefi for the period between 25 May 2002 and 15 June 2004 for breaches of articles 9 and 10 of the ICCPR; and
 - c) Manoochehr Yousefi for the period between 25 May 2002 and 15 June 2004 for breaches of articles 7, 9 and 10 of the ICCPR as well as articles 3, 19, 24, 28 and 37 of the CRC.
218. By letter dated 1 December 2009, the Department and the Complainants were invited to provide submissions in relation to the following areas relating to compensation:
- a) The exact date or dates from which it would be appropriate to conclude that the Commonwealth was on notice that further detention of the Yousefi family members respectively would have detrimental effects on their own mental health or that of other family members.
 - b) In the event that the President reports a breach of article 9 of the ICCPR, the period for which compensation should be paid to each member of the Yousefi family as well as the quantum of damages to be paid for this period.
 - c) In the event that the President reports breaches of articles 7 and 10 as well as articles 3, 19, 24, 28 and 37 of the CRC, the potential compensation that should be recommended for each member of the Yousefi family.

219. By letter dated 26 March 2010, the Department advised, in relation to each of these areas that:
- Having regard to the foreshadowed common law proceedings to be commenced on behalf of Mrs Yousefi and Mr Manoochehr Yousefi, the department considers that it would be inappropriate in these circumstances to provide a considered response that could have a potential adverse effect upon any defence that the Commonwealth may have available to it in said common law claims.
220. In July, August and December 2010 the Complainants provided further medical evidence in relation to Mrs Yousefi and Manoochehr.
221. On 6 August 2010 the Department advised that they did not wish to make any further submissions in this matter.
222. On 10 November 2010 the Commission invited each of the Complainants and the Department to make further submissions in relation to specific issues prior to the finalisation of the matter.
223. On 24 November 2010 the Department responded to that request for submissions.
224. On 31 January 2011 the Complainants provided their final submissions regarding compensation.

8.3 Impact of the common law proceedings

225. My statutory function is to inquire into the allegations that the Commonwealth has acted inconsistently with the human rights of Manoochehr Yousefi, Mr Yousefi and Mrs Mehrnoosh Yousefi. I acknowledge that common law proceedings surrounding the circumstances of their immigration detention commenced by Manoochehr Yousefi and Mrs Mehrnoosh Yousefi against the Commonwealth are still to be the subject of a judicial determination and note that Mr Yousefi's claim has been settled for an undisclosed sum.
226. In relation to Mr Yousefi, it is well established that where remedies are provided under separate claims, they may need to be taken into account in considering what is required for effective remedy.⁵⁶ Furthermore, damages should be limited to what is adequate to mark any additional wrong in the breach of fundamental human rights. I sought submissions from both parties regarding the nature of the claim settled by Mr Yousefi and whether the amount of the settlement could be disclosed with both parties' consent. I am aware that Mr Yousefi settled his common law claim against the Commonwealth but I do not know the terms of that settlement. My understanding is that no compensation is sought on behalf of Mr Yousefi and, accordingly, I make no recommendation with respect to him.
227. However, in the circumstances where compensation has been sought by Manoochehr Yousefi and Mrs Mehrnoosh Yousefi I consider it is appropriate to recommend that the Commonwealth pay compensation to each of them.

8.4 Consideration of compensation

228. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
229. However, in considering the assessment of a recommendation for compensation under s 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.⁵⁷

230. I am of the view that this is the appropriate approach to take to the present matter. As such, so far as is possible by a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.⁵⁸
231. Compensation claimed in respect of pain and suffering and loss of enjoyment (or amenities) of life would, in tort law, be characterised as heads of ‘non-economic loss’. Of their nature, they have no obvious monetary equivalent and courts therefore strive to achieve fair rather than full or perfect compensation in respect of such losses. Courts also tend to assess such damages as a global sum, rather than separately.
232. The Yousefi family remained in immigration detention for an unnecessarily long time after the Department received unambiguous medical and mental health advice calling for the urgent removal of the family from the immigration detention centre setting.
233. The tort of false imprisonment is a more limited action than an action for breach of article 9(1). This is because an action for false imprisonment cannot succeed where there is lawful justification for the detention, whereas a breach of article 9(1) will be made out where it can be established that the detention was arbitrary, irrespective of its legality.
234. Notwithstanding this important distinction, the damages awarded in false imprisonment provide an appropriate guide for the award of compensation for a breach of article 9(1). This is because the damages that are available in false imprisonment matters provide an indication of how the Courts have compensated for loss of liberty. I note, too, that the tort of false imprisonment is actionable without proof of damage as the right to liberty is ‘the most elementary and important of all common law rights’.⁵⁹
235. Mrs Mehrnoosh Yousefi and Manoochehr Yousefi each made submissions that seek to quantify the loss suffered by them.
236. The principal heads of damage for a tort of this nature are injury to liberty (the loss of time 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).⁶⁰
237. Damages may also be aggravated by the circumstances of a particular case, for example, where a lack of bona fides or improper or unjustifiable conduct on the part of a respondent is established.⁶¹
238. I note that the following awards of damages have been made for injury to liberty and provide a useful reference point in the present case:
- a) In *Taylor v Ruddock*,⁶²
 - i. The District Court at first instance considered the quantum of general damages for the plaintiff’s loss of liberty for two periods of 161 days and 155 days, during which the plaintiff was in ‘immigration detention’ under the Migration Act but held in NSW prisons. Although the award of the District Court was ultimately set aside by the High Court,⁶³ it provides useful indication of the calculation of damages for a person being unlawfully detained for a significant period of time.
 - ii. The Court found that the plaintiff was unlawfully imprisoned for the whole of those periods and awarded him \$50 000 for the first period of 161 days and \$60 000 for the second period of 155 days. For a total period of 316 days wrongful imprisonment, the Court awarded a total of \$110 000.

- iii. In awarding Mr Taylor \$110 000 the District Court 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 and therefore his disgrace and humiliation was less.
- iv. On appeal, the Court of Appeal of New South Wales considered that the award was low but within the acceptable range.⁶⁴ The Court noted that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish'.⁶⁵
- b) In *Goldie v Commonwealth of Australia & Ors (No 2)*,⁶⁶ Mr Goldie was awarded damages of \$22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days.
- c) In *Spautz v Butterworth*,⁶⁷ Mr Spautz was awarded \$75 000 in damages for his wrongful imprisonment as a result of failing to pay a fine. Mr Spautz spent 56 days in prison and his damages award reflects the length of his incarceration. His time in prison included seven days in solitary confinement.
- d) In *El Masri v Commonwealth (Department of Immigration and Citizenship)*,⁶⁸ the Commission recommended the payment of \$90 000 to Mr El Masri after finding that he had wrongfully spent 90 days in detention (to reflect his loss of liberty, humiliation and the mental suffering caused by his ongoing detention). The Commission also recommended the payment of the sum of \$5 000 for his wrongful detention on 28 November 2006 (mental suffering, humiliation and significant indignity) and the sum of \$10 000 for the Department's actions in subjecting Mr El Masri to prolonged detention in the restrictive conditions of the Management Support Unit which exacerbated the negative impact that his ongoing detention was having on his mental health and, in particular, his schizoaffective disorder.

8.5 Recommendation that compensation be paid

(a) Manoochehr Yousefi

239. I have recommended that compensation should be paid to Manoochehr Yousefi for breaches of articles 7, 9 and 10 of the ICCPR as well as articles 3, 19, 24, 28 and 37 of the CRC.⁶⁹
- (i) *The forcible transfer of Manoochehr Yousefi from Woomera Detention Centre to Baxter Detention Centre*
240. I have found that the forcible transfer Manoochehr Yousefi from Woomera Detention Centre to Baxter Detention Centre violated article 10 of the ICCPR.
- (ii) *Failure to remove the Yousefi family from the detention centre environment*
241. I have found that the practice of insisting the father of a family remain in an immigration detention centre as well as the act of failing to remove the Yousefi family from detention in an immigration detention centre, once the Commonwealth was aware of the deteriorating mental health of the family, were inconsistent with articles 7, 9 and 10 of the ICCPR in relation to Manoochehr Yousefi.
242. Moreover, at various times between 2001 and 2004 the best interests of Manoochehr Yousefi, as a child, were not the primary consideration in all actions concerning him (CRC, article 3(1)).

243. Significantly, Manoochehr Yousefi was denied the right to be protected from all forms of physical or mental violence (CRC, article 19(1)) and the Commonwealth's failure to implement the repeated recommendations by mental health professionals that Manoochehr Yousefi be removed from the detention environment with his parents amounted to cruel, inhumane and degrading treatment of him in detention (CRC, article 37(a)) and a failure to treat him with humanity and respect for his inherent dignity (CRC, article 37(c)).
- (iii) *Manoochehr's inability to access appropriate health care and education*
244. At various times between 2001 and 2004 Manoochehr Yousefi was denied the right to enjoy the highest attainable standard of physical and mental health (CRC, article 24(1)) and the right to an appropriate education on the basis of equal opportunity (CRC, article 28(1)).
245. I find that the circumstances of Manoochehr Yousefi's detention between 25 May 2002 and 15 June 2004 were such as to cause him significant mental suffering.
246. I consider that the Commonwealth should pay to Manoochehr Yousefi an amount of compensation to reflect his loss of liberty and the mental suffering caused by the forcible transfer, the failure to remove him from the detention centre environment and his inability to access appropriate health care and education.
247. Manoochehr Yousefi has submitted that he should receive compensation in the range of \$1 559 872 – \$1 742 506. This sum is made up of claims for:
- a) future out of pocket expenses (\$83 248)
 - b) future economic loss (\$905 624 – \$1 088 258)
 - c) past care (\$50 000) and general damages (\$350 000)
 - d) interest on past general damages (\$21 000)
 - e) aggravated damages (\$50 000)
 - f) exemplary damages (\$100 000).
248. He has also sought costs.
249. Assessing compensation and a consideration of the contingencies that ought to be taken into account in these matters is difficult and requires a degree of judgment.
250. Compensation should be paid for the period 25 May 2002 and 15 June 2004 (752 days). This represents the period Manoochehr Yousefi was returned to the immigration detention centre until he was released from the immigration detention centre.
251. I consider that payment of compensation (for damages including for ongoing psychiatric injury, future loss of earning capacity, future treatment expenses and costs) in the amount \$950 000 to Manoochehr Yousefi is appropriate.
252. In arriving at that figure, I have had regard to:
- a) the submissions of the Complainants;
 - b) Manoochehr Yousefi's relatively young age, which means that his loss is likely to be experienced over a longer period than that of an older person;

- c) the opinions expressed by Dr Phillips and Dr Roberts regarding the ongoing psychological injuries of Manoochehr Yousefi, which injuries I am satisfied are likely to result in significant economic loss. In particular I have noted the following observations of these doctors:
- i. On 9 July 2010 Dr Roberts stated:

Based on information which I currently have, it would seem that Mr Yousefi was developing normally psychologically prior to going to Woomera Detention Centre and was probably functioning reasonably well there initially.⁷⁰
 - ii. Dr Phillips noted:

Mr Yousefi lived in a psychologically disturbed environment during an important formative stage of his development. ... these stressors were inevitably going to erode his psychological resilience, and overwhelm his psychological defences with a breakthrough of a complex group of psychological symptoms.⁷¹
 - iii. Dr Phillips refers to Mr Yousefi becoming increasingly detached from society, withdrawn into his own isolated world and becoming dissociated with the alien world in which he lived. He began to develop frank psychological symptoms whilst incarcerated in Woomera and continuing at Baxter. Most prominent of the symptoms are attempts at suicide, many episodes of self-harming behaviour (generally lacerating his arms with glass or any other available object), dissociation by withdrawing into his own fantasy world, difficulty getting to sleep, recurrent nightmares, frank depressive experiences, sense of absolute pessimism, negative rumination, loss of mental and physical energy and loss of a sense of independence. He became angry and avoidant and feared for the safety of himself and his parents.⁷²
 - iv. At the time of assessment by Dr Phillips on 3 December 2008, Mr Yousefi had been in the general community for a number of years, but:

remains significantly incapacitated and handicapped by his various overt symptoms, but equally through an irreversible process of demoralization. He is severely burdened by his psychological problems at the present time, and it is improbable that the situation will change in the future.

Diagnostically, Mr Yousefi has a persistent group of anxiety spectrum and depression spectrum symptoms. For the sake of diagnostic economy, the plaintiff is best described as having developed a post-traumatic stress disorder DSM 4 TR 309.81. However a diagnosis of major depressive disorder ...can also apply.⁷³
 - v. Dr Phillips thought Manoochehr now has an ingrained set of symptoms from which he is unlikely to recover. Those symptoms affect and will continue to affect his sense of self, his esteem, his capacity to relate in a satisfactory manner with others, his capacity to achieve educational goals consistent with his capability and ambition, and his capacity to pursue an efficient and satisfactory lifestyle.⁷⁴

- vi. Dr Roberts saw Manoochehr more recently on 3 March 2010. She concluded from her assessment that Mr Yousefi's emotional functioning showed:

Severe levels of depression, moderate to severe levels of anxiety and what are likely to be significant levels of psychopathology, despite evidence of some embellishment of symptomatology.⁷⁵

- vii. She thought the most likely diagnoses are chronic dysthymia (mental depression), borderline traits with severe damage to his personality functioning and reported ongoing dissociative phenomena. There were also symptoms consistent with Post Traumatic Stress Disorder.⁷⁶
- viii. Dr Roberts concluded the damage to Manoochehr's psychological functioning was largely as a direct result of the detention centre experiences and trauma and he remains a vulnerable person with multiple emotional problems. She concludes:

I think Mr Yousefi is someone who is likely to continue to be affected by stress and setbacks and is likely to need provision for ongoing active treatment and support, particularly whilst studying. Hopefully he will be able to trust in a practitioner on an ongoing basis.

- ix. Dr Roberts concludes:

Mr Yousefi is a very psychologically damaged man as a result of his experiences in the detention centres and the protracted period of time he spent there. He is unlikely to ever reach the point where he is symptom free. He is likely to need ongoing monitoring of his psychological state and vulnerabilities.⁷⁷

- d) Previous recommendations made by the Commission in reports to the Minister for the payment of compensation under s 29(2)(c)(i) of the AHRC Act; and
- e) That the loss which includes pain and suffering and resulting disabilities associated with his psychiatric injuries and distress associated with being held in immigration detention as distinct from a residential setting should be discounted by between 10% and 20% due to the contribution made by events during the period of his non-arbitrary detention, which is not compensable.

253. I also consider that the payment of \$75 000 by way of aggravated damages is appropriate in this matter due to the volume of evidence before the Commission regarding the extent of the Commonwealth's actual knowledge of the fact that further detention was likely to cause or exacerbate Manoochehr's psychiatric injuries. In order to award aggravated damages, I must be satisfied that the conduct of the defendant was neither bona fides nor justifiable: *Spautz v Butterworth and Anor* (1996) 41 NSWLR 1 at 18A per Clarke JA (Priestley and Beazley JJA agreeing); *State of NSW v Dely* [2007] NSWCA 303 at [21] per Ipp JA. The treatment of Manoochehr Yousefi was not justifiable; he was subjected to suffering and degrading treatment which was aggravated by the Commonwealth's prolonged failure to act after it knew that Mr Yousefi's dire circumstances were having a severe psychiatric effect on him and he was in great distress.

(b) Mrs Mehrnoosh Yousefi

254. I have recommended that compensation should be paid to Mrs Yousefi for breaches of articles 9 and 10 of the ICCPR.

(i) Failure to remove the Yousefi family from the detention centre environment

255. I have found that the practice of insisting the father of a family remain in an immigration detention centre as well as the act of failing to remove the Yousefi family from detention in an immigration detention centre, once the Commonwealth was aware of the deteriorating mental health of the family, were inconsistent with articles 9 and 10 of the ICCPR in relation to Mrs Yousefi.

256. Compensation should be paid for the period 25 May 2002 and 15 June 2004 (752 days). This represents the period Mrs Yousefi was returned to the immigration detention centre until she was released from the immigration detention centre.

257. I consider that the Commonwealth should pay to Mrs Yousefi an amount of compensation to reflect her loss of liberty and the mental suffering caused by the failure to remove her from the detention centre environment.

258. Mrs Yousefi has submitted that she should receive compensation in the sum of \$1 081 971. This sum is made up of claims for:

- a) past expenses (\$10 000), future expenses (\$65 000)
- b) past economic loss (\$85 000)
- c) future economic loss (\$330 004)
- d) future care, (\$93 667)
- e) general damages (\$325 000)
- f) interest on past general damages (\$22 500)
- g) aggravated damages (\$50 000)
- h) exemplary damages (\$100 000).

259. She has also sought costs.

260. I consider that payment of compensation, including for costs, in the amount \$625 000 to Mrs Yousefi is appropriate.

261. In arriving at that figure, I have had regard to:

- a) The submissions of the Complainants;
- b) The opinions expressed by A/Prof Carolyn Quadrio regarding Mrs Mehrnoosh Yousefi (report 10 August 2010) and Dr Wendy Roberts (28 October 2010);
- c) Previous recommendations made by the Commission in reports to the Minister for the payment of compensation under s 29(2)(c)(i) of the AHRC Act; and
- d) That the loss which includes pain and suffering and resulting disabilities associated with her psychiatric injuries and distress associated with being held in immigration detention as distinct from a residential setting should be discounted by between 10% and 20% due to the contribution made by events during the period of her non-arbitrary detention, which is not compensable.

262. I also consider that the payment of \$50 000 by way of aggravated damages to Mrs Yousefi is appropriate in this matter. I am satisfied that the conduct of the defendant was neither bona fides nor justifiable: *Spatz v Butterworth and Anor* (1996) 41 NSWLR 1 at 18A per Clarke JA (Priestley and Beazley JJA agreeing); *State of NSW v Delly* [2007] NSWCA 303 at [21] per Ipp JA.

8.6 Other recommendations

(a) Apology

263. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi for the breaches of their human rights identified in this report. Apologies are important remedies for breaches of human rights. At least, they acknowledge the suffering of those who have been wronged.⁷⁸

(b) Legislation and policy

264. I am aware that since the events the subject of the complaint took place (2001-2004), there have been a number of significant developments relating to the immigration detention of children, including both unaccompanied minors and families with children.

265. In particular, in 2005 the Migration Act was amended to insert s 4AA, which 'affirms as a principle that a minor shall only be detained as a measure of last resort'. In addition, the Minister was granted powers under s 197AB of the Act, to make a Residence Determination to the effect that a person in immigration detention can reside at a specified place instead of being held in an immigration detention facility. These changes were instituted in part due to significant public concerns about the impact of prolonged detention of families and children in Australia's immigration detention centres. The overarching intention of these changes was to allow for children and their family members to reside in community detention arrangements (Community Detention) instead of being held in immigration detention facilities.

266. I am also aware that, since the events the subject of the complaint took place, the former Minister for Immigration and Citizenship, Senator Chris Evans, announced the Australian Government's policy reforms, 'New Directions in Detention'.⁷⁹ Among other things, the New Directions policy included a 'key immigration value' that children, and where possible their family members, will not be detained in an immigration detention centre.

267. The Commission welcomes the above developments. However, I note that the 'New Directions in Detention' policy reforms have not been enshrined in legislation. Further, despite the existence of s 4AA in the Migration Act, children and their family members continue to be subjected to mandatory immigration detention in Australia.

268. The Commission welcomes the fact that children are no longer detained in Australia's high security immigration detention centres. However, children (both unaccompanied minors and children with accompanying family members) are still detained in other types of immigration detention facilities, some for many months.

269. The Commission welcomed the October 2010 announcement by the Prime Minister and the Minister for Immigration and Citizenship that the Minister would begin to use his Residence Determination powers to move some unaccompanied minors and families with children into Community Detention. The Commission has encouraged the Australian Government to expand this initiative to include all children in detention, and to implement it as quickly as possible.

270. Despite these recent positive developments, the Commission is seriously troubled that over a two year period between late 2008 and late 2010, significant numbers of children were held in immigration detention facilities instead of being placed into Community Detention arrangements.

271. As of 4 February 2011, there were 6659 people in immigration detention in Australia including 1027 children.⁸⁰ Of those children, 37 were in Community Detention and the remainder were in various immigration detention facilities.
272. The complaint highlights the devastating effects prolonged detention in institutional settings can have on children and on families. There is an urgent need to make further policy and legislative changes to ensure that mistreatment of the type that occurred to this family is never repeated in Australia.
273. The Commission has made recommendations on these issues in a range of submissions and reports over the past decade, most importantly in the 2004 report of its National Inquiry into Children in Immigration Detention, *A last resort?*⁸¹ Many of the Commission's key recommendations in this area are yet to be implemented by the Australian Government.
274. Given the ongoing detention of people in immigration detention, and particularly children, despite the above developments, I make the following recommendations:
1. Legislation should be enacted to set out minimum standards for conditions and treatment of people in all of Australia's immigration detention facilities, including those located in excised offshore places. The minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.⁸²
 2. An independent body should be charged with the function of monitoring the provision of health and mental health services in immigration detention. The Australian Government should ensure that adequate resources are allocated to that body to fulfil this function.
 3. The Department should implement the Residence Determination Guidelines, under which people with significant physical or mental health concerns, people who may have experienced torture or trauma and people whose cases will take a considerable period to substantively resolve are to be referred to the Minister as soon as practicable for consideration of a Community Detention placement.⁸³
 4. The Department should implement the Residence Determination Guidelines, which require that all children and their accompanying family members or guardians be referred to the Minister for consideration of a Community Detention placement as soon as they are detained.⁸⁴
 5. The Migration Act and other relevant Commonwealth laws should be amended as a matter of urgency to incorporate the following minimum requirements:
 - a presumption against the detention of children for immigration purposes;
 - a proscription on children being detained in Immigration Detention Centres;
 - that a court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention;
 - that there should be prompt and periodic review by a court of the continuing detention of any child for immigration purposes;
 - if a child must be taken into immigration detention, as soon as possible after being detained they should be placed in Community Detention under a Residence Determination with any accompanying family members or guardians;

- prescribed minimum standards of treatment for children in immigration detention consistent with the ICCPR, CRC and other relevant international human rights standards such as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; and
- all courts and independent tribunals should be guided by the principle that the detention of children must be a measure of last resort and for the shortest appropriate period of time.

9 Findings and Recommendations of the Commission

9.1 Findings

For the reasons given above, I find that:

275. The human rights of Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi were breached by the actions of the Department.
276. The forcible removal of Manoochehr Yousefi from Woomera Detention Centre to Baxter Detention Centre violated article 10 of the ICCPR.
277. In relation to the failure to remove the Yousefi family from detention, both the:
 - a) practice of insisting the father of a family remain in an immigration detention centre; and
 - b) act of failing to remove the Yousefi family from detention in an immigration detention centre, once the Commonwealth was aware of the deteriorating mental health of the family;were inconsistent with articles 7, 9 and 10 of the ICCPR in relation to Mr Yousefi and Manoochehr Yousefi and were inconsistent with articles 9 and 10 of the ICCPR in relation to Mrs Yousefi.
278. As a consequence, Mr Yousefi was unjustifiably detained in a detention centre from 24 August 2001 until 15 June 2004 and in Mrs Yousefi and Manoochehr were unjustifiably detained in a detention centre from 25 May 2002 until 15 June 2004.
279. Because of the failure to remove the Yousefi family from detention:
 - a) at various times between 2001 and 2004 the best interests of the child Manoochehr Yousefi were not a primary consideration in all actions concerning him (CRC, article 3(1));
 - b) the Commonwealth failed to take all administrative measures to ensure Manoochehr Yousefi such protection and care as was necessary for his wellbeing, taking into account the rights and duties of his parents (CRC, article 3(2));
 - c) Manoochehr Yousefi was denied the right to be protected from all forms of physical or mental violence (CRC, article 19(1));
 - d) the Commonwealth's failure to implement the repeated recommendations by mental health professionals that Manoochehr Yousefi be removed from the detention environment with his parents amounted to:
 - i. cruel, inhuman and degrading treatment of him in detention (CRC, article 37(a)); and
 - ii. a failure to treat him with humanity and respect for his inherent dignity (CRC, article 37(c)).
280. At various times between 2001 and 2004 Manoochehr Yousefi was denied the right to:
 - a) enjoy the highest attainable standard of physical and mental health (CRC, article 24(1)); and
 - b) an appropriate education on the basis of equal opportunity (CRC, article 28(1)).

9.2 Recommendations

281. That the Commonwealth provide a formal written apology to Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi for the breaches of their human rights identified in this report.
282. In relation to Manoochehr Yousefi, the Commission recommends that the respondent pay financial compensation in the amount of **\$1 025 000**.
283. In relation to Mrs Mehrnoosh Yousefi, the Commission recommends that the respondent pay financial compensation in the amount of **\$675 000**.
284. Legislation should be enacted to set out minimum standards for conditions and treatment of people in all of Australia's immigration detention facilities, including those located in excised offshore places. The minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.⁸⁵
285. An independent body should be charged with the function of monitoring the provision of health and mental health services in immigration detention. The Australian Government should ensure that adequate resources are allocated to that body to fulfil this function.
286. The Department should implement the Residence Determination Guidelines, under which people with significant physical or mental health concerns, people who may have experienced torture or trauma and people whose cases will take a considerable period to substantively resolve are to be referred to the Minister as soon as practicable for consideration of a Community Detention placement.⁸⁶
287. The Department should implement the Residence Determination Guidelines, which require that all children and their accompanying family members or guardians be referred to the Minister for consideration of a Community Detention placement as soon as they are detained.⁸⁷
288. The Migration Act and other relevant Commonwealth laws should be amended as a matter of urgency to incorporate the following minimum requirements:
- a presumption against the detention of children for immigration purposes;
 - a proscription on children being detained in Immigration Detention Centres;
 - that a court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention;
 - that there should be prompt and periodic review by a court of the continuing detention of any child for immigration purposes;
 - if a child must be taken into immigration detention, as soon as possible after being detained they should be placed in Community Detention under a Residence Determination with any accompanying family members or guardians;
 - prescribed minimum standards of treatment for children in immigration detention consistent with the ICCPR, CRC and other relevant international human rights standards such as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; and
 - all courts and independent tribunals should be guided by the principle that the detention of children must be a measure of last resort and for the shortest appropriate period of time.

10 Department's response to the recommendations

289. On 9 June 2011, I provided a Notice under s 29(2)(a) of the AHRC Act outlining my findings and recommendations in relation to the complaint made by Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi against the Commonwealth.

290. By letter dated 8 July 2011 the Department provided the following response to my findings and recommendations:

Recommendation A: That the Commonwealth provide a formal written apology to Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi for the breaches of their human rights identified in the report.

The Department notes the President's recommendation to provide a formal written apology to Mr Parvis Yousefi, Mrs Mehrnoosh Yousefi and Manoochehr Yousefi. The Department will consider this recommendation in light of ongoing litigation involving Mrs Mehrnoosh Yousefi and Manoochehr Yousefi.

Recommendation B: In relation to Manoochehr Yousefi, that the respondent pay financial compensation in the amount of \$1,025,000.

The Department notes the President's recommendations in regards to compensation payable to Manoochehr Yousefi and Mrs Mehrnoosh Yousefi. Manoochehr Yousefi and Mrs Mehrnoosh Yousefi have separate, ongoing compensation claims in the Supreme Court of NSW involving the Commonwealth and detention service providers. These recommendations will be considered in light of that litigation.

Recommendation C: In relation to Mrs Mehrnoosh Yousefi, that the respondent pay financial compensation in the amount of \$675,000.

Please refer to the response to Recommendation B.

Recommendation D: Legislation should be enacted to set out minimum standards for conditions and treatment of people in all of Australia's immigration detention facilities, including those located in excised offshore places. The minimum standards should be based on relevant international human rights standards, should be enforceable and should make provision for effective remedies.

Recommendations regarding any proposed new or supplementary legislation are properly a matter for the Australian Government to consider and not a subject on which the Department can comment.

The Government's New Directions in Detention policy provides key values to guide detention policy and practices.

In addition, there are policy instructions addressing the treatment and conditions of people in Australian immigration detention facilities, including those in excised offshore places, as set out in the Detention Services Manual (DSM). The DSM is accessible by all staff via LEGEND, the Department's electronic database of migration and citizenship legislation, policy instructions, associated forms and other documents.

Issues addressed by the DSM include the provision of general and mental health services and education. These policy instructions have been developed consistently with Australia's international human rights obligations through a process which involved consultation with agencies, including the Commonwealth Ombudsman and the AHRC (then HREOC).

These principles are also reflected in the Department's contract with its detention service provider, Serco, and its contracted health services manager, International Health and Medical Services (IHMS).

The Department also notes that, as set out in the DSM, Chapter 1 – section 3, there are three key service delivery values that underpin the provision of services within the community and immigration detention services environment. These are:

- Respect for human dignity;
- Fair and reasonable treatment within the law; and
- Appropriate services.

In particular, section 3.1 *Respect for Human Dignity* states the following:

This value supports Australia's international obligations. Those providing services to persons in immigration detention and in the community must be aware of their responsibilities in regards to meeting Australia's human rights obligations under the following international conventions:

- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- 1951 UN Convention relating to the Status of Refugees and the 1967 Protocol;
- UN Convention on the Rights of the Child;
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Universal Declaration of Human Rights; and
- Vienna Convention on Consular Relations.

Recommendation E: An independent body should be charged with the function of monitoring the provision of health and mental health services in immigration detention. The Australian Government should ensure that adequate resources are allocated to that body to fulfil this function.

This matter has been addressed. The Detention Health Advisory Group (DeHAG) was convened in March 2006. DeHAG and its Mental Health Sub-Group provide the Department with independent expert advice to design, develop, implement and monitor health and mental health care services and policies for people in immigration detention.

The DeHAG consists of key health and mental health professional and consumer group organisations, including:

- The Australian Medical Association;
- The Royal Australian College of General Practitioners;
- The Mental Health Council of Australia;
- The Australian Psychological Society;
- The Forum of Australian Services for the Survivors of Torture and Trauma;
- The Victorian Health Promotion Foundation;
- The Royal Australian and New Zealand College of Psychiatrists;
- The Royal College of Nursing Australia;
- The Public Health Association of Australia; and
- The Australian Dental Association.

In addition, the Commonwealth Ombudsman's Office representative has observer status on the DeHAG.

The Department works with the DeHAG and other key health stakeholders to improve the physical and mental health of people under the Department's care. For example, in response to DeHAG recommendations, the Department has amended the policy instructions and procedures set out in the DSM for mental health screening of people in detention.

The Department has also made changes to its policy instructions (as reflected in the DSM) and its practices in response to DeHAG's findings and recommendations concerning Mental Health Screening practices.

The Department has recently contracted an external provider to assist in the review of clinical governance processes. This includes the development of a health audit tool and a pilot clinical review of health services provided by IHMS on Christmas Island. Following the finalisation of this review, the Department will investigate the option of conducting similar clinical reviews at other immigration detention facilities.

Recommendation F: The Department should implement the Residence Determination Guidelines, under which people with significant physical or mental health concerns, people who may have experienced torture or trauma and people whose cases will take a considerable period to substantively resolve are to be referred to the Minister as soon as practicable for consideration of a Community Detention placement.

The Department notes this recommendation. The Government's policy is that the following people should be referred as soon as practicable for consideration for Residence Determination:

- unaccompanied minors;
- minors and their accompanying family members;
- family groups with pregnant women;
- single, adult females;
- persons who may have experienced torture or trauma;
- persons with significant physical or mental health problems;
- cases which will take a considerable period to substantively resolve; and
- other cases with unique or exceptional characteristics.

Recommendation G: The Department should implement the Residence Determination Guidelines, which require that all children and their accompanying family members or guardians be referred to the Minister for consideration of a Community Detention placement as soon as they are detained.

The Department notes this recommendation. The Government's policy is that minors and their accompanying family members should be referred for consideration of Residence Determination as soon as practicable after being detained at an alternative immigration detention facility.

Recommendation H: The Migration Act 1958 (Cth) (Migration Act) and other relevant Commonwealth laws should be amended as a matter of urgency to incorporate the following minimum requirements:

- (i) *a presumption against the detention of children for immigration purposes;*
- (ii) *a proscription on children being detained in Immigration Detention Centres;*

- (iii) *that a court or independent tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of any initial detention;*
- (iv) *that there should be prompt and periodic review by a court of the continuing detention of any child for immigration purposes;*
- (v) *if a child must be taken into immigration detention, as soon as possible after being detained they should be placed in Community Detention under a Residence Determination with any accompanying family members or guardians;*
- (vi) *prescribed minimum standards of treatment for children in immigration detention consistent with the ICCPR, CRC and other relevant international human rights standards such as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; and*
- (vii) *all courts and independent tribunals should be guided by the principle that the detention of children must be a measure of last resort and for the shortest appropriate period of time.*

The Department notes this recommendation and will not be taking any further action.

The Government takes its international obligations seriously and acts consistently to comply with all its treaty obligations, including the Convention on the Rights of the Child. As outlined in the response to Recommendation E, the DSM is directly related to the treatment of children in detention. It was developed consistently with Australia's international human rights obligations through a process which involved consultation with agencies, including the Commonwealth Ombudsman and the AHRC (then HREOC).

The Government's policy has always been that the least restrictive form of immigration detention available should be used for those people who cannot be released into the community.

The placement of minors and their accompanying families in community-based accommodation (Residence Determination) is the Government's priority. However, there will be a continued need to accommodate some minors and their families in alternative places of detention where essential initial processing needs to occur to identify minors and family groups, to assess any special cases and support needs, and to identify and arrange appropriate accommodation and services to support movement from a more restrictive detention environment.

Immigration detention policy and the operation of detention facilities in Australia are subject to close scrutiny from both domestic and international bodies. In addition, persons in immigration detention have capacity to make complaints and have these investigated and assessed.

291. I report accordingly to the Attorney-General.



Catherine Branson
President
Australian Human Rights Commission
July 2011

Appendix 1: Summary of the human rights in the ICCPR and CRC relevant to this inquiry

The human rights in the ICCPR and CRC relevant to this inquiry are listed in the table below.

Human rights	Convention Article
ICCPR	
The prohibition on cruel, inhuman and degrading treatment	Article 7
The right to be treated with humanity and respect for the inherent dignity of the human person	Article 10
The right to liberty	Article 9
CRC	
The best interests of the child are to be a primary consideration	Article 3(1)
Obligation to take steps necessary for the well-being of children	Article 3(2)
The protection of children from mental violence in detention	Article 19
Obligation to provide children with the highest attainable standard of health	Article 24
The right of the child to education on the basis of equal opportunity	Article 28
Obligation to treat children in detention in a manner appropriate for their age and developmental needs	Article 37

Appendix 2: Summary of jurisprudence in relation to the ICCPR and CRC

International Covenant on Civil and Political Rights

Article 7

[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

1. Article 7 of the ICCPR prohibits cruel, inhuman and degrading treatment. For detention to violate article 7 there must be some element of reprehensibility in the treatment of detainees, such as, an excessive use of force or a reprehensible failure to provide medical and mental health care facilities.

Provision of appropriate medical and mental health care facilities

2. The Human Rights Committee has held that knowledge that prolonged detention is causing a person to suffer mental health problems may be a breach of article 7. In *C v Australia*,⁸⁸ a finding of ‘cruel, inhuman and degrading treatment’ under article 7 of the ICCPR was made where an immigration detainee’s prolonged arbitrary detention was reported as contributing to his mental health problems and the authorities were aware of this but delayed releasing the detainee from immigration detention.

Use of force

3. In relation to article 7 the Commission must consider whether the decision to use force and whether the degree of force used was inconsistent with the prohibition on inhumane and degrading treatment. In considering this the Commission should have regard to the Department’s knowledge of the respective mental illnesses of the Complainants.

Article 10

(1) [A]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

4. Article 10(1) of the ICCPR requires States to treat all persons deprived of their liberty ‘with humanity and respect for the inherent dignity of the human person’. This requirement is generally applicable to persons deprived of their liberty, including in immigration detention.
5. Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons. Establishing a breach of article 10, however, requires something more than the mere fact of deprivation of liberty.⁸⁹ A complainant must demonstrate that he or she has suffered more than just the condition of detention to substantiate a breach of the right to be treated humanely in detention under article 10(1) of the ICCPR.
6. Ultimately, whether there has been a breach of article 10(1) will require consideration of the facts of each case. The question to ask is whether the facts demonstrate a failure by the State to treat detainees humanely and with respect for their inherent dignity as a human being.

7. In determining this question regard should be had to the jurisprudence of the United Nations Human Rights Committee (UNHRC) and the Standard Minimum Rules for the Treatment of Prisoners⁹⁰ (the Standard Minimum Rules); and the Body of Principles for the Protection of all Persons under Any Form of Detention (the Body of Principles).⁹¹
8. The UNHRC has indicated that compliance with the Standard Minimum Rules and the Body of Principles is the minimum requirement for compliance with the obligation imposed under article 10(1) that people in detention be treated humanely.

Provision of appropriate medical and mental health care facilities

9. Article 10(1) places a positive obligation on Australia to provide a certain level of basic services, including medical and psychological care. The content of this obligation is informed by principle 24 of the Body of Principles, which states:

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.
10. The Standard Minimum Rules state:
 22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.
 - (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.
 - ...
 24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation; and the determination of the physical capacity of every prisoner for work.
 25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.
 - (2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.
 26. (1) The medical officer shall regularly inspect and advise the director upon:
 - (a) the quantity, quality, preparation and service of food;
 - (b) the hygiene and cleanliness of the institution and the prisoners;
 - (c) the sanitation, heating, lighting and ventilation of the institution;

- (d) the suitability and cleanliness of the prisoners' clothing and bedding; and
- (e) the observance of the rules concerning physical education and sports, in cases where there are no technical personnel in charge of these activities.

(2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

11. The United Nations principles for the protection of persons with mental illness and the improvement of mental health care make it clear that people with mental illness should have the right to be treated and cared for, as far as possible, in the community in which they live.⁹²
12. Standard Minimum Rule 82 specifically addresses the situation of mentally ill persons who are held in detention. It provides:
 - B. INSANE AND MENTALLY ABNORMAL PRISONERS
 - 82. (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.
 - (2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.
 - (3) During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer.
 - (4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.
 - 83. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure, if necessary, the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care.
13. Under article 10, the Department is obliged to take positive actions to prevent inhumane treatment of detained persons, such as examining alternative options to detention and providing appropriate medical and mental health care facilities.⁹³

Use of force against detainees

14. In relation to article 10(1) the Commission must consider whether the decision to use force and whether the degree of force used was inconsistent with the right of a detained person to be treated with humanity and respect for the inherent dignity of the human person.
15. Standard Minimum Rule 54(1) describes the circumstances in which force may be used against detainees as follows:
 - (1) Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

Interaction between article 7 and article 10(1)

16. The allegations concerning the use of force against the Complainants in the transfer from Woomera Detention Centre to Baxter Detention Centre and concerning the failure to remove the Complainants from the detention centre environment raise for consideration the application of articles 7 and 10(1) of the ICCPR.
17. In the case of a detained person, there is an overlap between article 7 and article 10(1) in that inhuman or degrading treatment or punishment under article 7 will also constitute a failure to treat that person with humanity and respect for the inherent dignity of the human person under article 10. The UNHRC has indicated that the threshold for establishing a breach of article 7 is higher than the threshold for establishing a breach of article 10.⁹⁴
18. Professor Manfred Nowak observes that:

[w]hereas article 7 primarily is directed at specific, usually violent attacks on personal integrity, article 10 relates more to the general state of a detention facility or some other closed institution and to the specific conditions of detention. As a result, article 7 principally accords a claim that State organs refrain from certain action (prohibition of mistreatment), while article 10 also covers positive State duties to ensure certain conduct.⁹⁵
19. Moreover, the assessment of whether the treatment of a person is inconsistent with article 7 or 10 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim. Accordingly, the assessment of whether the treatment is inconsistent with article 7 or 10 of the ICCPR is in part a subjective evaluation. Factors such as the victim's age and mental health will aggravate the effect of certain treatment so as to bring that treatment within article 7 or 10.⁹⁶

Article 9

(1) Everyone has the right of 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 procedures as are established by law.

20. Article 9(1) of the ICCPR protects the right to liberty and guarantees that 'no one shall be subjected to arbitrary arrest or detention'. Detention includes immigration detention.⁹⁷
21. Under the ICCPR, 'lawful detentions may be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality'.⁹⁸ Prolonged detention and even indefinite detention may be lawful where a detainee does not have a visa,⁹⁹ however, they might still be arbitrary.
22. Importantly, in relation to immigration detention, prolonged detention and even indefinite detention may be lawful where a detainee does not have a visa,¹⁰⁰ however, they might still be arbitrary because the requirement that detention not be 'arbitrary' is separate and distinct from the requirement that a detention be lawful. In *Van Alphen v The Netherlands*,¹⁰¹ the UNHRC said:

[A]rbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.¹⁰²

23. A similar view was expressed in *A v Australia*,¹⁰³ in which the UNHRC said:
- [T]he Committee recalls that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author’s detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.¹⁰⁴
24. In *Kwok v Australia*¹⁰⁵ the UNHRC said:
- With respect to the claim that the author was arbitrarily detained, in terms of article 9, paragraph 1, prior to her release into community detention, the Committee recalls its jurisprudence that, in order to avoid characterization of arbitrariness, detention should not continue beyond the period for which the State can provide appropriate justification. In the present case, the author’s detention as an unlawful non-citizen continued, in mandatory terms, for four years until she was released into community detention. While the State party has advanced general reasons to justify the author’s detention, the Committee observes that it has not advanced grounds particular to her case which would justify her continued detention for such a prolonged period. In particular, the State party has not demonstrated that, in the light of the author’s particular circumstances, there were no less invasive means of achieving the same ends.
25. In *MIMIA v Al Masri*,¹⁰⁶ the Full Federal Court stated that article 9(1):
- ... requires that arbitrariness is not to be equated with ‘against the law’ but is to be interpreted more broadly, and so as to include a right not to be detained in circumstances which, in the individual case, are ‘unproportional’ or unjust.¹⁰⁷
26. This broad view of arbitrariness has also been applied in the case of *Manga v Attorney-General*,¹⁰⁸ where Hammond J concluded that:
- The essence of the position taken in the tribunals, the case law, and the juristic commentaries is that under [the ICCPR] all unlawful detentions are arbitrary; and lawful detentions may also be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability and proportionality.
- It has also been convincingly demonstrated that the reason for the use of the word ‘arbitrary’ in the drafting of the international covenant was to ensure that both ‘illegal’ and ‘unjust’ acts are caught. The (failed) attempts to delete the word ‘arbitrary’ in the evolution of art 9(1), and replace with the word ‘illegal’ are well documented.¹⁰⁹
27. In another New Zealand case dealing with arbitrary arrest and detention, *Neilsen v Attorney-General*,¹¹⁰ it was held that:
- An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.¹¹¹

28. In the context of the European Convention on Human Rights, a broad view has also been taken as to the scope of the term arbitrary. The European Court of Human Rights has held that:
- [I]t is a fundamental principle that no detention which is arbitrary can be compatible with [art] 5(1) and the notion of ‘arbitrariness’ in [art] 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.¹¹²
29. The Court further held that ‘one general principle established in the case law is that detention will be “arbitrary” where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities.’¹¹³
30. Finally, a person’s detention that is initially not arbitrary may come to breach article 9(1) of the ICCPR by reason of subsequent events which change the nature of the detention.¹¹⁴

Convention on the Rights of the Child

Article 3

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

31. Article 3(1) of the CRC can be summarised as relevantly providing that in all actions concerning children undertaken by administrative authorities, the best interests of the child shall be a primary consideration.
32. Article 3(2) of the CRC relevantly requires the Commonwealth to take all administrative measures to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents. A child’s mental health is directly constitutive of his or her wellbeing.
33. The obligation in article 3(1) expressly covers all actions concerning children, including “decisions by courts of law, administrative authorities, legislative bodies and both public and private social-welfare institutions”. This has been explained by the Committee on the Rights of the Child in its General Comment No 5.

The article refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.¹¹⁵

34. In *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*¹¹⁶ a majority in the High Court rejected the argument that the provisions of article 3 were intended to apply only to ‘actions’ that were directed at children and not those that merely have consequences for children.¹¹⁷ Their Honours stated that the objects of the CRC will best be achieved by giving the word ‘concerning’ a wide-ranging application.
35. Article 3(1) does not require the best interests of the child to be the sole consideration in all decision-making.
36. The UNHCR, in its Guidelines on Determining the Best Interests of the Child states:
- the best interests must be the determining factor for specific actions, notably adoption (article 21) and separation of a child from parents against their will (article 9);
 - the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (article 3).¹¹⁸
37. In *Teoh*, Mason CJ and Deane J noted:
- The article is careful to avoid putting the best interests of the child as *the* primary consideration; it does no more than give those interests first importance along with other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight.¹¹⁹
- Later, their Honours stated:
- A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.¹²⁰
38. The UNICEF *Implementation Handbook for the Convention on the Rights of the Child* provides the following commentary on article 3:
- The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests....
- The child’s interests, however, must be the subject of active consideration; it needs to be demonstrated that children’s interests have been explored and taken into account as a primary consideration.¹²¹
39. The England and Wales High Court¹²² and the United Kingdom Supreme Court¹²³ have held that while a primary consideration is not the same as the paramount or determinative consideration; it must at least mean a consideration of the first importance.
40. In order to comply with article 3(1), the Department must specifically address its attention to the impact of detention on children, and make their best interests a primary consideration in deciding what laws will regulate immigration in Australia and how those laws should be administered. In order to comply with article 3(1), laws in relation to immigration detention must permit, and the Department must make, individualised decisions regarding the best interests of each child. The administering authorities must address their minds to the specific circumstances of each child. Such individualised decisions should relate not only to the question of whether or not a child needs to be detained, but also to the circumstances and manner in which that detention is to take place.
41. There are a variety of factors that make up what may or may not be in the best interests of the child but they include the liberty of the child and the protection of family unity (article 9(1), CRC).

Article 19

(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child 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.

42. Australia is obliged under article 19(1) of the CRC to take all appropriate administrative measures to protect children from all forms of physical or mental violence, abuse or neglect while in the care of parent(s) or any other person who has the care of the child.

While in the care of...

43. Article 19 is *not* limited to violence perpetrated solely by caregivers in a personal context.¹²⁴
44. The phrase ‘while in the care of parent(s), legal guardian(s)’ indicates that the primary focus of the article is ‘intra-familial’ situations. This was recognised by the Australian Human Rights Commission in a 2005 report which stated that ‘the obligations [under article 19] imposed on persons or bodies other than families is less demanding, based in part on their less extensive knowledge of the circumstances of the child in their care’.¹²⁵
45. The Committee on the Rights of the Child recognises only three conditions for children: emancipated, in the care of primary or proxy caregivers or in the de facto care of the State.¹²⁶ Children of migrating parents¹²⁷ and unaccompanied children outside their country of origin are considered children without obvious primary or proxy caregivers for whom the State is obliged to take responsibility as the de facto caregiver.¹²⁸
46. The phrase ‘any other person who has the care of the child’ appears to broaden the application of the article to cover personnel of institutions responsible for the care or protection of children.¹²⁹ The phrase ‘any other person who has the care of the child’ is sufficiently broad to include all institutional settings¹³⁰ such as an immigration detention centre.
47. The Committee on the Rights of the Child states that caregivers include those with clear, recognised legal, professional-ethical and/or cultural responsibility for the safety, health, development and well-being of the child. This extends to institutional personnel (governmental or non-governmental) in the position of caregivers, including responsible adults in juvenile justice and residential care settings. In the case of unaccompanied children, the State is the de facto caregiver.¹³¹

Violence

48. The Committee on the Rights of the Child has stated that the term ‘violence’ ‘must not be used in any way to minimise the impact of, and need to address non-physical and/or non-intentional forms of harm (such as neglect and psychological maltreatment)’.¹³²

Mental violence

49. Mental violence includes humiliation, harassment, verbal abuse, the effects of isolation and other practices that cause or may result in psychological harm.¹³³
50. It also includes neglecting mental health, medical and educational needs and placement in solitary confinement, isolation or humiliating or degrading conditions of detention.¹³⁴

51. The AHRC has found that mental violence will include a situation in which a child in immigration witnessed acts of physical violence and/or was exposed to acts or practices that caused psychological harm.¹³⁵

Neglect

52. Neglect means the failure to meet children's physical and psychological needs, protect them from danger, or obtain medical, birth registration or other services when those responsible for children's care have the means, knowledge and access to services to do so. It includes:
- physical neglect (including failure to protect a child from harm);
 - psychological or emotional neglect (including exposure to intimate partner violence);
 - neglect of physical or mental health (withholding essential medical care); and
 - educational neglect (failure to comply with laws requiring caregivers to secure their children's education through attendance at school).¹³⁶
53. The UNICEF Implementation Handbook states that 'protecting children from self-harm, including suicide and attempted suicide, clearly comes within the ambit of article 19'.¹³⁷

Article 24

(1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

(2) States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: ...

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care.

54. Under article 24 of the CRC, the Commonwealth recognizes the right of the child to the enjoyment of the 'highest attainable standard of health' and to facilities for the treatment of illness and rehabilitation of health.
55. The Commonwealth is obliged under article 24 of the CRC 'to strive to ensure that no child is deprived of his or her right of access to such health care services'. Health care services include mental health treatment.
56. The Committee on the Rights of the Child has observed that State Parties to the CRC have the obligation to:
- ensure that health services, including counselling and health services for mental and sexual and reproductive health, **of appropriate quality and sensitive to the adolescents' concerns**, are available to all adolescents'.¹³⁸ (emphasis added)

Unaccompanied children

57. Respect for the best interests of the child requires that where an unaccompanied child has been placed for the 'purposes of care, protection or treatment of his or her physical or mental health', the child has a right to periodic review of their treatment and all other circumstances relevant to their placement.¹³⁹

58. Unaccompanied children have the right to the same access to health care as national children. In ensuring equal access, the State must take into account the particular vulnerabilities of unaccompanied children, including that they may have experienced trauma and violence.¹⁴⁰

Article 28

(1) State Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

...

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

59. Article 28 of the CRC applies equally to all children within Australia, regardless of whether they are in immigration detention. Article 29 of the CRC explains that the main purpose of education for children is 'the development of the child's personality, talents and mental and physical abilities to their fullest potential'.
60. While no absolute standard of education is required by article 28 of the CRC, it is clear that it must be made available on the basis of 'equal opportunity'. This means that there must be no lesser provision of education for any one group of children, regardless of nationality, immigration status or how they arrived in Australia.
61. Further the *Convention against Discrimination in Education*¹⁴¹ to which Australia is a party prohibits the Commonwealth from among other things 'limiting any person or group of persons to education of an inferior standard'.¹⁴² It also requires the Commonwealth to give 'foreign nationals resident in Australia the same access to education as that it gives to [its] own nationals'.¹⁴³
62. Similarly, the UN Committee on the Rights of the Child is of the view that children who have had their refugee status applications rejected are entitled to education commensurate to that available to other children resident within that country.¹⁴⁴

Unaccompanied children

63. The Committee on the Rights of the Child has emphasised the need for unaccompanied children to be able to access education through all phases of the displacement cycle. The Commission states that 'every unaccompanied and separated child, irrespective of status, shall have full access to education in the country that they have entered'.¹⁴⁵

Children in detention

64. High standards of education apply to children who are in forms of detention.¹⁴⁶
65. The Special Rapporteur on the right to education has recommended that special attention be given to ensuring that all children, including children in detention, subject to compulsory education have access to, and participate in, such education.¹⁴⁷

Article 37

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

(b) 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; ...

(c) 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.

66. The UN Committee on the Rights of the Child has indicated that the detailed standards set out in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the UN Rules) are relevant to the interpretation of article 37.
67. Article 37(b) of the CRC provides that ‘no child shall be deprived of his or her liberty unlawfully or arbitrarily’. The CRC goes further than the general prohibition on arbitrary and unlawful detention in article 9(1) of the ICCPR, by adding that detention of children should be a ‘measure of *last resort* and for the *shortest appropriate period* of time’.
68. There are a number of elements to article 37(b):
- the detention of a child must be in conformity with law;
 - the detention of a child must not be arbitrary (this is a distinct requirement, in addition to the requirement of lawfulness);
 - the detention of a child must be used only as a measure of last resort; and
 - the detention of a child must be for the shortest appropriate time.
69. Again, the Committee on the Rights of the Child regards the UN and Beijing Rules as relevant to the interpretation of article 37(b), which is appropriate given that article 37(b) was based upon aspects of those standards.¹⁴⁸ In that context, it is relevant to note that the UN Rules state that detention ‘should be used as a last resort’ and ‘be limited to exceptional cases’¹⁴⁹ and that the Beijing Rules reiterate that any detention should be brief¹⁵⁰ and state this should only occur where the child has committed ‘a serious act involving violence’.¹⁵¹
70. The *travaux préparatoires* to the CRC indicate that article 37(b) was also based upon the similarly worded article 9(1) of the ICCPR. As such, it is relevant to consider the jurisprudence of the UNHRC regarding that provision. As discussed above, in *A v Australia*, the Human Rights Committee stated that detention was arbitrary if it was ‘not necessary in all the circumstances of the case’ and if it was not a proportionate means to achieving a legitimate aim.¹⁵²
71. While there is no set definition of the ‘shortest appropriate period’, when read with the ‘last resort’ principle it is clear that the Commonwealth must consider any less restrictive alternatives that may be available to an individual child in deciding whether and/or for how long a child is detained. Detention of children should only occur in exceptional cases.¹⁵³ If, after considering the available alternatives, detention is considered to be appropriate in the specific circumstances, then it should be as short as possible.

72. The UN Committee on the Rights of the Child has emphasised the importance of finding alternatives to the detention of children.¹⁵⁴ The UNHCR sets out various alternatives in its Detention Guidelines including release subject to reporting, residency requirements or the provision of a surety. The UNHCR Detention Guidelines also state that ‘minors who are asylum seekers should *not* be detained’ and that ‘all appropriate alternatives to detention should be considered in the case of children accompanying their parents’.¹⁵⁵
73. The initial detention of children who arrive in Australia without a visa is not unlawful because it is prescribed in the Migration Act. However, mandatory detention under the Migration Act is only lawful for as long as the detention is ‘reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered’.¹⁵⁶ If the immigration detention goes beyond those purposes it is punitive and therefore unlawful. Moreover, ‘lawful’ detention might still be ‘arbitrary’ because of elements of injustice, inappropriateness, unreasonableness or indeterminacy or if it is ‘not necessary in all the circumstances of the case’ or not a proportionate means to achieving a legitimate aim.¹⁵⁷ Furthermore, even if the initial detention is not arbitrary, a subsequent period of detention may become arbitrary, for example, because of the length of the detention or because the detention ceases to be a proportionate response.¹⁵⁸
74. The UNHCR, which has applied the jurisprudence of the ICCPR and the CRC to the Refugee Convention, has held that the detention of child asylum seekers will never be reasonable, necessary, proportionate or appropriate. The UNHCR Detention Guidelines state unequivocally that ‘minors who are asylum seekers should *not* be detained’.¹⁵⁹ This is reiterated in the UNHCR *Refugee Children: Guidelines on Protection and Care* and accords with the basic principle in the CRC that detention be a matter of last resort.
75. United Nations instruments have defined what is meant by ‘detention’, in relation to children, as follows:
- Deprivation of liberty means any form of detention or imprisonment or the placement of a person in another public or private custodial setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.¹⁶⁰
76. The UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.¹⁶¹
77. As noted above, the UN Committee on the Rights of the Child has indicated that the detailed standards set out in the the Beijing Rules and the the UN Rules are relevant to the interpretation of article 37.¹⁶² Indeed, the *travaux préparatoires* indicate that article 37(c) was based upon aspects of those standards.¹⁶³
78. Amongst other things, those standards stress:
- (1) the importance of considering alternatives to detention in an institution;¹⁶⁴
 - (2) the need to ensure that the conditions of detention and care promote, sustain and protect the health of child detainees (including mental health);¹⁶⁵
 - (3) the need to ensure adequate medical care (both preventative and remedial) and to ensure immediate access to adequate medical facilities;¹⁶⁶ and

- (4) the importance of providing appropriate educational and leisure opportunities and providing an environment where child detainees may associate with other children their age.¹⁶⁷
79. The UN Rules require that the detention of a child should always be a disposition of last resort and for the minimum necessary period¹⁶⁸ and the Beijing Rules state that any detention should be brief¹⁶⁹ and should occur only where the child has committed 'a serious act involving violence'.¹⁷⁰
80. A proper application of article 37 requires a case-by-case assessment of whether the detention of the child is justified in the individual circumstances. While the execution of legitimate policy goals may be one of the circumstances to consider in such an assessment, it will not be the sole or determinative factor in assessing whether the detention of an individual child accords with the right to liberty under international law. Moreover, while the length of detention *per se* will not be determinative of whether detention will be arbitrary, it is relevant to the requirement that detention be necessary and proportionate to the goals.¹⁷¹
81. Article 37(c) stresses that children deprived of their liberty should not lose their fundamental rights and that their treatment must take account of their age and child development.
82. Article 37(c) was also based upon the terms of article 10(1) of the ICCPR. The jurisprudence of the UNHRC regarding article 10(1) is thus also relevant to the interpretation of article 37(c) of the CRC.
83. That jurisprudence has attempted to distinguish the provisions of article 10(1) from article 7 of the ICCPR (which proscribes torture or other cruel or inhuman or degrading treatment or conduct). This is relevant in the context of the CRC as the terms of article 37(a) of the CRC are similar to the terms of article 7 of the ICCPR. Professor Manfred Nowak summarises this jurisprudence as follows:
- [w]hereas article 7 primarily is directed at specific, usually violent attacks on personal integrity, article 10 relates more to the general state of a detention facility or some other closed institution and to the specific conditions of detention. As a result, article 7 principally accords a claim that State organs refrain from certain action (prohibition of mistreatment), while article 10 also covers positive State duties to ensure certain conduct: Regardless of economic difficulties, the State must establish a minimum standard for humane conditions of detention (requirement of humane treatment). In other words, it must provide detainees and prisoners with a minimum of services to satisfy their basic needs (food, clothing, medical care, sanitary facilities, communication, light, opportunity to move about, privacy, etc). Finally, it is ... stressed that the requirement of humane treatment pursuant to article 10 goes beyond the mere prohibition of inhuman treatment under article 7 with regard to the extent of the necessary 'respect for the inherent dignity of the human person'.¹⁷²
84. Early jurisprudence of the UNHRC indicated that detention of a person in conditions 'seriously detrimental to their health' was a breach of both articles 7 and 10(1) of the ICCPR.¹⁷³ However, it seems to be accepted that such treatment is more appropriately regarded as a breach of article 10(1) alone.¹⁷⁴
85. It is also clear from UNHRC jurisprudence that the threshold for establishing a breach of article 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7.¹⁷⁵

Appendix 3: Summary of the recommendations from the reports of medical and mental health professionals who treated the Yousefi family

Date		Name	Extracts of observations and/or recommendations
1.	26 July 2002	Professor Norman James	<i>This is a highly dysfunctional family unit with serious individual psychopathology ... little can be done to help them while in detention. Manoochehr is beginning to develop borderline personality traits.</i>
2.	19 August 2002	Dr Jon Jureidini	<i>Concurs unreservedly with Dr Bakhitarian and Mr Paleologos' recommendation that the whole family should be removed from detention. It is dangerous for Manoochehr to remain in the detention environment ... [self destructive behaviour was indicative of] 'significant trauma and Manoochehr not having the adequate psychological means of coping with that trauma.'</i>
3.	11 October 2002	Dr Lockwood	<i>At a case conference: Actual improvement to their mental health would only occur outside detention. Another detention centre would just maintain the status quo. From a child protection perspective, this situation cannot continue as it constitutes serious emotional abuse of Manoochehr. Recommends investigation of possible release.</i>
4.	16 October 2002	J Cooke & D Acaster, Pscyhologists	<i>Current placement in November compound inappropriate.</i>

Date		Name	Extracts of observations and/or recommendations
5.	21 October 2002	D Acaster, Psychologist	<p><i>Long term detention has a devastating effect on the Yousefi Family... their son's mental state has been significantly effected. Michael is currently in an extremely fragile emotional state. This is likely to continue to influence many areas of his life including his ability to form relationships, his future risk of psychiatric morbidity and suicide.</i></p> <p><i>Detention of his family at the Woomera Detention Centre is no longer an option. I strongly recommend that the Yousefi family be given alternative accommodation, preferably community based and provided with ongoing psychiatric and psychological treatment and support.</i></p> <p><i>Anything less would be a failure in our duty of care.</i></p>
6.	29 October 2002	Mental Health Team	<p><i>All avenues to help this family have been exhausted. The Mental Health staff have strongly recommended that the family be given alternative accommodation and provided with psychiatric and psychological treatment and support. [The Department] have refused all options put forward. The Mental Health staff can no longer help this family.</i></p>
7.	7 March 2003	Matina Pentes, Mental Health Worker	<p><i>Mr Parvis Yousefi was displaying symptoms that suggest Major Depression with paranoid psychotic features and that his condition was deteriorating.</i></p> <p><i>Manoochehr's condition required urgent intervention.</i></p> <p><i>Recommended that the family be transferred to a large metropolitan detention centre to provide easily accessible adolescent and adult psychiatric care.</i></p>
8.	12 April 2003	Dr Elaine Skinner	<p><i>Detention environment appears to have been a significant contributor to Mr Yousefi's condition and a better alternative should be sought.</i></p>

Date		Name	Extracts of observations and/or recommendations
9.	21 May 2003	Dr Jon Jureidini	<p><i>All ACM visiting mental health staff have been unanimous in their agreement that this family cannot be treated in detention.</i></p> <p><i>Each member suffers severe psychological disturbance sufficient to warrant consideration of admission.</i></p> <p><i>Unless removed, they cannot benefit from any mental health intervention.</i></p> <p><i>[The Department's] actions are denying them any significant mental health intervention.</i></p> <p><i>To keep the family in detention is a decision to deny them mental health intervention.</i></p> <p><i>Mental health interventions in detention setting will prove fruitless.</i></p>
10.	13 June 2003	Stephen Monaghan, Health Services Manager	<p><i>Supports past recommendations for community detention.</i></p> <p><i>No progress has been made by the Baxter Health Team.</i></p>
11.	30 October 2003	Dr Jon Jureidini	<p><i>Once again let me state the need for urgent psychiatric treatment that cannot occur within the Detention environment. Failure to do so carries enormous risks. The fact that I have previously warned of such risks and there has not yet been a disaster should not be regarded as reassuring.</i></p>
12.	4 February 2004	Dr Jon Jureidini	<p><i>Reiterated extreme concern for the family's welfare while they remained in detention.</i></p>

Appendix 4: Functions of the Commission

The Commission has specific legislative functions and responsibilities for the protection and promotion of human rights under the AHRC Act. Part II Divisions 2 and 3 of the AHRC Act confer functions on the Commission in relation to human rights. In particular, section 11(1)(f) of the AHRC Act empowers the Commission to inquire into acts or practices of the Commonwealth that may be inconsistent with or contrary to the rights set out in the human rights instruments scheduled to or declared under the AHRC Act.

Section 11(1)(f) of the AHRC Act states:

(1) The functions of the Commission are:

...

- (f) 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.

Section 3 of the AHRC Act defines an ‘act’ or ‘practice’ as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth.

The Commission performs the functions referred to in section 11(1)(f) of the AHRC Act upon the Attorney-General’s request, when a complaint is made in writing or when the Commission regards it desirable to do so (section 20(1) of the AHRC Act).

In addition, the Commission is obliged to perform all of its functions in accordance with the principles set out in section 10A of the AHRC Act, namely with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

The Commission attempts to resolve complaints under the provisions of the AHRC Act through the process of conciliation. Where conciliation is not successful or not appropriate and the Commission is of the opinion that an act or practice constitutes a breach of human rights, the Commission shall not furnish a report to the Attorney-General until it has given the respondent to the complaint an opportunity to make written and/or oral submissions in relation to the complaint (section 27 of the AHRC Act).

If, after the inquiry, the Commission finds a breach of human rights, it must serve a notice on the person doing the act or engaging in the practice setting out the findings and the reasons for those findings (section 29(2)(a) of the AHRC Act). The Commission may make recommendations for preventing a repetition of the act or practice, the payment of compensation or any other action or remedy to reduce the loss or damage suffered as a result of the breach of a person’s human rights (sections 29(2)(b) and (c) of the AHRC Act).

If the Commission finds a breach of human rights and it furnishes a report on the matter to the Attorney-General, the Commission is to include in the report particulars of any recommendations made in the notice and details of any actions that the person is taking as a result of the findings and recommendations of the Commission (sections 29(2)(d) and (e) of the AHRC Act). The Attorney-General must table the report in both Houses of Federal Parliament within 15 sitting days in accordance with section 46 of the AHRC Act.

It should be noted that the Commission has a discretion to cease inquiry into an act or practice in certain circumstances (section 20(2) of the AHRC Act), including where the subject matter of the complaint has already been adequately dealt with by the Commission (section 20(2)(c)(v) of the AHRC Act).

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- 1 The relevant Department has since been renamed twice and is currently called the Department of Immigration and Citizenship (DIAC).
- 2 See the comments of the Human Rights Committee 95th Session (16 March to 3 April 2009) concluding observations re Australia. CCPR/C/AUS/CO/5 at p 5.
- 3 Minister for Immigration and Citizenship, *Minister's Residence Determination Power Under S. 197AB and S. 197AD of the Migration Act 1958: Guidelines* (2009), paras 4.1.4, 4.1.5.
- 4 Minister for Immigration and Citizenship, *Minister's Residence Determination Power Under S. 197AB and S. 197AD of the Migration Act 1958: Guidelines* (2009), para 6.1.2.
- 5 Human Rights and Equal Opportunity Commission, *A last resort? National inquiry into Children in Immigration Detention* (2004). At http://humanrights.gov.au/human_rights/children_detention_report/index.html (viewed 5 March 2011).
- 6 From the Department of Human Services, South Australia.
- 7 *Australian Human Rights Commission Act 1986* (Cth), section 3.
- 8 See *Secretary, Department of Defence v HREOC* (Cth), *Burgess & Ors (Burgess)* (1997) 78 FCR 208.
- 9 (1938) 60 CLR 336, 362 (Dixon J).
- 10 (1992) 110 ALR 449, 449–450 (Mason CJ, Brennan, Deane and Gaudron JJ).
- 11 ‘...it is...stressed that the requirement of humane treatment pursuant to Article 10 goes beyond the mere prohibition of inhuman treatment under Article 7 with regard to the extent of the necessary “respect for the inherent dignity of the human person”.’ See M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 247–8.
- 12 *Vuolanne v Finland*, Communication No 265/1987: CCPR/C/35/D/265/1987 at [9.2]; *Brough v Australia*, Communication No 1184/2003: CCPR/C/86/D/1184/2003 at [9.4]. See also *Keenan v United Kingdom* [2001] ECHR 242 (3 April 2001), with respect to the meaning of the equivalent provision in the *Convention for the Protection of Human Rights and Fundamental Freedoms*.
- 13 The Standard Minimum Rules were approved by the United Nations Economic and Social Council in 1957. They were subsequently adopted by the United Nations General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1 <http://www2.ohchr.org/english/law/treatmentprisoners.htm> (viewed 17 March 2011).
- 14 The Body of Principles were adopted by the United Nations General Assembly in resolution 43/173 of 9 December 1988 Annex: UN Doc A/43/49 (1988).
- 15 UN Human Rights Committee, General Comment 21 (1992), [5]. See also *Mukong v Cameroon*, Communication No 458/1991, UN Doc CCPR/C/51/458/1991, [9.3]. The Body of Principles apply to all persons under any form of detention or imprisonment. The Standard Minimum Rules are directed at the treatment of prisoners and the management of penal institutions. Although immigration detention facilities are not penal institutions in the sense that they do not house convicted criminals or people charged with a criminal offence, the Standard Minimum Rules are expressed to set out minimum conditions which are accepted as suitable by the United Nations for the general management of institutions housing all categories of prison.
- 16 I note that Dr Elaine Skinner’s Report of 12 April 2003 observes that Mrs Yousefi is angry about the use of force during the transfer. This is some 3 months after the transfer.
- 17 For example Dr Lockwood’s advice at the Case conference held on 11 October 2002.
- 18 (2002) AusHRC 25. See also *Burgess*.
- 19 *Ibid.*
- 20 *Ibid.*
- 21 The Department noted that: ‘This occurred in March 2004. Records show that the family did not accept the offer to apply for a BE. The family were granted temporary protection visas approximately two months later.’
- 22 Report of Dr Fiona Hawker, Psychiatrist of the Royal Adelaide Hospital, Glenside Campus Mental Health Service to Dr Simon Lockwood (GP) of Woomera Hospital, dated 21 May 2002.
- 23 DHS, Family and Youth Services, Senior Practitioner, Social Worker, Crisis Response and Child Abuse Service, Investigation Report on Child Protection Intake from Woomera Detention Centre, 10 May 2002, 4 (provided by the Department in the 2004 national inquiry into Children in Detention).
- 24 Report of Dr Jon Jureidini, 22 July 2002.
- 25 See for example the report of Dr Bakhtirian and Con Paleologos to Mr David Coultou, ACM Manager, dated 23 July 2002 and the report of Dr Jon Jureidin, dated 19 August 2002.
- 26 This is supported by a letter from Sharon Edgerton dated 29 May 2002 requesting a medical assessment ‘as to whether the detainees have a special need (based on physical/mental health or torture/trauma experiences) that cannot be cared for’, in order for the Department to give further consideration as to whether the family is eligible for a bridging visa.
- 27 UN Human Rights Committee, General Comment 8 (1982). See also *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999; *Baban v Australia*, Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001.

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- 28 *Manga v Attorney-General* [2000] 2 NZLR 65, [40]–[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/39/D/305/1988; *Spakmo v Norway*, Communication No 631/1995, UN Doc CCPR/C/67/D/631/1995.
- 29 Section 196(1) of the Migration Act provides that a detained unlawful non-citizen must be kept in immigration detention until he or she is (a) removed from Australia; (b) deported; or (c) granted a visa.
- 30 See UN Human Rights Committee, General Comment 31 (2004) [6]. See Joseph, Schultz and Castan ‘The International Covenant on Civil and Political Rights Cases, Materials and Commentary’ (2nd ed, 2004), 308, [11.10].
- 31 This is consistent with the Commission’s views in *Badraie v Commonwealth (Department of Immigration and Multicultural and Indigenous Affairs)* (2002) AusHRC 25.
- 32 *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), [8.4]. Commentators have suggested that there is ‘little doubt’ that the majority’s decision was linked with its finding that the detention was arbitrary. S Joseph, J Shultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2nd ed, 2004) [9.51].
- 33 UN Human Rights Committee, General Comment 21 (1992) and UN Human Rights Committee, General Comment 9 (1982).
- 34 Memo of Annabelle O’Brien to Jim Williams, dated 7 July 2003.
- 35 Report of Psychologist, Robin Gracie to Sharon Edgerton, Woomera Detention Centre, 18 June 2003.
- 36 United Nations Children’s Fund (‘UNICEF’), ‘Implementation Handbook for the Convention on the Rights of the Child’ (2008), 38–39. Note Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.
- 37 (1995) 128 ALR 353.
- 38 (1995) 128 ALR 353, 363 (Mason CJ and Deane J).
- 39 See AHRC, ‘A Last Resort: National Inquiry into Children in Immigration Detention’ (2004) 163, citing Minister for Immigration and Multicultural and Indigenous Affairs, Border Protection: Children in Detention, 29 April 2002.
- 40 See: UNICEF, ‘Implementation Handbook for the Convention on the Rights of the Child’ (2008), 40–41.
- 41 UNICEF, ‘Implementation Handbook for the Convention on the Rights of the Child’ (2008), 256.
- 42 UNICEF, ‘Implementation Handbook for the Convention on the Rights of the Child’ (2008), 265.
- 43 UNICEF, ‘Implementation Handbook for the Convention on the Rights of the Child’ (2008), 258.
- 44 UNICEF, ‘Implementation Handbook for the Convention on the Rights of the Child’ (2008), 548.
- 45 UN Rules, Rule 1.
- 46 Rule 17.1(b) of the Beijing Rules provides that ‘Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum’.
- 47 Rule 17.1(c) of the Beijing Rules provides that ‘Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response’.
- 48 Beijing Rules, Rules 13.2, 28.1, 28.2, 29.1.
- 49 UN Rules, Rule 28 and Beijing Rules, Rule 26.2.
- 50 UN Rules, Rules 49 and 51.
- 51 UN Rules, Rules 18, 32 and Part (IV)E and F and Beijing Rules, Rules 24.1, 26.1, 26.2, 26.6.
- 52 I note that Rule 38 of the UN Rules provides that ‘Every Juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. **Such education should be provided outside the detention facility in community schools wherever possible** and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs.’ (emphasis added)
- 53 *Australian Human Rights Commission Act (1986)*, (Cth) s 29(2)(a).
- 54 *Australian Human Rights Commission Act (1986)*, (Cth) s 29(2)(b).
- 55 *Australian Human Rights Commission Act (1986)*, (Cth) s 29(2)(c).
- 56 *Simpson v Attorney General (Baigent’s case)* [1994] 3 NZLR 667, 678 (Cooke P) and 718 (Casey J).
- 57 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 [55] (Wilcox J).
- 58 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 59 *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J); see also *Murray v Ministry of Defence* [1988] 1 WLR 692, 701–703; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J); and *Sadler & State of Victoria v Madigan* [1998] VSCA 53 (1 October 1998), [51].
- 60 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1, 14–15 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].

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- 61 *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1, 15–17 (Clarke JA); *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239–240 (Lockhart J).
- 62 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 63 On the basis that they found the detention was lawful because of the provisions of the Migration Act.
- 64 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 65 *Ibid.*, [48]–[49].
- 66 [2004] FCA 156.
- 67 *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA).
- 68 (2009) AusHRC 41.
- 69 I have not recommended that compensation be paid to Mr Yousefi for the reasons outlined in part 8.3 above.
- 70 Report of Dr Roberts dated 9 July 2010 at p 81 para 5.14.
- 71 Report of Dr Phillips dated 29 May 2009 at p 20.
- 72 *Ibid.*, p 20–21.
- 73 *Ibid.*, p 22.
- 74 *Ibid.*, p 23.
- 75 Report of Dr Roberts at p 82 para 5.15.
- 76 *Ibid.*, p 82 para 5.15.
- 77 *Ibid.*, p 82 para 5.17.
- 78 D Shelton, *Remedies in International Human Rights Law* (2000) 151.
- 79 C Evans, *New Directions in Detention – Restoring Integrity to Australia’s Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, Australian National University, Canberra, 29 July 2008) (New Directions). At <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm> (viewed 5 March 2011).
- 80 Community and Detention Services Division, DIAC, *Immigration Detention Statistics Summary* (4 February 2011). At <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/> (viewed 5 March 2011).
- 81 Human Rights and Equal Opportunity Commission, *A last resort? National inquiry into Children in Immigration Detention* (2004). At http://humanrights.gov.au/human_rights/children_detention_report/index.html (viewed 5 March 2011).
- 82 See the comments of the Human Rights Committee 95th Session (16 March to 3 April 2009) concluding observations re Australia.CCPR/C/AUS/CO/5 at p 5.
- 83 Minister for Immigration and Citizenship, *Minister’s Residence Determination Power Under S. 197AB and S. 197AD of the Migration Act 1958: Guidelines* (2009), paras 4.1.4, 4.1.5.
- 84 Minister for Immigration and Citizenship, *Minister’s Residence Determination Power Under S. 197AB and S. 197AD of the Migration Act 1958: Guidelines* (2009), para 6.1.2.
- 85 See the comments of the Human Rights Committee 95th Session (16 March to 3 April 2009) concluding observations re Australia.CCPR/C/AUS/CO/5 at p 5.
- 86 Minister for Immigration and Citizenship, *Minister’s Residence Determination Power Under S. 197AB and S. 197AD of the Migration Act 1958: Guidelines* (2009), paras 4.1.4, 4.1.5.
- 87 Minister for Immigration and Citizenship, *Minister’s Residence Determination Power Under S. 197AB and S. 197AD of the Migration Act 1958: Guidelines* (2009), para 6.1.2.
- 88 *C v Australia*, Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), [8.4]. Commentators have suggested that there is ‘little doubt’ that the majority’s decision was linked with its finding that the detention was arbitrary. S Joseph, J Shultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2nd ed, 2004) [9.51].
- 89 See *Vuolanne v Finland*, Communication No 265/1987, UN Doc CCPR/C/35/D/265/1987 (1989), *Jensen v Australia*, Communication No 762/1997, UN Doc CCPR/C/71/D/762/1997 (2001).
- 90 The Standard Minimum Rules were approved by the United Nations Economic and Social Council in 1957. They were subsequently adopted by the United Nations General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1 <http://www2.ohchr.org/english/law/treatmentprisoners.htm>.
- 91 The Body of Principles were adopted by the United Nations General Assembly in resolution 43/173 of 9 December 1988 Annex: UN Doc A/43/49 (1988).
- 92 United Nations Principles for the protection of persons with mental illness and the improvement of mental healthcare, adopted by General Assembly resolution 46/119 of 17 December 1991, principle 7.1; see also principle 20.
- 93 UN Human Rights Committee, General Comment 21 (1992) and UN Human Rights Committee, General Comment 9 (1982).

- 94 '...it is...stressed that the requirement of humane treatment pursuant to Article 10 goes beyond the mere prohibition of inhuman treatment under Article 7 with regard to the extent of the necessary "respect for the inherent dignity of the human person".' See Nowak, 247–8.
- 95 M Nowak, UN Covenant on Civil and Political Rights CCPR Commentary (1993), 188.
- 96 *Vuolanne v Finland*, Communication No 265/1987: CCPR/C/35/D/265/1987 at [9.2]; *Brough v Australia*, Communication No 1184/2003: CCPR/C/86/D/1184/2003 at [9.4]. See also *Keenan v United Kingdom* [2001] ECHR 242 (3 April 2001), with respect to the meaning of the equivalent provision in the *Convention for the Protection of Human Rights and Fundamental Freedoms*.
- 97 UN Human Rights Committee, General Comment 8 (1982). See also *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999; *Baban v Australia*, Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001.
- 98 *Manga v Attorney-General* [2000] 2 NZLR 65, [40]–[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/39/D/305/1988; *Spakmo v Norway*, Communication No 631/1995, UN Doc CCPR/C/67/D/631/1995.
- 99 Section 196(1) of the Migration Act provides that a detained unlawful non-citizen must be kept in immigration detention until he or she is (a) removed from Australia; (b) deported; or (c) granted a visa.
- 100 *Ibid.*
- 101 Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988.
- 102 *Ibid.*, [5.8].
- 103 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993.
- 104 *Ibid.*, [9.2].
- 105 *Yin Fong Kwok v Australia*, Communication No 1442/2005 CCPR/C/97/D/144/2005.
- 106 (2003) 126 FCR 54.
- 107 *Ibid.*, [152].
- 108 [2000] 2 NZLR 65.
- 109 *Ibid.*, [40], [41], references listed at [41], [42].
- 110 [2001] 3 NZLR 433.
- 111 *Ibid.*, [34].
- 112 *Saadi v United Kingdom* [2008] ECHR 80, [67].
- 113 *Ibid.*, [69].
- 114 See *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway*, Communication No 631/1995, CCPR/C/67/D/631/1995; Concluding Comments Regarding Switzerland (1996), CCPR/C/79/Add.70; *Weeks v United Kingdom*, Series A, No 114, ECHR, 2 March 1987; *Erkalo v Netherlands*, Application No 23 807/94, ECHR, 23 September 1998.
- 115 General Comment No 5 at 12.
- 116 (1995) 183 CLR 273.
- 117 In particular, see the decisions of Mason CJ and Deane J at 289. But note the dissent of McHugh J at 319.
- 118 UNHCR guidelines on the best interests of the child p 15.
- 119 At 289.
- 120 At 292.
- 121 United Nations Children's Fund ('UNICEF'), 'Implementation Handbook for the Convention on the Rights of the Child' (2008), 38–39. Note Article 45 of CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.
- 122 *MXL, R (on the application of) & Ors v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin) (30 September 2010), 84.
- 123 *ZHZH (Tanzania) FC (Appellant) v Secretary of State for the Home Department* [2011] UKSC 4 (1 February 2011) at 26.
- 124 Committee on the Rights of the Child, General Comment No 13 (2011), Article 19: the right of the child to freedom from all forms of violence, 17 February 2011, para 34.
- 125 Note that this comment was made in relation to a minor who was a cadet in the Tasmanian Air Training Corps: Report of an inquiry into complaints by Ms Susan Campbell that the human rights of her daughter were breached by the Commonwealth of Australia under the Convention on the Rights of the Child, HREOC Report No 29, 2005, para 4.2.2.
- 126 Committee on the Rights of the Child, General Comment No 13 (2011), Article 19: the right of the child to freedom from all forms of violence, 17 February 2011, para 31.

- 127 Committee on the Rights of the Child, General Comment No 13 (2011), Article 19: the right of the child to freedom from all forms of violence, 17 February 2011, para 35.
- 128 Committee on the Rights of the Child, General Comment No 13 (2011), Article 19: the right of the child to freedom from all forms of violence, 17 February 2011, para 33.
- 129 S Detrick *A commentary on the United Nations Convention on the Rights of the Child* Martinus Nijhoff Publishers (1999) p 321.
- 130 UNICEF, 'Implementation Handbook for the Convention on the Rights of the Child' (2008), 258.
- 131 Committee on the Rights of the Child, General Comment No 13 (2011), Article 19: the right of the child to freedom from all forms of violence, 17 February 2011, para 31.
- 132 Committee on the Rights of the Child, General Comment No 13 (2011), Article 19: the right of the child to freedom from all forms of violence, 17 February 2011, para 4.
- 133 UNICEF, 'Implementation Handbook for the Convention on the Rights of the Child' (2008), 256.
- 134 Committee on the Rights of the Child, General Comment No 13 (2011), para 21 Article 19: the right of the child to freedom from all forms of violence.
- 135 *Badraie v Commonwealth (Department of Immigration and Multicultural and Indigenous Affairs)*, (2002) AusHRC 25, para 13.3.
- 136 Committee on the Rights of the Child, General Comment No 13 (2011), Article 19: the right of the child to freedom from all forms of violence, 17 February 2011, para 19.
- 137 UNICEF, 'Implementation Handbook for the Convention on the Rights of the Child' (2008), 265.
- 138 UN Committee on the Rights of the Child, General Comment 4 (2003), [32(c)].
- 139 CRC General Comment No 6: treatment of unaccompanied and separated children outside their country of origin, 2005.
- 140 *Ibid*, para 46.
- 141 UNESCO, *Convention against Discrimination in Education*, Adopted by the General Conference at its eleventh session, 14 December 1960.
- 142 *Convention against Discrimination in Education*, Article 1.
- 143 *Ibid*, Article 3.
- 144 UN Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Belgium*, UN Doc CRC/C/15/Add.38, 20 June 1995, [9]; *Concluding Observations of the Committee on the Rights of the Child: Denmark*, UN Doc CRC/C/15/Add.33, 15 February 1995, [14].
- 145 Committee on the Rights of the Child, General Comment No 6, 2005, CRC/GC/2005/6, para 41.
- 146 See United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rules 13, 38–47.
- 147 Report of the Special Rapporteur on the right to education, Vernor Munoz, *The right to education of persons in detention*, A/HRC/AA8, 2 April 2009.
- 148 See *A Commentary on the United Nations Convention on the Rights of the Child*, S Detrick, p 630.
- 149 Rules 1 and 2.
- 150 Rule 17(b) provides 'Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum'.
- 151 Rule 17(c) provides that 'Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response'.
- 152 Communication No 560/1993, 30 April 1997.
- 153 UNICEF Implementation Handbook, 2002, p 550; UNHCR, *UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 1999, guideline 3.
- 154 See for example, Committee on the Rights of the Child, *Concluding Observations on the Committee on the Rights of the Child: Austria*, UN Doc CRC/C/15/Add.98, 7 May 1999, para 27; Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Canada*, UN Doc CRC/C/15/Add.37, 20 June 1995, para 24; and Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Sweden*, UN Doc CRC/C/15/Add.2, 18 February 1993, para 12.
- 155 UNHCR Detention Guidelines, guidelines 4 and 6 (emphasis retained). See also UNHCR, *Refugee Children: Guidelines on Protection and Care*, Geneva, 1994, ch 7, IV: 'Strong efforts must be made to have [children and their families] released from detention and placed in other accommodation'.
- 156 *Chu Kheng Lim v Minister of Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.
- 157 HRC, *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 April 1997, para 9.2. The HRC found that Australia's mandatory detention of asylum seekers is not against international law *per se*, but that the failure to ensure periodic review of whether the detention continued to be appropriate caused the detention to be arbitrary and therefore a breach of international law, paras 9.3–9.4.

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- 158 HRC, *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/ 1988, 15 August 1990, paras 5.6–5.8; HRC, *Spakmo v Norway*, Communication No 631/1995, UN Doc CCPR/C/67/D/631/1995, 11 November 1999, para 6.3; HRC, *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 April 1997; HRC, *Concluding Observations of the Human Rights Committee: Switzerland*, UN Doc CCPR/C/79/Add.70, 8 November 1996, para 15.
- 159 UNHCR Detention Guidelines, guideline 6 (emphasis in original). The guidelines come to this position by applying articles 2, 3, 9, 22 and 37 of the CRC.
- 160 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, rule 11(b)(2).
- 161 UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, guideline 1.
- 162 UNICEF, 'Implementation Handbook for the Convention on the Rights of the Child' (2008), 548.
- 163 S Detrick, *op cit*, p 633.
- 164 See eg Beijing Rules paragraphs 13.2, 28.1, 28.2 and 29.1.
- 165 See eg UN Rules paragraphs 12 and 28 and the Beijing Rules paragraph 26.2.
- 166 See eg UN Rules paragraphs 49 and 51.
- 167 See eg UN Rules paragraphs 18 and 32 and Parts (IV)E and (IV) F and the Beijing Rules paragraphs 24.1, 26.1, 26.2 and 26.6.
- 168 UN Rules, Rule 1.
- 169 Rule 17.1(b) of the Beijing Rules provides that 'Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum'.
- 170 Rule 17.1(c) of the Beijing Rules provides that 'Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response'.
- 171 See S Joseph, *The International Covenant on Civil and Political Rights*, Oxford University Press, 2000, p 217.
- 172 *Ibid*, at 188.
- 173 *Massera v Uruguay* (5/1977).
- 174 S Joseph, above n 171.
- 175 Nowak M, *UN Covenant on Civil and Political Rights CCPR Commentary* MP Engel, Germany, 1993, at 186.

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