



Australian  
Human Rights  
Commission

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# Mr VA v Commonwealth of Australia (Department of Home Affairs)

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**[2023] AusHRC 152**

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November 2023

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Australian Human Rights Commission  
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## **Mr VA v Commonwealth of Australia (Department of Home Affairs)**

[2023] AusHRC 152

*Report into arbitrary detention and a safe place of detention*

Australian Human Rights Commission 2023

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

Dear Attorney

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

Mr VA complains that the Department breached his human rights by arbitrarily detaining him and failing to treat him with humanity and with respect for his inherent dignity while he was in detention, contrary to articles 9(1) and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

Mr VA had his bridging visa cancelled because he had been charged with two criminal offences. He was acquitted of these charges and subsequently convicted of a single summary offence after a second set of charges was laid. After his visa was cancelled, he was kept in immigration detention for three years and four months, far longer than any criminal sentence that could have been imposed as a result of the single proven summary offence. A significant factor in his prolonged detention was a mischaracterisation by the detention service provider of his criminal record and, hence, his risk to the community.

As a result of this inquiry, I have found that Mr VA was arbitrarily detained, contrary to article 9(1) of the ICCPR. I have also found that certain acts, including his placement in Mackenzie compound at Villawood Immigration Detention Centre and the use of handcuffs on him, were inconsistent with or contrary to his rights under article 10(1) of the ICCPR.

Pursuant to s 29(2)(b), I have included 7 recommendations to the Department in this report, including a number of systemic recommendations to the processes that apply to the potential cancellation of a bridging visa on the basis of a criminal charge. The Department has agreed to 5 of those recommendations, either in whole or in part.

On 16 May 2023, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 21 September 2023. That response can be found in Part 6 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive style with a large initial 'R'.

Emeritus Professor Rosalind Croucher AM

**President**

Australian Human Rights Commission

November 2023

## Contents

<b>1</b>	<b>Introduction .....</b>	<b>6</b>
<b>2</b>	<b>Legal framework.....</b>	<b>9</b>
2.1	<i>Functions of the Commission .....</i>	<i>9</i>
2.2	<i>Scope of ‘act’ and ‘practice’ .....</i>	<i>10</i>
2.3	<i>Arbitrary detention.....</i>	<i>10</i>
2.4	<i>Safe place of detention.....</i>	<i>12</i>
<b>3</b>	<b>Background .....</b>	<b>15</b>
<b>4</b>	<b>Consideration.....</b>	<b>18</b>
4.1	<i>Lawfulness of detention .....</i>	<i>18</i>
4.2	<i>Risk assessment.....</i>	<i>23</i>
4.3	<i>Placement within Villawood Immigration Detention Centre .....</i>	<i>37</i>
4.4	<i>Handcuffing on escort .....</i>	<i>41</i>
4.5	<i>Being held in cells at court .....</i>	<i>44</i>
4.6	<i>Less restrictive alternatives to detention .....</i>	<i>49</i>
<b>5</b>	<b>Recommendations.....</b>	<b>53</b>
5.1	<i>Apology .....</i>	<i>53</i>
5.2	<i>Cancellation of bridging visas on the basis of criminal charges.....</i>	<i>54</i>
5.3	<i>Risk assessments based on criminal charges.....</i>	<i>58</i>
5.4	<i>Grants of bridging visas by departmental delegates .....</i>	<i>61</i>
5.5	<i>Other matters .....</i>	<i>61</i>
<b>6</b>	<b>The Department’s response to my findings and recommendations ..</b>	<b>62</b>

# 1 Introduction

1. The Australian Human Rights Commission (Commission) is conducting an inquiry into complaints by Mr VA against the Department of Home Affairs (the Department) alleging a breach of his human rights.
2. This is primarily a complaint of arbitrary detention contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup> The right to liberty and freedom from arbitrary detention is not protected in the Australian Constitution or in legislation. The High Court has upheld the legality of indefinite detention under the *Migration Act 1958* (Cth) (Migration Act).<sup>2</sup> As a result, there are limited avenues for an individual to challenge the lawfulness of their detention.
3. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights. Detention may be lawful under domestic law but still arbitrary and contrary to international human rights law.
4. In order to avoid detention being considered arbitrary under international human rights law, detention must be justified as reasonable, necessary, and proportionate on the basis of the individual's particular circumstances. There is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the immigration policy, for example the imposition of reporting obligations, sureties or other conditions, in order to avoid the conclusion that detention was 'arbitrary'.
5. Mr VA makes a number of allegations that his detention was unlawful. I find that these allegations have not been substantiated. However, this does not provide a complete answer to the question of whether his detention was arbitrary, or whether his treatment in detention was appropriate.
6. Mr VA was taken into immigration detention because he had been charged with two offences in relation to an allegation that he had exposed himself while on a train. He was ultimately acquitted of these two charges. While in detention he was charged with similar offences in relation to a separate incident. He was ultimately convicted of a single summary offence and was required to enter into a good behaviour bond for a period of 12 months.
7. The maximum penalty for the summary offence for which Mr VA was convicted was a fine of 10 penalty units (\$1,800 at the relevant time),<sup>3</sup> or

imprisonment for six months.<sup>4</sup> However, Mr VA was kept in immigration detention for three years and four months, more than six times the maximum period for which he could have been imprisoned had his offence been of the most serious kind, which it was not.

8. While in immigration detention, Mr VA's criminal proceedings were wrongly described on both the Security Risk Assessment Tool (SRAT) used by Serco, the Department's detention services provider, and on the Community Protection Assessment Tool (CPAT) used by the Department. I find that the misdescription of Mr VA's conduct caused him to be incorrectly assessed on both the SRAT and the CPAT as being a 'high' risk. Importantly, the CPAT is the tool used by the Department when determining whether a person should be in held detention or in the community.
9. By 1 September 2017, when Mr VA's first instance proceedings were finalised, it was clear that his only criminal conduct was a single summary offence. There were no other adverse factors on his risk assessment that could have led to a conclusion that he was 'high' risk. He was not a national security risk; he had not been involved in any incidents in detention; he did not have any other criminal history.
10. If the CPAT had accurately recorded the nature of Mr VA's criminal offending, there was no reasonable basis upon which a finding could have been reached that Mr VA was a 'high' risk to the community. In those circumstances, the only appropriate placement recommendation was Tier 1: community placement.
11. As a result, I find that Mr VA's detention after 1 September 2017 was 'arbitrary', contrary to article 9 of the ICCPR. His ongoing detention in closed detention facilities could not be justified as reasonable, necessary or proportionate to the aim of ensuring the effective operation of Australia's migration system. This is because the reasons put forward to justify his placement in held detention were based on a fundamentally erroneous understanding of the relevant facts.
12. Further, for the reasons set out in paragraphs 226 to 235 below, it was open to the Department at that stage to grant Mr VA a bridging visa E, or for the Minister to make a residence determination in his favour. I find that this is what should have occurred. It appears that the option of a departmental delegate of the Minister granting Mr VA a bridging visa was overlooked until March 2020. I understand that the Department has since changed its procedures to ensure that consideration is given to such

options at the earliest opportunity. I commend the Department for this change in its procedures.

13. While in immigration detention, Mr VA was initially classified by Serco as being 'high risk' on the SRAT. He was placed with high risk detainees in Mackenzie, a medium to high security compound at Villawood Immigration Detention Centre (VIDC).<sup>5</sup> Mr VA expressed concern about being held in Mackenzie compound on a number of occasions and reported that another detainee had demanded cigarettes from him and threatened to kill him. He was not transferred to a lower security compound and was later seriously assaulted by other detainees and required hospital treatment. Around eight months after this assault, he was transferred to La Trobe, one of the lower security compounds at VIDC.<sup>6</sup> A year after this assault, Mr VA obtained a copy of his SRAT following a freedom of information request and made a formal complaint to Serco about it. As a result of this complaint, Serco identified that it had erroneously categorised him as 'high' risk on the SRAT and downgraded his risk rating to 'medium'.
14. I find that Serco's decision to place Mr VA in Mackenzie, and its failure to move him to a lower risk compound in response to his concerns, was materially affected by the erroneous assessment of his risk. At least by 1 September 2017, when the first instance proceedings against him were finalised, Serco should have been aware of Mr VA's actual risk, and should have responded to his concerns about his placement at VIDC by moving him to a lower risk compound. If Serco had done this, the serious assault on Mr VA may have been avoided. I find that the failure to adequately manage the risks faced by Mr VA was contrary to the obligation to Mr VA under article 10 of the ICCPR to treat him with humanity and with respect for his inherent dignity.
15. While not in an immigration detention facility, Mr VA was treated as though he were a 'high risk' detainee. This included being handcuffed on each occasion that he was taken out of held detention, including to attend court and medical appointments. From 2 September 2017 until 17 July 2018, it appears that Mr VA was required to be handcuffed on 17 occasions: twice to attend court, once to attend hospital following the serious assault on him, and 14 times to attend torture and trauma counselling.
16. I find that the use of handcuffs on Mr VA after 1 September 2017 was not warranted and could not be justified as a necessary or proportionate measure for the safety of himself or others. Serco failed to undertake an appropriate re-evaluation of the risk posed by Mr VA after 1 September 2017 which, if undertaken, should have resulted in a reduction in his risk

rating. I find that the continued use of handcuffs on Mr VA after 1 September 2017 amounted to inhumane treatment, contrary to article 10 of the ICCPR.

17. In section 5 of this report, I set out a number of systemic recommendations, particularly to the processes that apply to the potential cancellation of a bridging visa on the basis of a criminal charge. In summary, I have recommended that cancellation should only occur when the criminal charge is objectively serious; the person whose visa is cancelled should have 28 days to challenge the cancellation; and if the charges are withdrawn or dismissed, this should automatically trigger a reassessment of the cancellation decision. I have also made a number of recommendations about the process for assessing risk based on criminal charges. I have recommended that the Department develop criminal law expertise for case managers responsible for completing the Community Protection Assessment Tool; that risk assessments based on criminal charges should be updated when criminal proceedings are finally determined; and that assessments of risk properly distinguish between being charged with a criminal offence and being convicted of a criminal offence.
18. Given the legitimate concerns held by Mr VA about how his criminal record was interpreted and the impact that this had on his reputation, I have also recommended that the Commonwealth provide him with a formal apology.

## **2 Legal framework**

### **2.1 Functions of the Commission**

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

22. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.<sup>7</sup>

## **2.2 Scope of ‘act’ and ‘practice’**

23. The terms ‘act’ and ‘practice’ are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
24. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
25. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or those acting on its behalf.<sup>8</sup>

## **2.3 Arbitrary detention**

26. Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

27. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
- (a) ‘detention’ includes immigration detention;<sup>9</sup>
  - (b) lawful detention may become arbitrary when a person’s deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth’s legitimate aim of ensuring the effective operation of Australia’s migration system;<sup>10</sup>
  - (c) arbitrariness is not to be equated with ‘against the law’; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;<sup>11</sup> and
  - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>12</sup>

28. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee found detention for a period of 2 months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.<sup>13</sup> Similarly, the Human Rights Committee considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was 'considerably in excess of what is necessary'.<sup>14</sup>
29. The Human Rights Committee has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.<sup>15</sup>
30. Relevant jurisprudence of the Human Rights Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.<sup>16</sup>

31. Under international law, the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, continuing immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth of Australia) in order to avoid being 'arbitrary'.<sup>17</sup>

32. It will be necessary to consider whether the detention of Mr VA in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system, and therefore 'arbitrary' under article 9 of the ICCPR.

## **2.4 Safe place of detention**

33. Australia has obligations under articles 9(1) and 10(1) of the ICCPR, respectively, to uphold the right to security of person, and to ensure that people in detention are treated with humanity and respect for the inherent dignity of the human person.
34. The right to security of person protects individuals against intentional infliction of bodily or mental injury, including where the victim is detained.<sup>18</sup> The right to personal security also obliges States parties to take appropriate measures to protect individuals from foreseeable threats to life or bodily integrity proceeding from private actors. States parties must take both measures to prevent future injury and retrospective measures, such as enforcement of criminal laws, in response to past injury.
35. The rights guaranteed in article 10(1) of the ICCPR are afforded to people held in immigration detention centres<sup>19</sup> — both private and State facilities.<sup>20</sup>
36. Article 10(1) imposes a positive obligation on States to ensure that detainees are treated with humanity and respect for their inherent dignity.<sup>21</sup> This is in recognition of the fact that detained persons are particularly vulnerable because they are wholly reliant on a relevant authority to provide for their basic needs.<sup>22</sup> In this case, the relevant authority is the Commonwealth of Australia through the Department and the service providers who act on its behalf.
37. These international law commitments require Australia to ensure that people in immigration detention are treated fairly and reasonably, and in a manner that upholds their dignity.
38. Related obligations are recognised by the common law of Australia and through the common law duty of care that the Department and its service providers owe to people in immigration detention.
39. General Comment No 21 of the Human Rights Committee sets out the content of the obligation in article 10(1) of the ICCPR, stating:

Article 10, paragraph 1, imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.<sup>23</sup>

40. Professor Manfred Nowak has commented on the threshold for establishing a breach of article 10(1), when compared to the related prohibition against 'cruel, inhuman or degrading treatment' in article 7 of the ICCPR, as follows:

In contrast to article 7, article 10 relates only to the treatment of persons who have been deprived of their liberty. Whereas 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 10 primarily imposes on States parties a positive obligation to ensure human dignity. 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 and human rights (food, clothing, medical care, sanitary facilities, education, work, recreation, communication, light, opportunity to move about, privacy, etc). ... Finally it is again 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'.<sup>24</sup>

41. These conclusions are also evident in the jurisprudence of the Human Rights Committee, which discusses the positive obligation on relevant authorities to treat detainees with humanity and respect for their dignity.<sup>25</sup>
42. Joseph, Schultz and Castan point out that article 10(1) obliges State Parties to provide protection for detainees from other detainees.<sup>26</sup> In reaching that conclusion, the authors cited comments made by the Human Rights Committee in its 'Concluding Observations on Croatia' when it stated that the 'Committee is concerned at reports about abuse of prisoners by fellow prisoners and regrets that it was not provided with information by the State party on these reports and on the steps taken by the State party to ensure full compliance with article 10 of the [ICCPR]'.<sup>27</sup>

43. The content of article 10(1) has been developed through a number of UN instruments that articulate minimum international standards in relation to people deprived of their liberty,<sup>28</sup> including:
- a. the *Standard Minimum Rules for the Treatment of Prisoners* (Mandela Rules),<sup>29</sup> and
  - b. the *Body of Principles for the Protection of all Persons under Any Form of Detention* (Body of Principles).<sup>30</sup>
44. In 2015, the Mandela Rules were adopted by the United Nations. They provide a restatement of a number of United Nations instruments that set out the standards and norms for the treatment of prisoners, and represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.<sup>31</sup>
45. The Human Rights Committee invites State Parties to indicate in their periodic reviews the extent to which they are applying the Mandela Rules and the Body of Principles.<sup>32</sup> At least some of those principles have been determined to be minimum standards regarding the conditions of detention that must be observed, regardless of a State's level of development.<sup>33</sup>
46. Several of the Mandela Rules are relevant to the safety of detainees in respect of the behaviour of other detainees, and the general security and good order of detention facilities, including the following:
- Rule 1: All prisoners shall be treated with the respect due to their inherent dignity and value as human beings ... the safety and security of prisoners ... and visitors shall be ensured at all times.
- Rule 2: ... prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings.
- Rule 12: ... Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the prison.
- Rule 36: Discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well ordered community life.
47. From the above, the following conclusions may be drawn:
- a. article 10(1) of the ICCPR imposes a positive obligation on State parties to take action to ensure that detained persons are treated with humanity and dignity;

- b. the threshold for establishing a breach of article 10(1) of the ICCPR is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR, which is a negative obligation to refrain from such treatment;
  - c. article 10(1) of the ICCPR may be breached if a detainee's rights, protected by one of the other articles of the ICCPR, are breached—unless that breach is necessitated by the deprivation of liberty;
  - d. minimum standards of humane treatment must be observed in detention conditions, including immigration detention; and
  - e. article 10(1) of the ICCPR requires that detainees and prisoners are provided with a minimum of services to satisfy their basic needs.
48. In my view, and consistent with past Commission inquiries,<sup>34</sup> I consider that detainees in immigration detention have a basic need for their safety and security to be protected while in detention. Australia must ensure that immigration detainees have this basic need met in order to fulfil the obligations imposed on it by article 10(1) of the ICCPR to treat detainees with humanity and respect for the inherent dignity of the human person.

### **3 Background**

49. Mr VA is a citizen of India. He first arrived in Australia on 15 November 2010 on a subclass 456 Business (Short Stay) visa. He subsequently applied for a protection visa on two occasions, each of which was refused. Over a number of years, he sought merits review and judicial review of these decisions. He was granted bridging visas while these reviews were carried out and, except for short periods between the grant of bridging visas, he was lawfully in Australia for a period of almost six years.
50. While the initial visa granted to Mr VA permitted him to work in Australia, at least some of his subsequent bridging visas did not have work rights. This included a visa granted on 4 April 2016, which he held for seven months before being taken into immigration detention. Mr VA says that without the ability to work he was not able to afford housing and was homeless. It appears that he may have been homeless for at least a year and living on trains in Sydney prior to being taken into immigration detention.
51. At around 5.15am on 11 November 2016, while he was travelling on a train on the North Shore line, Mr VA was arrested by NSW Police in relation to

an alleged incident on 9 November 2016. He was taken into police custody. Mr VA did not have any prior criminal record. Police records indicate that this was Mr VA's first time in police custody and that he appeared overwhelmed by the situation but that he was calm and cooperative.

52. Police alleged that a woman had witnessed him masturbating two days previously while travelling on the same train. Mr VA was charged with two offences:
  - committing 'an act of indecency with or towards a person of the age of 16 years or above' (*Crimes Act 1900* (NSW), s 61N(2) as it was at the time)
  - wilful and obscene exposure in a public place (*Summary Offences Act 1988* (NSW), s 5).
53. At around 1.20pm he was brought before a court in relation to these charges. On return to the police station, police made contact with a hostel providing shelter for men at risk of homelessness and also with the Department. The Department indicated that it would conduct an urgent review of Mr VA's immigration status. Following this review, the Department told police that it was considering cancelling Mr VA's visa and officers would be attending the police station to interview him.
54. At around 2.30pm, Mr VA was again brought before the court and was granted conditional bail. The conditions of his bail were that he was to reside at a particular hostel, not travel on trains from 9.00pm to 6.00am and appear in court at the next return date in three days' time. That is, having been informed of the nature of the charges, the court did not consider that it was necessary for the safety of the community for Mr VA to be held on remand.
55. At around 3.45pm, approximately 2 hours after they had been informed of Mr VA's arrest, officers of the Department attended the police station and conducted an interview with him. As a result of that interview, they cancelled his visa under s 116 of the Migration Act. The reasons for cancellation are referred to in more detail below. Mr VA was taken into immigration detention and transferred to VIDC.
56. As a result of the cancellation of his visa, Mr VA would spend the next three years and four months in immigration detention. While in immigration detention, he was acquitted of the charges laid on the day he was arrested.

57. On or about 2 February 2017, after Mr VA had been in immigration detention for about two and a half months, police visited him in detention and charged him with offences under the same two provisions in relation to a separate incident alleged to have taken place on a train on 8 November 2016, the day before the first incident.
58. In relation to the second alleged incident: the charge of committing an act of indecency was dismissed on 26 July 2017 on the basis that there was no prima facie case. Mr VA was convicted of a single summary offence of wilful and obscene exposure in a public place and was sentenced on 1 September 2017. The court found that Mr VA's conduct did not warrant any period of criminal incarceration. Instead, he was required to enter into a good behaviour bond for a period of 12 months.
59. In relation to the first alleged incident, Mr VA was acquitted of both charges following a hearing on 8 August 2017. That is, he was acquitted of the charges that were the sole reason for the cancellation of his visa.
60. Mr VA sought to appeal his conviction of the summary offence to the District Court. This appeal was dismissed on 31 January 2018.
61. After the conclusion of all of his criminal matters, which were determined not to warrant any period of incarceration, whether for the protection of the public or for any other reason, it would be almost two years and two months before Mr VA was eventually released from immigration detention.
62. The maximum penalty for the summary offence for which Mr VA was convicted was a fine of 10 penalty units (\$1,800 at the relevant time),<sup>35</sup> or imprisonment for six months.<sup>36</sup> In total, Mr VA's period of administrative immigration detention was more than six times the maximum period for which he could have been imprisoned had his offence been of the most serious kind, which it was not.
63. While in immigration detention, Mr VA was classified as being 'high risk'. It appears that the only material basis for this classification was a view formed about his criminal record, comprising a single summary offence. He was placed with other high risk detainees in a medium to high security compound and was assaulted by other detainees.
64. While not in an immigration detention facility, Mr VA was treated as though he were a 'high risk' detainee. This included being handcuffed on each occasion that he was taken out of held detention, including to attend court and medical appointments.

## 4 Consideration

### 4.1 Lawfulness of detention

65. Article 9 of the ICCPR prohibits both unlawful detention and arbitrary detention. Mr VA alleges that his detention was unlawful. In making that claim, Mr VA points to two matters.
- (a) Grounds for cancellation of visa
66. First, he says that it was not open to the Department to cancel his visa on the basis of criminal charges. He says that he had not signed a code of behaviour in accordance with public interest criterion 4022 and that his visa was not subject to visa condition 8564.
67. Public interest criterion 4022 provides that a visa applicant may be required to sign a code of behaviour in a form approved by the Minister. Among other things, the code of behaviour requires visa holders to comply with the law. Visa condition 8564 is a condition that may be imposed on a visa requiring the holder not to engage in criminal conduct.
68. The Department confirmed that visa condition 8564 was not a condition attaching to Mr VA's bridging visa and was not considered as part of the decision to cancel his visa. Instead, Mr VA's visa was cancelled under s 116(1)(g) of the Migration Act and reg 2.43(1)(p)(ii) of the Migration Regulations 1994 (Cth) (Migration Regulations). Section 116(1)(g) provides that the Minister may cancel a visa on grounds prescribed by the regulations. Regulation 2.43(1)(p)(ii) provides that the Minister may cancel a bridging visa (subclass 050 or 051) if satisfied that the holder has been charged with an offence against the law of the Commonwealth, a State, a Territory or another country. It is enough for cancellation that the person has been *charged* with an offence, they need not have been convicted of the offence.
69. At the time that Mr VA's visa was cancelled, ministerial Direction 63 directed delegates about how to decide whether to cancel a non-citizen's visa under s 116(1)(g), relying on the prescribed ground in reg 2.43(1)(p)(ii). The Direction provided that this ground is enlivened when a visa holder is charged with 'any offence, irrespective of the seriousness of the offence'.<sup>37</sup> The direction contained both primary considerations and secondary considerations. The only primary consideration relevant to Mr VA's case was 'the Government's view that the prescribed grounds for cancellation ... should be applied rigorously in that every instance of non-compliance against these regulations should be considered for cancellation, in

accordance with the discretionary cancellation framework'.<sup>38</sup> This primary consideration mandated at least *consideration* of cancellation in Mr VA's case.

70. There were a number of relevant secondary considerations set out in Direction 63.<sup>39</sup> These included (but were not limited to):
- the seriousness of the alleged offence
  - the possible consequences of cancellation, including the prospect of indefinite detention
  - the degree of hardship that may be experienced by the visa holder if their visa is cancelled.
71. Officers of the Department provided Mr VA with a 'Notice of intention to consider cancellation under s 116 of the Migration Act 1958' (NOICC) on 11 November 2016, during their interview with him. The NOICC recorded that Mr VA made the following submissions as to why his visa should not be cancelled:
- he was not guilty of the offences with which he had been charged on 11 November 2016 – this was ultimately proven to be correct
  - he was homeless and living on the train, with nowhere to go, and had been doing this for a year
  - the Department of Immigration was responsible for the position he found himself in, because it refused to grant him work rights.
72. Mr VA claims that the Department should have, but did not, consider a number of additional factors including that if his visa was cancelled, he would likely face prolonged detention (including because he had made an application for a protection visa that had not yet been finally determined), and that he had behaved in a compliant and cooperative way when interviewed (as recorded on the NOICC).
73. The NOICC does not provide reasons that indicate how the primary and secondary considerations were weighed up by the officer making the cancellation decision. The officer ticked a box next to a statement that read:
- After weighing up all of the information available to me, I am satisfied that the grounds for cancelling the visa outweigh the reasons for not cancelling. I have therefore decided to cancel the visa.

74. Effectively, the officer made a decision that the fact that Mr VA had been charged with two offences outweighed all of the other submissions he made about why his visa should not be cancelled.
75. Direction 63 provides that if a visa holder has been charged with an offence, but the charge is dismissed 'cancellation is not appropriate'.<sup>40</sup> Ultimately, the charges against Mr VA that formed the basis of the cancellation of his visa were dismissed. However, this was after his visa had already been cancelled. At the time of cancellation, it was open to the officer making the decision to cancel his visa.
76. There may well have been good arguments in Mr VA's favour, if he had sought merits review of this decision, that the decision was not the 'correct and preferable' decision. The Migration Act provides a very limited opportunity for people in Mr VA's situation to seek merits review: as he had been taken into immigration detention, any application to the Administrative Appeals Tribunal had to be made within 2 working days of cancellation.<sup>41</sup> The Commission has previously described why this time period is inadequate.<sup>42</sup>
77. Although there may have been good reasons to review the decision on its merits, Mr VA did not seek merits review of the decision in the AAT and the Commission's function in this inquiry is not to conduct a review on the merits of the cancellation decision.
78. In this inquiry, Mr VA has asked the Commission to find that the cancellation of his visa was unlawful. Mr VA did not seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) within the time required by that Act. Mr VA suggests that the decision maker failed to take into account a range of issues, however, it appears that the decision maker took into account the submissions made by him as recorded on the NOICC and it does not appear that Mr VA now says that he made submissions that were not recorded on the NOICC. I am not able to be satisfied that the officers failed to take into account matters that they were bound to take into account under Direction 63. I have formed the view that Mr VA's visa was validly cancelled under s 116(1)(g) of the Migration Act in the sense that this decision was one that was open to a decision maker to make. While I have expressed this view for the purposes of assessing whether there has been a breach of article 9 of the ICCPR, this view does not preclude Mr VA seeking other relief from a court or tribunal in relation to the lawfulness of his visa cancellation if he considers that my view is wrong.

(b) Notice of cancellation of visa

79. The second ground on which Mr VA considered that his visa cancellation was unlawful related to the circumstances in which his visa was cancelled. As noted above, officers of the Department attended the police station where Mr VA was held at 3.45pm on 11 November 2016. Mr VA was given notice at 3.58pm that officers of the Department intended to cancel his visa.
80. The standard form of the NOICC instructs officers that there should be 'a reasonable period' between giving a person the NOICC and the commencement of an interview during which the person is able to make submissions about whether or not their visa should be cancelled. It appears from the NOICC that Mr VA was told that the interview would commence at 4.10pm. However, there is also a hand-written annotation on the form that reads: 'Client waived ten minutes, wanted to start interview now.' The interview commenced at 4.00pm.
81. At 4.32pm, the officers of the Department gave Mr VA a notification of their decision to cancel his visa. At 4.45pm, Mr VA was detained by officers of the Department on the basis that he was an unlawful non-citizen.
82. Mr VA now says that he was not provided with a reasonable period prior to the commencement of the interview, and that this rendered the cancellation decision unlawful.
83. There is a statutory procedure for cancelling visas under s 116 of the Migration Act, and that procedure is set out in Part 2, Division 3, Subdivision E of the Act. Section 118A provides that the subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with. The visa holder must be given notice of the proposed cancellation, including information relevant to why the visa may be cancelled, and invited to comment on it.<sup>43</sup> The invitation to give comments may be by way of an interview between the visa holder and a departmental officer. If the invitation to give comments is to be at an interview, the interview is to take place at a time specified in the invitation, being a time within a prescribed period or, if no period is prescribed, within a reasonable period.<sup>44</sup> It does not appear that a period has been prescribed for this purpose.<sup>45</sup> The effect is that an interview must be held within a reasonable period of time. However, the legislation does not explicitly provide for any particular period of time to elapse *prior* to an interview commencing.

84. Mr VA referred to the case of *Chiu v Minister for Immigration* [2014] FCCA 2596. This case dealt with the question of whether a visa holder, Mr Chiu, was accorded procedural fairness in relation to the conduct of an interview during which his visa was cancelled under s 116. Mr Chiu said that he did not want to wait to start the interview after a NOICC had been given to him, and was told by the departmental officer that 'it was a legal requirement that he be given time to consider' the NOICC.<sup>46</sup> The particular legal requirement was not identified. Mr Chiu was given 10 minutes to consider the NOICC and later alleged that this was not sufficient time.<sup>47</sup> The Court considered that 10 minutes was a short period but held that Mr Chiu did not demonstrate why it was not a reasonable period in the circumstances (or why it rendered the decision to cancel his visa legally unreasonable).<sup>48</sup> Among other things, the Court said that Mr Chiu had 'not shown how he would have employed additional time to any material effect'.<sup>49</sup>
85. I am not persuaded that there is a rule prescribing a particular time that must elapse prior to an interview under s 121(3) of the Migration Act being conducted.<sup>50</sup> Nevertheless, the scheme of ss 119–121 of the Act suggests that visa holders are to be given a reasonable opportunity to respond to adverse information and give reasons why their visa should not be cancelled.<sup>51</sup> In an appropriate case, this may include giving the applicant sufficient time to prepare for an interview.<sup>52</sup>
86. Here, there is some evidence that Mr VA declined an offer from a departmental officer to wait 10 minutes before the interview commenced. On the information currently before the Commission, it does not appear that he disputes that this offer was made or that he declined it.
87. During the course of the interview, Mr VA was asked why his visa should not be cancelled. The NOICC records Mr VA saying:
- I am not guilty. I do not believe grounds [for cancellation] exist.
- ...
- My visa should not be cancelled because it is because of immigration that I am in this situation. I am on the street. I wanted to get work rights but immigration said no. I wanted to go to a detention centre but immigration said no.
88. He was also asked about the circumstances in which the alleged grounds for cancellation arose and whether there were any extenuating circumstances beyond his control that led to the grounds existing. The NOICC records Mr VA saying:

I am homeless. I am living in the train. I have nowhere to go. I worry about the people, people ask me for money. They are drunk. I sleep in the quiet carriage. I have been doing this for one year.

89. Mr VA says that he was not provided with enough time to prepare for this interview and that if he had been given a reasonable period of time he 'could have satisfied the delegate that the visa should not [have been] cancelled'. However, Mr VA has not made any submissions about what else he would have said to the departmental officers if he had been provided with additional preparation time prior to the interview.
90. I have considered the submissions made by Mr VA to the departmental officers as recorded in the interview record. I have also considered the submissions subsequently made by Mr VA about whether his visa was validly cancelled. I am not satisfied that the way in which departmental officers notified Mr VA of their intention to consider cancelling his visa were contrary to the requirements of ss 119–121 of the Migration Act. As a result, I am not satisfied that the cancellation was unlawful for this reason.
91. This section has focused on the lawfulness of the steps that led to Mr VA's detention. I consider the separate question of whether Mr VA's detention was arbitrary in section 4.6 below.

## **4.2 Risk assessment**

92. After Mr VA's visa was cancelled, he was taken to VIDC and held there for the next three years and four months.
93. Mr VA made a number of complaints about how he was treated in immigration detention at VIDC and whether proper consideration was given to alternatives to closed detention. In particular, Mr VA complains that:
- he was placed in a compound reserved for high risk detainees where he was the victim of an assault
  - he was required to wear handcuffs when escorted to court appointments outside of the detention centre
  - he was held in a cell at court while waiting for hearings
  - he was not considered for less restrictive alternatives to closed immigration detention.

94. Each of these complaints is intimately connected to an assessment of Mr VA's risk. For the reasons described in more detail below, I find that Mr VA was wrongly assessed through a number of processes as being a 'high' risk detainee. These assessments materially contributed to decisions about where to place him within the centre, whether he would be required to be handcuffed when outside the centre, whether he would be required to be held in a cell while at court awaiting his hearing, and whether he would have his case referred to the Minister for consideration of less restrictive alternatives to closed immigration detention.
95. Given the central importance of the risk assessments, these will be considered first, before assessing whether the other conduct that Mr VA complains of was inconsistent with or contrary to his human rights.
96. There were three types of risk assessment applied to Mr VA:
- a Detainee Reception Risk Assessment carried out on arrival on 11 November 2016 to determine his initial risk level and how he should be treated for the first month of his detention
  - a Community Protection Assessment Tool (CPAT) applied by the Department on 28 November 2016 and 13 November 2017 to determine whether Mr VA should be placed in held detention or in the community
  - a Security Risk Assessment Tool (SRAT) applied by Serco monthly after the first month of detention to determine where Mr VA should be accommodated within VIDC and how he should be treated when on escort outside VIDC.

(a) Risk assessment at reception

97. On the day that Mr VA was first taken into immigration detention at VIDC, a Detainee Reception Risk Assessment was carried out. This assessment noted that:
- it was 'unknown' whether Mr VA had any indicators for criminal history or aggression
  - Mr VA had no self-harm indicators
  - Mr VA had no escape indicators, other than being a single adult male who had been in immigration detention for less than 30 days.
98. In 2019, the Commission conducted a detailed inquiry into the *Use of force in immigration detention*. As the Commission reported in that inquiry, prior to Mr VA's detention it was the Department's policy that:

- any single adult male or single adult female
  - who either
    - had been in detention for less than 30 days; or
    - had a criminal background involving violence or aggression, or any attempted (or actual) abscond/escape, violent or escape oriented history from detention or any form of custody; and
  - had no physical impediments that would impair their ability to overpower or abscond from escort staff
  - would be deemed to be 'high risk'.<sup>53</sup>
99. At the time of Mr VA's detention, the policy had been amended to apply in the first 28 days of a person's detention and did not apply where there was sufficient knowledge or information about the detainee to inform the risk assessment.<sup>54</sup>
100. The Detainee Reception Risk Assessment form lists Mr VA's 'Initial DSP Placement Risk' and his 'Initial DSP Escort Risk' as being 'high'. The Department confirmed that these assessments represented the 'default' risk assessments for someone in Mr VA's circumstances. He was a single adult male who had been in detention for less than 28 days without any physical impediments.
101. It appears that the first substantial assessment of Mr VA's risk was done on 8 December 2016 when his criminal charges were reviewed. This is discussed from paragraph 122 below.
- (b) Community Protection Assessment Tool
102. The Community Protection Assessment Tool (CPAT) is a risk-based placement tool used to help make assessments of the suitability of detainees for release into the community.<sup>55</sup> The CPAT results in a risk category or 'tier' that corresponds to a recommended kind of placement for a detainee.
103. It appears that the structure of these tiers was first proposed in a Detention Capability Review prepared by the Department in 2016,<sup>56</sup> and endorsed by the Department's Executive.<sup>57</sup> The Final Report of that review recommended four tiers of placement:

- **Tier 1: community placement.** People in this category would have been assessed as posing a low to medium risk to both safety and security and resolution of their immigration status.<sup>58</sup> They should generally be granted a bridging visa unless legal or policy reasons mean that they cannot be given lawful status in which case they would be considered for a residence determination.
- **Tier 2: transit accommodation.** This category would be used for people who are:
  - subject to airport turnaround
  - ready to be removed and cannot be removed directly from the community
  - awaiting initial health, character and security checks before transitioning into the community
  - required to be in held detention for a short period for other reasons.<sup>59</sup>

People in this category would be placed in held detention for a short period of time in Immigration Transit Accommodation to support resolution of their immigration status. The Department said that this would 'reflect the original purpose' of Immigration Transit Accommodation.

- **Tier 3: high security detention.** This category would be used for people who 'even with the imposition of the most stringent conditions, cannot be managed safely in the community' while their immigration status is resolved.<sup>60</sup> They would be held in Immigration Detention Centres. Some people would only require short term detention, while others may be in detention for longer periods while their immigration status was resolved. While there would be 'no mandated maximum timeframe' for Tier 3 placement, there would need to be 'regular review of the individual's placement'.<sup>61</sup>
- **Tier 4: specialised detention.** This category would be used for people who would otherwise be in Tier 3 but who 'pose an extreme risk to themselves or others' and are better managed by specialist providers, for example prisons or mental health facilities, than by the Department.<sup>62</sup>

104. However, as recognised by Mr Robert Cornall AO in his Independent Detention Case Review conducted for the Department in March 2020, this

is effectively a two tier placement model: 'low risk individuals are placed in the community and all other detainees are placed in held detention'.<sup>63</sup>

105. Mr Cornall described the operation of the CPAT in the following way:

Departmental officers enter particulars online about whether the person: is removal ready; has engaged with the Department about status resolution; is a risk to national security; has established the person's identity; has engaged in criminal behaviour; and has behaved satisfactorily in detention.

These factors are rated green, amber or red and the CPAT automatically makes a placement recommendation, such as Tier 1 – bridging visa.<sup>64</sup>

106. The Department has briefed the Commission about the operation of the CPAT. It said that the CPAT is a decision support tool that assists Status Resolution Officers to consider the most appropriate placement option for clients while status resolution processes are being undertaken. While the CPAT will produce a placement recommendation based on the information entered into the tool, it does not make the final decision. Nevertheless, the CPAT is a very important input into that decision making process.

107. On 28 November 2016, a CPAT was completed for Mr VA. There are four 'harm indicators' on the CPAT, dealing with: national security, identity, criminality and behaviour impacting others.

108. The CPAT recorded that there was no information available to indicate any national security concerns. There were no identity issues: Mr VA's identity was established to the satisfaction of the Department. There were no incidents of concern in the two and a half weeks since Mr VA had been detained. The CPAT recorded that he had 'not currently presented with any behavioural concerns to detention service providers'.

109. The only negative indicators on Mr VA's CPAT related to the criminal charges that he faced. The CPAT recorded, wrongly, that that he had been charged with an offence of 'commit act of indecency *with* person 16 year or over' (emphasis added). The Department says that this description was 'transcribed from the NSW Police Factsheet and the Court listing'. However, this was an incomplete summary of s 61N(2) of the *Crimes Act 1900* (NSW) (see paragraph 52 above) and did not accurately describe the actual charge that Mr VA faced. In some documents, for example, the cover sheet for the brief of evidence, a summary of the language of s 61N(2) is given as: 'Commit act of indecency with person 16 years or

over-T2'. It appears that this is what the Department mistakenly relied upon. However, when the details of the offence are examined, for example, in an early Court Attendance Notice issued to Mr VA while he was in immigration detention containing the particulars of the actual charge, the offence is described more accurately as follows:

Crimes Act 1900, Section 61N(2)

Law Part Code 296 – T2

Commit act of indecency

between 4.27am and 4.50am on 09/11/2016 at St Leonards

did commit an act of indecency *towards* [name], a person above the age of 16 years, to wit, 38 years of age.

(emphasis added)

110. The CPAT also recorded, again wrongly, that his charges 'relate[d] to a minor person involving violence'. Neither of the offences that Mr VA had been charged with involved any allegation of violence. The offences did not involve a minor. He was not charged with an act of indecency *with* any person. The relevant charge involved an act of indecency *towards* another person (who, it was alleged, was an adult).
111. The Department says that when completing a CPAT, it relies on information provided to it from relevant law enforcement and judicial authorities insofar as the CPAT relates to criminal offending. In this case, it appears that part of the reason for incorrectly recording the nature of Mr VA's alleged criminal offences was the Department's reliance on the summary of the offence provision given in some police and court documents. However, there was other material available that provided further context to these offences and indicated that they were less serious than the Department appears to have assumed. At least part of the problem was a failure by departmental officers to properly interpret material it had been given from law enforcement and judicial authorities. For example, none of the material provided by law enforcement or judicial authorities indicated that Mr VA's offences involved a minor.
112. As a result of the (incorrect) recital of his criminal charges, the CPAT rated his risk of harm to the community as 'high'. It therefore recommended that his appropriate placement was 'Tier 3 – Held Detention'. The relevant Status Resolution Officer did not make a decision to substitute this recommendation with a different assessment. As a result, Mr VA was detained at VIDC, where he was held for the next three years and four months, rather than being referred for consideration of less restrictive forms of detention.

113. The Department provided the Commission with a report prepared by consulting firm EY titled 'MIR: Status Resolution – Review of Decision Support Tools', dated 3 August 2016. This report assessed the effectiveness of the CPAT in a pilot study of 118 cases in which the CPAT tool was used. This report was provided by EY to the Department shortly before the first CPAT was used in relation to Mr VA in November 2016.
114. The EY report found that 1,082 individual ratings (79%) across the 118 CPAT tools in the sample raised no issues of concern. However, there were issues in 290 individual ratings (21%) across the sample, or an average of around 2.5 issues of concern per tool. Issues included missing ratings (5%), no evidence to support the rating (6%), insufficient evidence to support the rating (1%), incorrect rating (8%) and the inclusion of irrelevant information (2%).<sup>65</sup> The report identified two key limitations in the use of the tool at that time that are of relevance for Mr VA's case.
115. First, EY found that the CPAT was able to support consistent placement recommendations for clients that were identified at the extreme ends of the risk rating spectrum (either very low or very high risk). However, the CPAT was 'not yet able to support consistent placement recommendations for almost two-thirds of cases where there is greater complexity, ambiguity or competing risk factors'.<sup>66</sup>
116. Secondly, a particular weakness in the overall process was the capability of case managers to make assessments about certain kinds of risk, including the risks arising from criminality. EY said:
- Specific questions in the tool, particularly those relating to national security, criminality and health, sometimes required specialist knowledge that case managers do not have. Where case managers are not experts in a particular area and are making decisions on subject matter where they have little experience, the reliability of placement recommendations is impaired since the inputs used to make that decision are not professionally assessed.
- ...
- Criminality, in particular, presented a problem for the tool. Across the pilot, this was a risk dimension with one of the highest rates of incorrect ratings assessed.<sup>67</sup>
117. In the sample examined by EY, criminality was incorrectly assessed 14% of the time. Of those cases, 41% involved a risk assessment that was too high, and 59% involved a risk assessment that was too low.<sup>68</sup> The problems in accurately assessing criminality, potentially due to lack of specialist

knowledge in interpreting law enforcement and court documents, also affected Mr VA's case.

118. EY recommended that the Department explore arrangements to access specialist expertise in these areas. It said that this could involve the use of external service providers, augmented with training for case managers to enable them to better engage with technical information provided by specialists.<sup>69</sup>
119. The report from EY was provided to the Department in 2016. I understand that as part of the Department's current Alternatives to Held Detention program it is reviewing risk tools and developing a revised risk assessment framework and tools to enable a dynamic and nuanced assessment of risk for status resolution purposes.<sup>70</sup>

(c) Security Risk Assessment Tool

120. The Commission considered the Security Risk Assessment Tool (SRAT) in detail as part of its inquiry into the *Use of force in immigration detention*.<sup>71</sup> One of the key points made in that report was that the quality of the ultimate risk rating calculated by the tool is reliant on the quality of information entered into it. If the information entered is inaccurate, then the risk rating will also be inaccurate.
121. Further independent analysis of the SRAT since the Commission's report has also cast doubt on its reliability. A review by Griffith University in 2019 concluded that:

While the SRAT has been the risk assessment tool of choice for the service providers contracted by the ABF [Australian Border Force], it is clear that the SRAT is not borne out of sound scientific research.<sup>72</sup>
122. On 8 December 2016, the first SRAT was completed for Mr VA. It noted that Mr VA had been in immigration detention for 26 days and was a 'low' placement risk, but still a 'high' escort risk. The SRAT noted that Mr VA:
  - was the subject of no incidents while in detention
  - was the subject of no intelligence reports while in detention
  - had no behavioural risk indicators
  - had no criminal history
  - had no escape indicators
  - had no medical risk indicators.

123. The Department has confirmed that Mr VA's 'high' escort risk at this stage was primarily due to the policy of assigning a 'high risk' rating to single adult males during the first 28 days of detention. The Commission asked whether there were any other factors that contributed to Mr VA's escort risk at this stage. The Department identified only two factors:
- in his initial interview when taken into immigration detention, Mr VA commented that 'I will stay in detention until my death if not released'
  - he had been identified as 'unwilling to depart' Australia because he feared harm if returned to India.
124. The first statement seems to be little more than a statement of the obvious. According to the SRAT, it was not taken as a suggestion that Mr VA was contemplating self-harm (his risk of self-harm was rated as 'low'). The fact that Mr VA was unwilling to depart Australia of itself does not suggest that he should be considered a 'high risk' when being escorted outside of the detention centre, particularly given that the SRAT confirmed there were no indicators suggesting that there was a risk he might seek to escape (again, his risk of escape was rated as 'low').
125. As noted in paragraph 57 above, on 2 February 2017, police attended VIDC and charged Mr VA with a second set of offences.
126. The next SRAT completed for Mr VA was on 10 March 2017. This was his first SRAT after the initial 28 days of his detention had elapsed. In this SRAT, Mr VA's risk rating was increased across a number of domains. In particular, for the first time, the SRAT recorded that Mr VA:
- had a 'high' risk criminal profile
  - had a 'high' risk for aggression/violence
  - had a 'high' DSP Placement Risk.
127. The SRAT included, for the first time, a notation under the heading 'Criminal History' and next to the subheading 'Sexual Assault', stating: 'MULTIPLE'. Serco advised the Department that the effect of this notation was that Mr VA was allocated a 'high' risk assessment across each of the three domains identified above.
128. The Department confirmed that the notation indicated (wrongly) that Mr VA had a criminal history involving multiple sexual assaults.
129. 'Additional Comments' on page 2 of the document provided:

Charged with – Commit act of indecency with person 16 years or over – Wilful and obscene exposure in/near public place/school. Mention on 9/1/2017.

130. Again, the description of the charge is incorrect in that it suggests an act of indecency *with* a person, which may have been interpreted by Serco as amounting to a sexual assault. The Department confirmed that Serco did not know the context of the allegations, and made its assessment of risk based on the description of the charge. In response to my preliminary view in this inquiry, the Department conceded that the misrepresentation of the charges faced by Mr VA 'may have been interpreted over cautiously' by Serco. The Department also confirmed that the SRAT, in making assessments of risk, does not distinguish between charges that have not been proven, and convictions for offences.
131. On 8 August 2017, the prosecution of the first set of charges, involving the incident alleged to have occurred on 9 November 2016, was finalised and Mr VA was acquitted. An email from an Australian Border Force officer at VIDC on 9 August 2017 confirmed this outcome. The Department told the Commission that Mr VA's acquittal did not trigger a review of his risk assessment by Serco, despite his risk assessment being substantially, if not entirely, based on his criminal charges. The next regular risk assessment was conducted almost three weeks later on 28 August 2017.
132. The Department said that the email confirming Mr VA's acquittal was 'overlooked' during the 28 August 2017 risk assessment. Further, the Department said:

[T]hat information [the acquittal] was not part of the first review or any subsequent reviews. The reviews were conducted without awareness of the outcome of the court case.
133. The fact that Mr VA had been acquitted of the first set of charges was not reflected on his SRAT until more than a year later, on 20 November 2018, after Mr VA had obtained a copy of his SRAT following a freedom of information request and had made a formal complaint to Serco about it. It was only at that point that his placement and escort risk were changed to 'medium'.
134. On 1 September 2017, the prosecution of the second set of charges, involving the incident alleged to have occurred on 8 November 2016, was finalised and Mr VA was convicted of a single summary offence: wilful and obscene exposure in a public place. Although Mr VA was convicted of this summary offence, the Court did not impose a sentence of imprisonment or a fine. Instead, a conditional release order was made under s 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) for a period of 12 months.

135. Although the ultimate conviction did not involve any act of violence, no steps were taken by Serco to review Mr VA's SRAT. Until 20 November 2018, it continued to record that Mr VA had a criminal history involving multiple sexual assaults, that he had a high risk criminal profile and was a high risk of aggression and violence.
136. On 20 October 2017, Mr VA made a complaint to Serco about his risk assessment and his placement in Mackenzie compound at VIDC. On 30 October 2017, Serco wrote to Mr VA in response to this complaint stating that his risk assessment was 'deemed appropriate at this time'.
137. On 16 November 2017, Mr VA was assaulted by another detainee in Mackenzie compound. This incident is described in more detail in section 4.3 below.
138. In July 2018, Mr VA was eventually placed in La Trobe, one of the lower security compounds at VIDC. The Commission has reviewed Mr VA's SRAT as at 17 July 2018. Since he was first detained, there had been no incidents recorded on his SRAT other than his single conviction for a summary offence that could possibly be an indicator of risk.
139. Mr VA's SRAT records the following incidents from November 2016 to July 2018:
  - 30 instances of Use of Force on Mr VA by Serco officers:
    - In 26 cases, these were pre-planned uses of handcuffs to transport Mr VA to court, to hospital or to the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors. In each of these cases, the use of force was planned solely because of Mr VA's 'high' risk rating. In most cases, the SRAT records that Mr VA was 'Involved' in the use of force on him. In three of these cases, Mr VA was wrongly identified in the SRAT as an 'Alleged Offender' in relation to the pre-planned use of force on him.
    - In 3 cases, these were unplanned uses of handcuffs to transport Mr VA to court or to hospital. Again, the use of force was solely because of Mr VA's 'high' risk rating.
    - In the remaining case, force was used to separate Mr VA from another detainee who was behaving in an abusive and aggressive manner towards him.
  - 1 instance of a Serious Assault on Mr VA, where he was the victim.
  - 1 instance of a Minor Assault on Mr VA, where he was the victim.

- 1 instance of Abusive/Aggressive Behaviour towards Mr VA, where he was the victim.
- 1 instance of Food and Fluid Refusal, which IHMS described in the following way: '[Mr VA] was identified to engage in deliberate FFR on 27 Sep 2017. He was observed by an IHMS primary health nurse to be eating on 29 Sep 2017 ... . [Mr VA] discussed his reason for FFR with an IHMS Health Services Manager (HSM), stating he did not want to be part of the [group] protest; however he could not go to the dining room without "consequences".'

140. The lack of any behavioural incidents by Mr VA while in detention was also confirmed in a note by ABF staff in August 2018 in relation to an escort request. Under a heading 'ABF comments' the document records 'Nil incidents in detention'.

141. Despite Mr VA having a criminal record limited to a single summary offence, and despite having engaging in no incidents of concern while in detention, Mr VA's SRAT continued to suggest that he had:

- a 'high' risk rating for aggression/violence
- a 'high' risk criminal profile
- a 'high' DSP Placement Risk
- a 'high' DSP Escort Risk.

142. On any sensible view, these risk assessments were simply not sustainable.

(d) Second Community Protection Assessment Tool

143. On 13 November 2017, a further assessment under the Community Protection Assessment Tool (CPAT) was completed for Mr VA. The harm indicators in this CPAT were unchanged. That is, the CPAT confirmed that there were no national security concerns, no identity concerns and no behavioural concerns since he was first detained.

144. As with the first CPAT, the only negative indicators on Mr VA's CPAT related to the criminal charges that he had faced. The CPAT continued to record, wrongly, that that he had been charged with an offence of 'commit act of indecency *with* person 16 year or over' and that his charges 'relate[d] to a minor person involving violence'.

145. The continued errors in the CPAT are concerning for two reasons:

- first, by this stage all of the criminal charges against Mr VA had been determined at a first instance level (his appeal against his summary conviction was still pending) and it was clear that he had not committed any act of violence, sexual or otherwise

- secondly, as the result of these errors, the CPAT continued to rate Mr VA as a 'high' risk of harm to the community and continued to recommend that he be held in closed detention.

(e) Continuation of mistakes about Mr VA's level of risk

146. It appears that assessments of Mr VA's risk continued to be affected by errors about his criminal record.

147. On 12 November 2018, the Department provided the Commonwealth Ombudsman with a 24 month report for Mr VA pursuant to section 486N of the Migration Act. As part of that report, under the heading 'Security and Character', the Department reported:

On 11 November 2016, [Mr VA] was arrested and charged with the following offences:

- Commit act of indecency with person 16 years or over
- Wilful and obscene exposure in / near a public place / school.

On the same day [Mr VA] was released on bail and transferred to Villawood IDC. On 31 January 2018, [Mr VA] appeared at Downing District Court, where he was convicted of the above charges and was directed to enter into a good behaviour bond for 12 months.

148. This report was wrong in two respects:

- First, Mr VA was acquitted of the charges made against him on 11 November 2016.
- Secondly, Mr VA was only ever convicted of one count of wilful and obscene exposure in a public place. He was never convicted of an act of indecency with any person (or near a school).

149. These matters were put to the Department during the course of this inquiry. In response, the Department said:

The Department acknowledges that the information contained within the 24 month report contained an error. Investigations into the error indicate that this was due to human error on part of the Departmental report writer (misinterpretation of an earlier charge sheet).

Since this time the Department has introduced a more rigorous two stage QA process for s486N reports. The subsequent reports provided to the Ombudsman under s486N of the Act for [Mr VA] (30 month and 36 month) contained the correct information regarding [Mr VA's] criminal charges within the 'Summary' section of the reports.

150. Providing incorrect information to the Commonwealth Ombudsman significantly reduces the effectiveness of the oversight that the Ombudsman provides when assessing the appropriateness of detention arrangements under s 486O of the Migration Act. In this case, no recommendations were made by the Ombudsman in relation to Mr VA following the Department's 24 month report.<sup>73</sup>
151. The mistakes identified above were corrected in the 30 month report to the Commonwealth Ombudsman. In response to the Department's 30 month report, the Ombudsman recommended that the Department expedite its assessment of Mr VA's case against the s 195A guidelines.
152. On 19 November 2018, Mr VA raised concerns with Serco about the suggestion in his SRAT that he had had a criminal record involving multiple sexual assaults. By this time, all of his criminal matters had been finalised and he had been convicted of a single summary offence in relation to only one incident, which was not a sexual assault and not an offence involving aggression or violence. He asked for the SRAT to be amended.
153. In response to questions from the Commission, the Department said that Mr VA's SRAT was amended by Serco on 20 November 2018 and his placement and escort risk were changed to 'medium'.
154. On 3 December 2018, Serco wrote a letter to Mr VA stating that:

The specific document you refer to (Security Risk assessment) is prepared only for the management of your accommodation, safety, security and well-being while you are in immigration detention. ... The information is accurate at the date of the report(s) and reflects the advice provided to Serco by the Department of Home Affairs and various open-source information. Furthermore the record is contemporaneous in nature and reflects the information available at a given point in time. As such, Serco will not be making retrospective changes to the document at this time.
155. This response is surprising for at least three reasons. First, it failed to acknowledge Mr VA's primary concern: that his risk assessment was based on erroneous information, and had been since he was first taken into immigration detention more than a year previously. Secondly, it falsely asserted that the information Serco relied on was 'accurate at the date of the report(s)'. Thirdly, while Serco said that it would not be making 'retrospective changes' to the SRAT, it made prospective changes to correct

the persistent error in its risk assessment of Mr VA, with the result that his risk rating was immediately downgraded to 'medium'. It does not appear that there was any acknowledgement by Serco of its previous error, or confirmation to Mr VA at this time that his risk rating had been downgraded.

### **4.3 Placement within Villawood Immigration Detention Centre**

156. When Mr VA was first detained at VIDC, he was initially placed in the Mitchell compound before being transferred to the Mackenzie compound. While VIDC as a whole is a high security detention facility, Mitchell and Mackenzie are medium to high security compounds within VIDC used to accommodate adult men.<sup>74</sup> At the time, there were two lower security compounds for adult men, La Trobe and Lachlan, and a higher security compound, Blaxland.
157. From 13 November 2016 (two days after he was first detained) until 16 November 2017 (when he was assaulted by another detainee), Mr VA was held in Mackenzie compound. An email from the Regional Director of the Community Protection Division of the Department dated 13 November 2016, indicates that Mr VA was moved to Mackenzie 'due to his ongoing criminal charges'. In response to my preliminary view in this inquiry, the Department conceded that his placement in Mackenzie was due to what was perceived to be 'the sensitive nature of the charge against him'.
158. The Department claimed that there was 'no indication that [Mr VA]'s safety was under threat in the Mackenzie compound and he had not been involved in any incidents that would require a transfer to another compound'. However, Mr VA expressed concern about being held in Mackenzie compound on a number of occasions. On 17 December 2016, after being in Mackenzie for a month, he notified Serco, the detention services operator, that another identified detainee had demanded cigarettes from him and threatened to kill him. He asked to be relocated out of Mackenzie.
159. In a written response to this request, Serco said:

[Y]ou also mentioned that you wanted to be relocated out of Mackenzie because you believe this is not the appropriate compound for you. During the discussion FOMs [Facility Operations Managers] have advised you the proper process in requesting the change in compound. You were also

encourage[d] to discuss this with your Case Manager and get feedback about your current placement.

Finally, you were advised to seek staff assistance in Mackenzie compound, when necessary, including [in] cases when you believe you are being threatened by other detainees to ensure that this is investigated accordingly and to ensure you are adequately supported.

160. The letter does not describe the 'proper process' for requesting a change in compound. Following this incident, Mr VA was not transferred out of Mackenzie compound.
161. On 28 June 2017, Mr VA again raised concerns with Serco about the safety of Mackenzie compound. In particular, he was concerned that: '[d]ue to the use of drugs most of the detainees that come from prison have shown act[s] of aggressiveness and violence towards other detainees who are vulnerable'. He asked that violent detainees be transferred to another compound or facility. In a written response, Serco said:
- Facility Operations Manager ... explained that a number of detainees may exhibit adverse behaviour as you highlighted and this may be because of their own personal background or history.
- Facility Operations Manager ... reassured you that these types of behaviours discussed will not be tolerated. He explained that there are support mechanisms that can be implemented by Serco to support detainees who display these kinds of behaviours to ensure that the detainee can modify the behaviours to ensure that these are more appropriate in the future and are in line with community standards also.
162. By 1 September 2017, Mr VA had been convicted of a single summary offence. He had been acquitted of two offences and the final offence had been dismissed because there was no prima facie case. As noted in paragraph 157 above, the criminal charges appear to have been the basis for his initial placement in Mackenzie. However, the outcome of the proceedings against him do not appear to have prompted any reconsideration of his placement within VIDC.
163. On 19 October 2017, Mr VA again raised concerns about his detention in Mackenzie compound. He asked why he was considered to be a person of high risk. He said that he did not feel safe being held in a compound with detainees whose visas had been cancelled on character grounds under s 501 of the Migration Act. He referred again to the threats to his life made by another detainee.

164. In a written response to this request, Serco said:

In your complaint you advised that you have concerns regarding your placement in Mackenzie and that you had issues regarding your risk assessment. ...

DSM [Detention Services Manager] ... explained that your placement is the result of a multi stakeholder collaboration in which all factors surrounding your case are taken into account. This placement is reviewed regularly and it has been explained to you by DSM ... that your placement is currently deemed appropriate.

The issue of the risk assessment is also a multi stakeholder decision based on many variables which are also reviewed regularly. Your risk rating has also been deemed appropriate at this time.

165. In response to my preliminary view in this inquiry, the Department agreed that Mr VA's risk rating in his SRAT was 'incorrect at times' and that 'the misrepresentation of the charge against [Mr VA] that was included in his SRAT could have led to a misguided conclusion that he was high risk'.
166. As discussed in paragraphs 152 to 155 above, Mr VA's risk rating at this time was based on an erroneous view of his criminal record and, once this error was finally recognised by Serco, was immediately downgraded. However, at the time of his complaint in October 2017, Mr VA was not transferred out of Mackenzie compound.
167. As noted in paragraph 143 above, on 13 November 2017, a further CPAT was conducted and again recommended that Mr VA be kept in Tier 3 Held Detention. Again, this CPAT was based on an erroneous view of Mr VA's criminal record.
168. Three days later, on 16 November 2017, Mr VA was the victim of what the Department described as a 'serious assault'. A Facility Operations Manager witnessed a detainee punch Mr VA five or six times with a closed fist to his 'upper body' (which appears to have included his face). Mr VA then collapsed to the ground and was kicked twice by the same detainee. A post-incident report suggested that the incident was captured on CCTV, but the Department later told the Commission that this was an error and that there was no CCTV camera in the location where Mr VA was assaulted and that therefore no CCTV footage ever existed. The Department said that it has since discussed with Serco the need to have adequate CCTV coverage of areas required by its contract.

169. A report by IHMS, the medical services contractor at VIDC, said that Mr VA was 'very teary and scared' and was unable to close his eyes properly due to the pain.
170. Mr VA was taken to Liverpool Hospital with obvious facial trauma, swelling around his right eye, swelling over his left eyebrow, and swelling to his upper lip, according to hospital records. Because he was considered to be 'high risk', he was handcuffed during this escort. An eye examination found a small corneal abrasion. A CT scan found no fracture of the facial bones. His right hand was tender over the midshaft of the fifth metacarpal. An x-ray found no bone fracture to his hand.
171. The post-incident review completed by Serco says that the alleged offender told officers that 'he believed detainee [VA] had sex offences and wanted to assault him'. The report does not offer any opinion about how the detainee came to have this view.
172. Following his return to VIDC, Mr VA was initially accommodated in one of the high-care accommodation rooms in the Hotham compound. He was then transferred to Mitchell compound which, as noted above, is another medium to high security compound. The Department says that this transfer was as a result of 'residual tensions from detainees in Mackenzie compound where the alleged incident occurred'.
173. On 20 November 2017, Mr VA reported to an IHMS mental health nurse that he remained concerned for his safety in Mitchell compound. The clinical notes record:

Reported that yesterday two detainees came to him asking about his charges, stated that these two detainees had verbally threatened his life, threatened to kill him [and] that he wasn't safe. Reported that detainees from his former compound are passing on information to detainees in his current compound. Reported that initially he was scared to approach Serco as he was watched by the others but eventually the opportunity presented itself and he had reported this verbal assault to Serco. Is scared to sign police documents to charge these individuals.
174. On 23 November 2017, the alleged perpetrator of the assault on Mr VA was transferred to another detention facility.
175. On 28 November 2017, Mr VA reported to an IHMS psychiatrist that he would sleep outside on the common grass area in the Mitchell compound where he could be seen by CCTV because he was afraid of being attacked in his room where there was no CCTV coverage. He reported that he had been intimidated by other detainees in Mitchell, 'because other detainees have heard that he was a paedophile'. The psychiatrist observed that Mr

VA's mental health had deteriorated after the assault and that he was more paranoid and anxious.

176. There was no reference in any of Mr VA's monthly case reviews to the assault on him. Instead, his case review on 14 December 2017 reported: 'No significant health or welfare issues have been identified for [Mr VA]' and '[Mr VA] does not have any health or welfare issues which would require increased contact with his case manager'.
177. On 17 December 2017, Serco reported an incident in Mitchell compound where another detainee 'advanced towards detainee [VA] as if to assault him' before being restrained by a Serco officer.
178. As noted above, Mr VA was initially reluctant to ask the police to conduct an investigation into the assault on him on 16 November 2017. However, on 16 January 2018 he asked the police to conduct an investigation. On 27 March 2018 the AFP wrote to the ABF saying that the referral for investigation 'was rejected, on the basis of being low priority and the availability of resources'. Mr VA was notified of this outcome by the ABF.
179. In or around July 2018, Mr VA was moved into the La Trobe compound, which is a lower security compound within VIDC used to accommodate adult men.<sup>75</sup> It was not until November 2018 that Mr VA's risk assessment was downgraded to medium, following the recognition by Serco of errors in the information it held about him.
180. I find that Serco's decision to place Mr VA in Mackenzie, and the failure to move him to a lower risk compound in response to his concerns, was based on an erroneous assessment of his risk. At least by 1 September 2017, when the first instance proceedings against him were finalised, Serco should have been aware that Mr VA was not a high-risk detainee and should have responded to his concerns about his placement at VIDC by moving him to a lower-risk compound. If Serco had done this, the serious assault on Mr VA may have been avoided. I find that the failure to adequately manage the risks faced by Mr VA was contrary to the obligation to Mr VA under article 10 of the ICCPR to treat him with humanity and with respect for his inherent dignity.

#### **4.4 Handcuffing on escort**

181. There are a number of consequences of being classified as 'high' risk on an SRAT. One of those, as previously reported by the Commission, is that detainees are required to be handcuffed when being escorted to

appointments outside of the detention centre environment such as to attend court or medical appointments.<sup>76</sup>

182. It appears that, during the first 28 days of his detention, when he was deemed to be high risk in accordance with Serco policy, Mr VA was required to be handcuffed on three occasions: twice to attend court and once to attend a medical appointment.
183. From the end of that initial 28-day period until 1 September 2017 when he was convicted of a single summary offence, it appears that Mr VA was required to be handcuffed on 9 occasions:
- to attend court on 6 occasions
  - to attend a medical appointment on one occasion
  - for 'detainee processing' on one occasion
  - for an unidentified 'high risk escort' on one occasion.
184. From 2 September 2017 until 17 July 2018, it appears that Mr VA was required to be handcuffed on 17 occasions:
- to attend court on 2 occasions (in relation to his unsuccessful appeal of his conviction for a single summary offence)
  - to attend hospital following the assault on him on 16 November 2017
  - to attend the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) on 14 occasions.
185. On 16 January 2018, Mr VA made a formal complaint to Serco about the use of handcuffs to attend appointments including court proceedings or medical appointments outside VIDC. He said that the use of handcuffs caused him humiliation and indignity. In a written response to this complaint, Serco said:
- The use of mechanical restraints for escorts including medical escorts and court escorts are reviewed on a case by case basis and take into consideration a wide variety of factors. Serco, International Health and Medical Services (IHMS) and Australian Border Force (ABF) collate relevant information and decisions are made as to whether restraints will be utilised on the escort which are then formally approved or declined by Australian Border Force. In relation to your complaint, the use of mechanical restraints were approved by Australian Border Force. Thank you for bringing your concerns to our attention.
186. On 6 August 2018, Mr VA refused to wear handcuffs for an escort to a medical appointment and so was not permitted to attend that appointment.

187. On 13 August 2018, Mr VA made a number of complaints to Serco about the use of handcuffs on him. Among other things, he said:

- the hinged handcuffs were tight on his wrists and caused him pain
- it was 'traumatic' being handcuffed while being transported to appointments because he was afraid of how he would exit the vehicle if there was an emergency
- he was embarrassed and humiliated by having to wait in public areas of a hospital or doctor's surgery while wearing handcuffs.

188. He asked for his security risk assessment for the purpose of placement and escorts to be 'meaningfully reviewed'.

189. In a written response to this complaint, Serco said:

The Use of Mechanical Restraints for escorts are reviewed on a case by case basis and [take] into consideration a wide variety of factors with different stake holders.

Where Mechanical Restraints are utilised on an escort, these are formally approved by Australian Border Force.

For future escorts, SERCO will make available the larger size Mechanical Restraints which will be more comfortable on your wrist.

On the matter of the Use of Mechanical Restraints, I consider this complaint is now closed.

190. By 1 September 2017 at the latest, it should have been clear that Mr VA was not a high-risk detainee. By that stage, it was clear that Mr VA's criminal record was limited to a single summary offence and he had not engaged in any acts while in detention that would contribute to an adverse security assessment.

191. This view is supported by the fact that when Serco revised its SRAT on 20 November 2018 (see paragraphs 152 to 155 above) it realised that its risk assessment of Mr VA was erroneous and immediately downgraded his escort risk to 'medium'. A detainee with a medium risk rating is not required to be handcuffed on escort.

192. In response to my preliminary view in this inquiry, the Department agreed that Mr VA's risk rating in his SRAT was 'incorrect at times' and that 'the misrepresentation of the charge against [Mr VA] that was included in his SRAT could have led to a misguided conclusion that he was high risk'.

However, the Department did not agree that he was inappropriately handcuffed. The Department said:

Approval for the use of mechanical restraints is granted by the ABF on a case-by-case basis with the SRAT being only one factor taken into consideration. Other factors that may be considered include a detainee's risk of self-harm while in the community e.g. attending medical appointments, risk of harm to others including members of the public and risk of destruction of property. A lowered risk rating, whether that be medium or low, does not automatically indicate that mechanical restraints are not to be used.

193. With respect, this submission misses the point. The fact that Mr VA was inappropriately given a 'high' risk rating meant that, unless there were some exceptional circumstances, restraints would be used. While it is possible that restraints can also be used for people classified as medium or low risk, the kind of multifactorial analysis suggested by the Department in such cases was not in fact undertaken for Mr VA. Nor were any of the particular factors suggested by the Department in the above passage present. Mr VA's SRAT consistently showed that he had a low risk of self-harm, he had never been involved in any destruction of property, and his risk of harm to the community had been consistently overstated.
194. I find that the use of handcuffs on Mr VA after 1 September 2017 was not warranted and could not be justified as a necessary or proportionate measure for the safety of himself or others.
195. I find that Serco failed to undertake an appropriate re-evaluation of the risk posed by Mr VA after 1 September 2017, which, if undertaken, should have resulted in a reduction in his risk rating.
196. I find that the continued use of handcuffs on Mr VA after 1 September 2017 amounted to inhumane treatment, contrary to article 10 of the ICCPR.

#### **4.5 Being held in cells at court**

197. Mr VA complains that on four occasions when he attended the Downing Centre court complex, he was placed in a holding cell while waiting for the hearing of his case. He alleges that this conduct was unlawful and that on one occasion he was prevented from appearing in Court.
198. The Department produced Escort Operational Orders and observation logs in relation to each of these four events. On each occasion, Mr VA was handcuffed for transport between VIDC and the Downing Centre which

took around 3 hours for a round trip. Once at the Downing Centre, the handcuffs were removed and Mr VA was placed in a holding cell.

199. Based on Serco escort observation logs, Mr VA was placed in a holding cell at the Downing Centre for the following periods of time:

- On 14 November 2016, for 5 hours and 10 minutes.
  - He was taken out of the holding cell to attend court for 30 minutes and to meet with his legal aid lawyer twice for a total of 45 minutes.
  
- On 9 December 2016, for 5 hours and 50 minutes.
  - It appears that Registry staff advised Serco that Mr VA's case was adjourned and no appearance was required.
  
- On 13 March 2017, for approximately 5 hours and 55 minutes.
  - He was taken out of the holding cell to meet with his legal aid lawyer twice for approximately 45 minutes in total.
  - It appears that Registry staff again advised Serco that Mr VA's case was adjourned and no appearance was required.
  
- On 26 April 2017, for 6 hours and 40 minutes.
  - He was taken out of the holding cell to meet with his legal aid lawyer twice for 25 minutes in total.
  - It appears that orders were made setting down both of Mr VA's proceedings for hearing while Mr VA was not present in court.

(a) Lawfulness of detention in holding cells

200. Mr VA says that his detention was unlawful because there was a change in the nature of his detention from being in immigration detention to being in the custody of officers of Corrective Services NSW. The Department says that NSW holding cells are places of immigration detention, that all State corrections officers are authorised officers under the Migration Act,<sup>77</sup> and that at all relevant times Mr VA was detained under s 189 of the Migration Act.

201. The definition of 'immigration detention' in s 5 of the Migration Act includes being held by, or on behalf of an 'officer' in a prison or remand centre of the Commonwealth, a State or a Territory,<sup>78</sup> or in another place

approved by the Minister in writing.<sup>79</sup> The Department said that it was not necessary for the Minister to specifically approve the Downing Centre holding cells in writing because 'a court holding cell is included in the definition of ... "immigration detention"'. While the terms of the legislation are not entirely clear on this point, I note that in New South Wales, s 3 of the *Crimes (Administration of Sentences) Act 1999* (NSW) provides that a 'correctional centre' includes 'any police station or court cell complex in which an offender is held in custody in accordance with this or any other Act'.

202. The Department notes that on 13 September 2000, the then Minister for Immigration and Multicultural Affairs, acting under paragraph (g) of the definition of 'officer' in s 5(1) of the Migration Act, authorised employees of correctional services or prison departments, or their equivalent, of all States and Territories who are employed at correctional service or prison facilities, to be 'officers' for the purposes of the Migration Act.<sup>80</sup>
203. In response to my preliminary view in this inquiry, Mr VA raised for the first time a question about whether the correctional officers who detained him at the Downing Centre had a 'reasonable suspicion' that he was an unlawful non-citizen for the purposes of s 189 of the Migration Act. I have previously indicated that I was satisfied that Mr VA's visa was validly cancelled on 11 November 2016 (see paragraph 78 above). The cancellation would have resulted in Mr VA being an unlawful non-citizen. When Mr VA attended the Downing Centre, he was brought there directly from an immigration detention facility. Mr VA has not pointed to any other material upon which an officer detaining him could have reasonably formed the view that he was not an unlawful non-citizen. I have not been provided with evidence from the Department about the state of mind of the relevant detaining officers because of the point in time at which this issue first arose. In the circumstances I am not persuaded that I should draw an inference that the detaining officers at the Downing Centre lacked a reasonable suspicion that Mr VA was an unlawful non-citizen.
204. Again, in response to my preliminary view in this inquiry, Mr VA raised for the first time whether Serco staff who escorted him to Court met the character and training requirements to be authorised officers. Mr VA has not pointed to any evidence that suggests, even at a prima facie level, that there was a doubt about whether particular officers met the character and training requirements specified in the Department's contract with Serco. In the circumstances, I am not persuaded that there is a reasonable basis for further investigation to be undertaken at this stage of the inquiry into these matters.

205. In light of the above, I am not satisfied that Mr VA's detention while in holding cells at the Downing Centre court complex was unlawful.
206. Mr VA also relies on *SU v Commonwealth of Australia and anor; BS v Commonwealth of Australia and anor* [2016] NSWSC 8 in support of his contention that his detention was unlawful. In that case, the plaintiffs were wrongly arrested while they were in immigration detention and held in cells at the Sydney Police Centre.<sup>81</sup> Their incarceration in the Sydney Police Cells was 'a direct result of the decision to (unlawfully) arrest them'.<sup>82</sup> That is not the circumstance in relation to the present inquiry, where Mr VA's presence in the holding cells at the Downing Centre appears to be as a result of his being lawfully in immigration detention.<sup>83</sup>

(b) Right to appear in person in court

207. Finally, Mr VA also contends that on one occasion the Commonwealth breached its duty to bring him before a Court by instead keeping him in a holding cell and denying him access to a legal aid lawyer. Mr VA relied on *BZAAB v Minister for Immigration and Citizenship* [2011] FCA 429. In that case the applicant had been taken into immigration detention as a result of an alleged violation of the terms of her bridging visa and the Minister failed to produce the applicant to the Court on a date listed for a directions hearing. The applicant was unrepresented. Justice Logan was critical of the Minister for not making the applicant available and noted that it was 'one of the fundamental responsibilities that falls upon those who deprive a person of their liberty not to interfere, by so doing, with that person's access to Commonwealth judicial power'.<sup>84</sup>
208. Mr VA alleged that the incident involving him occurred on 11 April 2017. However, he did not have a court appearance on that date and it appears that the relevant date may in fact have been 26 April 2017. Based on the Serco escort observation log for that date, it appears that the following events occurred. Mr VA arrived at the Downing Centre holding cells at 9.20am and his handcuffs were removed. A detention services officer went 'upstairs' to confirm with a court officer that Mr VA was in the holding cells. At 11.00am, Mr VA was brought out of the holding cells for an interview with a legal aid lawyer in an interview room for 20 minutes before being returned to the holding cells. At 12.20pm, Mr VA was 'escorted to Level 4 holding cell'. At 2.30pm, after receiving a phone call from Corrective Services, an officer escorted Mr VA 'down to Legal Aid Interview Room' but there was 'no lawyer present' so he was placed back into the holding cells, presumably the 'downstairs' cells. At 2.50pm a detention service officer

'went to Level 4 ... looking for the Legal Aid lawyer'. At 2.55pm, the following description appears in the log:

Lawyer for detainee from Legal Aid sighted. Lawyer questioned DSOs where and why detainee is in lockdown and not in open public area. DSO ... replied that this is as per Immigration policy. Lawyer questioned again about the policy and authority for Corrective Services to hold him in the cells when he is not in custody and there is no warrant. DSO ... maintained the same reply saying this is Immigration policy. The lawyer in return said that he is going to complain about this.

209. At 3.00pm, Mr VA had a five-minute interview with his lawyer after which the log records that the attendance at court was concluded for the day and an escort vehicle was called.
210. From other documents produced to the Commission, it appears that a procedural hearing took place on 26 April 2017 in both of Mr VA's matters and they were set down for hearing. It appears from the Serco log that Mr VA was not present in court when his matters were called on. I infer that in moving Mr VA between different holding cells, he missed the opportunity to appear in Court when his matters were called.
211. There are some differences between this event and the event described in *BZAAB*. In the present case, Mr VA was brought to court by the Department for the purposes of a personal appearance. He was unable to appear in person apparently as a result of administrative errors in moving him between different holding cells at the courthouse. He was legally represented and it appears that his lawyer was able to appear on his behalf and a date was set for his trial.
212. Article 14(3)(d) of the ICCPR provides that one of the minimum guarantees to which a person charged with a criminal offence is entitled, is to be present during his trial. Most of the jurisprudence about this limb of article 14(3)(d) deals with trials *in absentia*.<sup>85</sup> The provision applies to criminal appeals,<sup>86</sup> and other substantive reviews where a court examines the facts and law and makes a new assessment of the issue of guilt or innocence.<sup>87</sup> The hearing on 26 April 2017 was procedural, and it appears that Mr VA was present for the later substantive trial in relation to the charges that he faced.
213. I find that there was a failure by the Department to ensure that Mr VA was present in court during a procedural hearing that was part of his criminal trial. This is unfortunate and should not have occurred. However, in all of the circumstances, I am not satisfied that this failure amounts to a breach of article 14(3)(d) of the ICCPR.

## 4.6 Less restrictive alternatives to detention

214. A person held in immigration detention could be released from held detention if granted a visa or if the Minister makes a residence determination in their favour. A residence determination is commonly referred to as community detention.
215. Mr VA alleges that the Department was 'not interested in an alternative placement' for him other than in VIDC.
216. The CPAT (described in section 4.2 above) is designed to provide advice about whether a detainee can be placed in the community. Each of the CPATs dated 28 November 2016 and 13 November 2017 recommended that Mr VA be kept in held detention.
- (a) Community detention
217. The Minister has issued guidelines in relation to the exercise of the power in s 197AB of the Migration Act to grant a residence determination. At the time that Mr VA was first detained, the relevant guidelines were ones issued by the Hon Peter Dutton MP, Minister for Immigration and Border Protection, dated 29 March 2015. Paragraph 10 of those guidelines provided that the Minister would not ordinarily expect the Department to refer a person for consideration of a residence determination where a person has been charged with an offence and is awaiting the outcome of the charges. This appears to be the only criterion listed in paragraph 10 that could have imposed an obstacle to referral.
218. Further guidelines were issued on 10 October 2017. Paragraph 10 of those guidelines was in the same terms.
219. Each of Mr VA's monthly case reviews up to July 2017 consistently recorded the position of the Department that Mr VA did not meet the guidelines for a community detention placement. The case reviews consistently gave two reasons for this finding:
- the CPAT dated 28 November 2016 recommended that Mr VA be placed in Tier 3 Held Detention
  - Mr VA had 'serious criminal matters relating to violence which have not been finalised'.
220. It was true that during this period Mr VA had criminal matters that were not finalised. However, it was not true that these matters related to

violence. Ultimately, it was also demonstrated that these were not 'serious criminal matters', because Mr VA was convicted of only a single summary offence for which a good behaviour bond was imposed. On any scale of criminal seriousness, this matter was clearly at the lower end.

221. By the time of the case review in September 2017, Mr VA had been convicted of a single summary offence at first instance and all other charges had been dismissed. The section of the case review dealing with client placement continued to refer to the CPAT recommendation. It also referred to the fact that Mr VA had an ongoing criminal matter (his appeal to the District Court) but now, properly, no longer referred to it as 'serious' or an offence 'relating to violence'.
222. As described in paragraphs 143 to 145 above, a further CPAT was completed for Mr VA on 13 November 2017. This CPAT wrongly concluded that Mr VA constituted a 'high' risk of harm to the community. This is because the CPAT wrongly recorded that Mr VA had been charged with an offence of 'commit act of indecency *with* person 16 year or over' and that his charges 'relate[d] to a minor person involving violence'.
223. If the CPAT had accurately recorded the nature of Mr VA's criminal offending, which by that stage had been determined at first instance (and only awaited Mr VA's appeal), there was no reasonable basis upon which a finding could have been reached that Mr VA was a 'high' risk to the community. In the circumstances, the appropriate placement recommendation was Tier 1: community placement.
224. A CPAT should have been conducted in September 2017, following the finalisation of the second set of proceedings against Mr VA. This is because the finding in the first CPAT that Mr VA was a 'high' risk to the community depended entirely on the (incorrect) description of the charges that he faced.
225. As a result, I find that Mr VA's detention after 1 September 2017 was arbitrary, contrary to article 9 of the ICCPR. His ongoing detention in closed detention facilities could not be justified as reasonable, necessary or proportionate to the aim of ensuring the effective operation of Australia's migration system. This is because the reasons put forward to justify his placement in held detention were based on a fundamentally erroneous understanding of the relevant facts. His detention was not justified on the basis of reasons specific to him, particularly in light of the available alternatives to closed detention.

(b) Bridging visa

226. Because of the ground on which Mr VA's bridging visa was cancelled, he was not eligible to *apply* for a further bridging visa. However, it was always open to the Minister to grant Mr VA a bridging visa under s 195A of the Migration Act. Further, as discussed below, it was open to the Department to grant Mr VA a bridging visa, even if he had not applied for it.
227. Item 1305(3)(g) of Schedule 1 of the Migration Regulations 1994 (Cth) provides that it is a criterion for a Bridging E visa that:
- The applicant has not previously held a visa that has been cancelled on a ground specified in paragraph 2.43(1)(p) or (q).
228. That is, if a person has had a bridging visa cancelled on the ground that they were charged with an offence (reg 2.43(1)(p)(ii)) they are not entitled to apply for another Bridging E visa even if they are acquitted of the charges that resulted in their visa being cancelled.
229. Mr VA was acquitted of the charges that resulted in his visa being cancelled. Despite this, Mr VA was not eligible to apply for another Bridging E visa and had to wait for action to be taken by the Department.
230. On 17 May 2019, after 2 years and 6 months in detention, Mr VA's case was first referred within the Department for an assessment against the Minister's guidelines under s 195A of the Migration Act.
231. On 2 March 2020, the Commonwealth Ombudsman recommended that the Department expedite its assessment of Mr VA's case against the s 195A guidelines.<sup>88</sup>
232. On 12 March 2020, the Department formed the view that it was not necessary for the Minister to grant a visa under s 195A because it was open to an officer of the Department to grant a bridging visa under regulation 2.25. This regulation relevantly applies to a non-citizen who:
- is unable to make a valid application for a bridging visa E
  - is not barred from making a valid application by a provision of the Migration Act or regulations other than item 1305 of Sch 1 of the regulations.
233. That is, if the only barrier to making an application is item 1305 of Sch 1, it is open to the Minister, or a delegate of the Minister, to grant a bridging visa to a person without them having to make an application.

234. Finally, after three years and four months in detention, Mr VA was granted a bridging visa on 24 March 2020 by a departmental delegate of the Minister.
235. Regulation 2.25 was in the same form on 1 September 2017, but it was not until March 2020 that the Department considered whether it applied to Mr VA and a departmental delegate relied on it to grant Mr VA a bridging visa. A departmental delegate of the Minister could have granted Mr VA a bridging visa E at any time after 1 September 2017. In response to my preliminary view in this inquiry, the Department conceded that the case triaging and prioritisation process in the Ministerial Intervention section, at least during 2019, did not involve an assessment of cases to determine whether they could be considered for a visa grant by a departmental delegate. The Department has said that the Ministerial Intervention section has since updated its processes and now all referrals for potential intervention by a Minister are assessed as part of the initial triaging process to ensure delegate manageable cases are identified and referred back to the relevant status resolution officer. The Department has also said that when a departmental delegate exercises a discretion not to grant a visa under regulation 2.25, it considers that it is best practice for the delegate to make a record of this decision and the reasons for the decision. The Commission agrees that this is best practice and commends the Department for updating its procedures.
236. Although in Mr VA's case no consideration was given, prior to March 2020, to a process that could have resulted in Mr VA being granted a visa, the Department says that Mr VA's detention remained lawful. I am satisfied that Mr VA's detention was lawful; however I am also required to assess whether it was arbitrary. I have formed the view that the Department's processes should have included an assessment of whether a visa could have been granted by a delegate rather than by a Minister. There was no rational justification for the failure to have regard to this option. It appears that it was merely overlooked. The failure to assess whether a delegate could have granted Mr VA a bridging visa deprived Mr VA of a real opportunity to be released from immigration detention. Further, I have formed the view that not only should such an option have been considered, but that after 1 September 2017, a bridging visa should have been granted, given the nature of the outcome of the legal proceeding against Mr VA which was the only justification for his initial detention.
237. For the reasons already explained, I find that the continued detention of Mr VA after 1 September 2017 was arbitrary, contrary to article 9 of the ICCPR. Appropriate less restrictive alternatives included the grant of a residence determination by the Minister, or the grant of a bridging visa by either the Minister or a delegate of the Minister.

## 5 Recommendations

238. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.<sup>89</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>90</sup> The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.<sup>91</sup>

### 5.1 Apology

239. In the course of this inquiry, the Department has, properly, acknowledged that mistakes were made in interpreting Mr VA's criminal record. Serco had wrongly recorded in an SRAT that Mr VA had a criminal history involving multiple sexual assaults. The Department had wrongly recorded in a CPAT that Mr VA's criminal history involved violence towards a child.

240. While Mr VA's SRAT was amended in November 2018, as described in paragraph 155 above there was no acknowledgment by Serco of the previous errors in the SRAT.

241. Mr VA feels highly aggrieved by the mischaracterisation of the charges that he faced. I have found that the mischaracterisation of these charges was significant in a range of decisions made about his detention. Further, Mr VA feels that he was put at risk in detention because of a view that he was a sex offender. This concern is supported by a post incident review completed by Serco after Mr VA was seriously assaulted. According to the post-incident review, the alleged offender told officers that 'he believed detainee [VA] had sex offences and wanted to assault him' (see paragraphs 171 and 175 above). I have not been in a position to make findings about how the detainee who assaulted Mr VA came to believe that Mr VA had been convicted of sex offences, but this view is consistent with the mischaracterisation of his criminal record in documents held by Serco and the Department.

242. I consider that Mr VA had legitimate concerns about how his criminal record was interpreted and the impact that this had on his reputation. In his initial complaint to the Commission, Mr VA sought an apology from the Department. He also sought changes to departmental procedures to ensure that the kinds of mistakes that occurred in his case did not happen

to other people in similar situations in the future. I have considered whether it would be appropriate to provide Mr VA with a formal apology.

243. In litigated cases dealing with remedies for discrimination, courts have taken different views about whether it is appropriate to order a respondent found to have engaged in discrimination to apologise. In *Creek v Cairns Post Pty Ltd*, Kiefel J (as her Honour then was) noted that a short apology would have been ordered had the discrimination complaint been made out.<sup>92</sup> Apologies have been ordered in a number of cases in the then Federal Magistrates Court.<sup>93</sup>
244. A different approach was taken by Branson J in *Jones v Toben*, where the respondent was a holocaust denier. Her Honour considered that it was not appropriate to 'seek to compel a respondent to articulate a sentiment that he plainly enough does not feel'.<sup>94</sup> The circumstances of that matter are very different from the present circumstances.
245. I note that under the Legal Services Directions 2017 (Cth), the Commonwealth is expected to behave as a model litigant in the conduct of litigation. This obligation extends to apologising where the Commonwealth is aware that it has acted wrongly or improperly.<sup>95</sup>
246. This inquiry is not litigation and I do not have power to compel an apology by the Commonwealth, but I consider that an apology is a remedy that I may recommend.
247. In this case, I consider that an apology by the Commonwealth to Mr VA is appropriate. Apologies are important remedies to address wrongful conduct, and I consider that they have particular importance as a mechanism to acknowledge and redress breaches of human rights. They can, at least to some extent, alleviate the suffering of those who have been wronged.<sup>96</sup>

### **Recommendation 1**

The Commission recommends that the Commonwealth provide Mr VA with a formal apology for the persistent mischaracterisation of his criminal record.

## **5.2 Cancellation of bridging visas on the basis of criminal charges**

(a) Seriousness of offending to be a primary consideration

248. Since June 2013, a person's bridging visa has been able to be cancelled under s 116(1)(g) of the Migration Act and regulation 2.43(1)(p)(ii) of the

Migration Regulations if the visa holder has been charged with an offence.<sup>97</sup> In September 2014, the then Minister for Immigration and Border Protection, the Hon Scott Morrison MP, made a direction under s 499 of the Migration Act (Ministerial Direction 63) instructing the Department about how to make decisions relying on this cancellation ground (and a number of similar grounds). That Ministerial Direction is still in force.

249. Ministerial Direction 63 sets a low bar for bridging visas to be cancelled on the basis of criminal charges. In particular, it starts from the premise that, if a person holding a bridging visa is charged with any criminal offence, no matter how trivial, they should expect that their visa will be cancelled. For example, the Direction provides:

The Australian Government has a low tolerance for criminal behaviour by non-citizens who are in the Australian community on a temporary basis, and do not hold a substantive visa. ...

[W]here Bridging E visa holders are charged with the commission of a criminal offence ... there is an expectation that such Bridging E visas ought to be cancelled while criminal justice processes or investigations are ongoing. ...

The grounds for cancellation at regulation 2.43(1)(p)(i) and (ii) are enlivened when a visa holder is convicted of, or charged with, any offence, irrespective of the seriousness of the offence. However, the seriousness of the offence may be considered as a secondary consideration in the exercise of discretion under section 116(1).

250. There are two primary considerations under Ministerial Direction 63:
- a. the Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously in that every instance of non-compliance against these regulations should be considered for cancellation, in accordance with the discretionary cancellation framework; and
  - b. the best interests of children under the age of 18 in Australia who would be affected by the cancellation.
251. The seriousness of the offence with which a person has been charged is only a secondary consideration.
252. In the Commission's view, the seriousness of criminal charges should be a primary factor driving the initial decision about whether a person's bridging visa should be cancelled. This is a common-sense approach

which would prevent people being deprived of their liberty unnecessarily and conserve scarce detention resources for cases where they are demonstrably required.

253. Similar concerns were raised by the Commonwealth Ombudsman in a 2016 report, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention*:

The Ombudsman is concerned about the proportionality of decisions to cancel a visa under this regulation in relation to charges that sit on the more minor end of the spectrum. The Explanatory Statement explains the purpose is to safeguard the Australian community. It is arguable whether a person charged, or even convicted, of minor matters such as shoplifting or a minor traffic offence, poses such a risk to the Australian community that the person should be detained.<sup>98</sup>

254. The Commission recommends that Ministerial Direction 63 be updated to place greater emphasis on ensuring that bridging visas are only cancelled on the basis of criminal charges where the charges are objectively serious.

## **Recommendation 2**

The Commission recommends that:

- (a) Ministerial Direction 63 be amended to provide that a primary consideration in deciding whether to cancel a non-citizen's Bridging visa E under regulation 2.43(1)(p)(ii) is the seriousness of the offence with which the visa holder has been charged
  - (b) consequential amendments are made to Ministerial Direction 63 including the sections dealing with 'general guidance' and 'principles' to remove the suggestion that bridging visas would ordinarily be subject to cancellation regardless of the seriousness of any charges faced by the visa holder.
- (b) Time limit for review of cancellation decision
255. Certain Acts, including the Migration Act, specify that particular administrative decisions are reviewable by the Administrative Appeal Tribunal (AAT). Those Acts will generally set out the time within which an application to the AAT must be made. For many decisions, the time prescribed for making an application is 28 days (eg freedom of information decisions, social services decisions, child support decisions, Centrelink decisions, NDIS decisions).<sup>99</sup>

256. However, for a person in immigration detention, the time limits for reviewing certain migration decisions are extraordinarily short. In the case of Mr VA, he had only two working days to apply for a review of the decision to cancel his bridging visa.<sup>100</sup> It is highly unlikely that anyone in Mr VA's position, who had been picked up by police, charged with an offence, had his visa cancelled while at the police station, and taken immediately into immigration detention, would be in any position to get legal advice and make an application for administrative review of the cancellation decision within two days.
257. This issue was also considered by the Ombudsman in the report referred to above. The Ombudsman conducted a review of 50 cases of visa holders who had their visas cancelled under these provisions and spoke with a range of people working in the area. The Ombudsman observed that:
- A common issue raised with our office is that people were not aware that they could seek merits review of the cancellation decision and by the time they became aware that they could, they were out of time to appeal.<sup>101</sup>
258. The Commission considers that people who have had their bridging visas cancelled should have the same opportunity to seek advice about their review rights as people seeking review of other common administrative decisions. I note that the Australian Government has recently announced that it will abolish the AAT and establish a new federal administrative review body.<sup>102</sup> Action taken by the Department in relation to the following recommendation could be considered as part of that review.

### **Recommendation 3**

The Commission recommends that the time limit for applying to the Administrative Appeals Tribunal (or any new federal administrative review body) for review of decisions described in s 338(4) of the Migration Act be extended to 28 days.

- (c) Automatic review of cancellation decision if charges not established
259. Mr VA's case highlights a serious procedural lacuna when bridging visas are cancelled on the basis of criminal charges: there is currently no process to review the appropriateness of the cancellation if those charges are withdrawn or dismissed.

260. Ministerial Direction 63 makes clear that:

Where a Bridging E visa holder has been charged with an offence(s), but the charge(s) is/are dismissed, cancellation is not appropriate. Similarly, where a Bridging E visa holder has been charged with an offence but has been found by a court to be not guilty or the charge is otherwise dismissed, cancellation is also not appropriate.

261. However, the direction says nothing about whether cancellation *remains* appropriate if the order of these events is reversed. Logically, if a person's visa is cancelled on the basis of criminal charges, based on an expectation that they may be a danger to the Australian community, but those charges are withdrawn or dismissed, removing the foundation for the expectation, then there should be a reconsideration of the decision to cancel. The inquiry by the Ombudsman in 2016 found that, at that time, there was no formal process for review:

While it would seem reasonable that the resolution of the charge that led to a person being re-detained would prompt a review of their circumstances, this investigation has established that this does not happen. In reality, people in this situation are dependent on the capacity of a poorly supported case management and escalation framework to adequately review the circumstances of their individual case. Release from detention for these people depends on whether they happen to fall within scope of the department's wider priorities.<sup>103</sup>

262. The Commission shares the Ombudsman's view that, where bridging visas are cancelled under s 116 on the basis of criminal charges, 'a non-adverse judicial outcome should be a trigger for an urgent review of a person's circumstances'.<sup>104</sup>

#### **Recommendation 4**

The Commission recommends that where a bridging visa has been cancelled under s 116 of the Migration Act on the basis of criminal charges, the withdrawal of these charges or a non-adverse judicial outcome should automatically trigger a review of the decision to cancel the visa.

### **5.3 Risk assessments based on criminal charges**

(a) Developing expertise in criminal law

263. A systemic problem identified by EY in 2016, around the same time that the initial CPAT for Mr VA was being prepared, was the lack of capability of

case managers to make assessments about certain kinds of risk, including the risks arising from criminality (see paragraphs 116 to 117 above).

264. Here, it appears that incorrect inferences were made, based on the summary descriptions of the offence provisions with which Mr VA was charged. Section 61N(2) of the *Crimes Act 1900* (NSW) provided that it was an offence to commit ‘an act of indecency with or towards a person of the age of 16 years or above’. This was summarised on some court documents as ‘Commit act of indecency with person 16 years or over-T2’. It appears that this summary led Serco officers to believe that Mr VA had been charged with ‘sexual assault’ and led departmental officers to believe that Mr VA has been charged with an act of (sexual) violence. These mistakes were important, because of the significance given to acts of violence in formulating assessments of risk in both the SRAT and the CPAT. Usually, offences involving violence will result in a CPAT recommendation that a person be detained in held detention.
265. In actual fact, Mr VA was charged (but not ultimately convicted) of ‘an act of indecency *towards* a person’. This was clear from the Court Attendance Notice provided to Mr VA while he was in immigration detention that required him to attend court on a charge that on a particular date and a particular place he ‘did commit an act of indecency *towards* [name], a person above the age of 16 years, to wit, 38 years of age’.
266. Further, departmental officers drew an inference that Mr VA had been charged with an offence involving children. It is not clear how this misunderstanding arose. Possibly it could have related to the reference to ‘a person 16 years or over’ in the summary of s 61N(2). Possibly it could have related to the other offence with which Mr VA was charged, namely s 5 of the *Summary Offences Act 1988* (Cth), which provided that ‘a person shall not, in or within view from a public place or a school, wilfully and obscenely expose his or her person’. It is possible that the reference to ‘a school’ in the description of the offence may have misled an officer into thinking that this was somehow relevant to the facts of the case. It was not. The allegations related to an incident on a train where the witness to the conduct was an adult.
267. The Commission agrees with the recommendation made by EY in 2016 that relevant departmental officers should develop expertise in criminal law if they are responsible for making assessments of risk on the basis of a person’s criminal record. This could be done, as EY suggested, through accessing specialist expertise from external service providers, or through training for case managers to enable them to better engage with technical

information provided by specialists. As Mr VA's case has demonstrated, errors in interpreting information provided by law enforcement and judicial authorities can have very serious consequences for a person's risk rating and, ultimately, for their liberty.

### **Recommendation 5**

The Commission recommends that the Department develop criminal law expertise for case managers responsible for completing the Community Protection Assessment Tool to assist them in properly interpreting information provided by law enforcement and judicial authorities.

(b) Review of risk assessments when criminal charges not established

268. I have identified above the need for a reassessment of the cancellation of a person's bridging visa if the cancellation was based on criminal charges and those charges are withdrawn or dismissed.

269. More generally, there is also a need for a reassessment to be conducted of a person's risk rating if it is based, in whole or in part, on criminal charges and those charges are withdrawn or the person is acquitted. In Mr VA's case, there was no reassessment of his risk after his criminal prosecutions were finalised. Instead, a reassessment was only undertaken after he had made an FOI request for his file and made a formal complaint that his risk had been overstated.

270. Further, there should be a recognition in the risk assessment tools used by Serco and the Department of the difference between being *charged with* an offence and being *convicted of* that offence (see paragraph 130 above).

### **Recommendation 6**

The Commission recommends that if a risk assessment for a person in immigration detention is based, in whole or in part, on the fact that the person has been charged with a criminal offence, a further risk assessment should be undertaken once those charges are finally determined.

### **Recommendation 7**

The Commission recommends that risk assessments for people in immigration detention properly distinguish between being charged with a criminal offence and being convicted of a criminal offence.

## **5.4 Grants of bridging visas by departmental delegates**

271. As noted above, the Department identified two changes it has made to the way in which applications for ministerial intervention are considered where a person has had a visa cancelled on the basis of criminal charges.
272. First, all referrals to the Ministerial Intervention section are triaged to determine whether a visa could be granted by a delegate instead of the Minister personally. In those circumstances, the case is referred back to the relevant status resolution officer. Given the many competing demands on the time of the Minister, this updated process is likely to result in faster decisions about whether a bridging visa should be granted and may reduce the duration of any unnecessary period of detention.
273. Secondly, if a delegate of the Minister decides not to grant a visa under regulation 2.25, the Department considers that it is best practice for the delegate to make a record of this decision and the reasons for the decision. This is likely to improve the accountability and oversight of decision making.
274. The Commission commends the Department for these changes to its procedures.

## **5.5 Other matters**

275. In response to my preliminary view in this inquiry, Mr VA said that the Commonwealth owed him a non-delegable duty of care to ensure his personal safety while detained and that, as a result of the preliminary view that there has been a breach of human rights (particularly under article 10 of the ICCPR), the Commonwealth is also liable to pay him compensation for negligence.
276. This inquiry has focused on the Commonwealth's obligations under international law. It may be that Mr VA also has claims under domestic law, including the law of negligence, but this is outside the scope of the current inquiry and I make no findings about that.
277. Mr VA also said that as a result of the length of his detention he has suffered loss of employment, educational opportunities and capacity to earn an income. He says that he has suffered clinical depression and anxiety, trauma, distress and permanent exacerbation of a pre-existing psychiatric condition.

278. These issues were not the subject of evidence in this inquiry and I do not make any findings about them. It is open to Mr VA to seek an 'act of grace' payment from the Department of Finance or to seek compensation from the Department of Home Affairs under the scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme).<sup>105</sup> This can include detriment relating to personal injury including mental injury and economic detriment that is not related to personal injury. In any claim for an 'act of grace' payment or compensation under the CDDA Scheme, it is open to Mr VA to rely on the findings about breaches of his human rights made in the course of this inquiry.

## 6 The Department's response to my findings and recommendations

279. On 16 May 2023, I provided the Department with a notice of my findings and recommendations.
280. On 21 September 2023, the Department provided the following response to my findings and recommendations:

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

### **Apology**

#### ***Recommendation 1: Disagree***

*The Commission recommends that the Commonwealth provide Mr VA with a formal apology for the persistent mischaracterisation of his criminal record.*

While the Department acknowledges the circumstances raised in the report, the Department does not consider it appropriate to issue an apology at this time.

### **Cancellation of bridging visas on the basis of criminal charges**

#### ***Recommendation 2: Partially agree***

*The Commission recommends that:*

*(a) Ministerial Direction 63 be amended to provide that a primary consideration in deciding whether to cancel a non-citizen's Bridging visa E under regulation 2.43(1)(p)(ii) is the seriousness of the offence with which the visa holder has been charged*

*(b) consequential amendments are made to Ministerial Direction 63 including the sections dealing with 'general guidance' and 'principles' to remove the suggestion that bridging visas would ordinarily be subject to cancellation regardless of the seriousness of any charges faced by the visa holder.*

The Department partially agrees with the Commission's recommendations regarding Ministerial Direction 63 and advises that these issues are currently under consideration. The Department expects to be able to provide an update on progress on these issues by the end of 2023.

### **Time limit for review of cancellation decision**

#### ***Recommendation 3: Partially agree***

*The Commission recommends that the time limit for applying to the Administrative Appeals Tribunal (or any new federal administrative review body) for review of decisions described in s 338(4) of the Migration Act be extended to 28 days.*

The Department partially agrees with recommendation three. The timeframes for applying for a review of an immigration decision are currently under review as part of the reform of the federal administrative review system being led by the Attorney-General's Department. Further information can be found at *A new federal administrative review body* | Administrative Appeals Tribunal (aat.gov.au).

### **Automatic review of cancellation decision if charges not established**

#### ***Recommendation 4: Disagree***

*The Commission recommends that where a bridging visa has been cancelled under s 116 of the Migration Act on the basis of criminal charges, the withdrawal of these charges or a non-adverse judicial outcome should automatically trigger a review of the decision to cancel the visa.*

The Department disagrees with recommendation four. The Department is unable to revoke a decision to cancel a visa made under s 116 of the *Migration Act 1958*. The non-citizen is able to apply for merits review within specified time frames if they are in Australia; they may apply for judicial review if in Australia or outside Australia.

The Department may revisit a decision where there is a jurisdictional error in the cancellation decision. Consideration as to what amounts to a jurisdictional error will vary on a case-by-case basis. Cancellation decisions that may be subject to jurisdictional errors are referred to legal officers for advice. When a decision to cancel a non-citizen's visa has been made on the basis of criminal charges, the subsequent withdrawal of charges or a non-adverse judicial outcome after a decision has been made is unlikely to be found to be jurisdictional error.

## **Risk assessments based on criminal charges**

### ***Recommendation 5: Agree***

*The Commission recommends that the Department develop criminal law expertise for case managers responsible for completing the Community Protection Assessment Tool to assist them in properly interpreting information provided by law enforcement and judicial authorities.*

The Department agrees to recommendation five and will explore options to provide training to Status Resolution Officers to assist them in interpreting information provided by law enforcement and judicial authorities.

### ***Recommendations 6 and 7: Accepted and already addressed***

*The Commission recommends that if a risk assessment for a person in immigration detention is based, in whole or in part, on the fact that the person has been charged with a criminal offence, a further risk assessment should be undertaken once those charges are finally determined.*

*The Commission recommends that risk assessments for people in immigration detention properly distinguish between being charged with a criminal offence and being convicted of a criminal offence.*

The Department accepts recommendations six and seven and advises they have already been addressed.

The risk assessment process is designed to assess the potential risk identified, using a likelihood versus consequence methodology and is based on information provided to the Facilities and Detainee Services Provider (FDSP). Where possible, and known, this information is included on a detainee's history within the Security Risk Assessment Tool (SRAT).

The Department reiterates its response to the Commission's preliminary findings that it agrees that the SRAT for Mr VA was incorrect at times and acknowledges that information that Mr VA had been acquitted of two charges alleged to have occurred on 9 November 2016 were not considered by the FDSP due to human error.

In line with contractual and detention operational policy requirements, the FDSP should have reviewed Mr VA's SRAT when the new information became available. It remains the Department's expectation that any risk identified in relation to a detainee's criminal charges are expected be removed in the event that charges are dismissed or withdrawn, at such time as that information becomes available to the FDSP via the Department. However, the Department maintains that while it would have been preferable for the SRAT to have included a clarification between the two i.e. 'charged with' or 'convicted of', this alone did not have a bearing on Mr VA's placement as the risk assessment is based on the likelihood and consequences of a potential risk involved.

The Department and the FDSP continue to jointly conduct regular performance reviews of service delivery, including timeliness of Security Risk Assessments, and if failures are identified which exceeds tolerance, a financial abatement may be applied.

**Table 1 - Summary of Department's response to recommendations**

Recommendation number	Department's response
1	Disagree
2	Partially Agree
3	Partially Agree
4	Disagree
5	Agree
6	Accepted and already addressed
7	Accepted and already addressed

281. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM  
**President**  
Australian Human Rights Commission  
November 2023

## Endnotes

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- <sup>1</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), [1980] ATS 23 (entered into force for Australia 13 November 1980).
- <sup>2</sup> *Al-Kateb v Goodwin* (2004) 219 CLR 562.
- <sup>3</sup> *Crimes Act 1914* (Cth), s 4AA (definition of 'penalty unit') as it stood at 8 November 2016.
- <sup>4</sup> *Summary Offences Act 1988* (NSW), s 5.
- <sup>5</sup> Australian Human Rights Commission, *Inspections of Australia's immigration detention facilities 2019 Report*, December 2020, p 23, at <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention>.
- <sup>6</sup> Australian Human Rights Commission, *Inspections of Australia's immigration detention facilities 2019 Report*, December 2020, p 23, at <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention>.
- <sup>7</sup> The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- <sup>8</sup> See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- <sup>9</sup> Human Rights Committee, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).
- <sup>10</sup> Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- <sup>11</sup> *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UNHRC in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
- <sup>12</sup> *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
- <sup>13</sup> United Nations Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).
- <sup>14</sup> United Nations Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
- <sup>15</sup> United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Shams & Ors v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007); *Baban v Australia*, Communication No. 1014/2001, CCPR/C/78/D/1014/2001 (2003); *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006).
- <sup>16</sup> Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].
- <sup>17</sup> Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6].
- <sup>18</sup> Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) [9].
- <sup>19</sup> Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [2].

- <sup>20</sup> Human Rights Committee, *Cabal and Bertran v Australia*, Communication No. 1020/2001, UN Doc CCPR/C/78/D/1020/2001 (7 August 2003) 15 [7.2].
- <sup>21</sup> Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [3].
- <sup>22</sup> Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [3].
- <sup>23</sup> Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/ Rev.1 at 33 (10 April 1992) [3].
- <sup>24</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel, 2<sup>nd</sup> ed, 2005) 250.
- <sup>25</sup> Human Rights Committee, *Walker and Richards v Jamaica*, Communication No. 639/1995, UN Doc CCPR/C/60/D/639/1995 (28 July 1997); Human Rights Committee, *Kennedy v Trinidad and Tobago*, Communication No 845/1998, UN Doc CCPR/C/74/D/845/1998 (26 March 2002); Human Rights Committee, *R.S. v Trinidad and Tobago*, Communication No 684/1996, UN Doc CCPR/C/74/D/684/1996 (2 April 2002).
- <sup>26</sup> Melissa Castan, Jennifer Schultz & Sarah Joseph, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 318.
- <sup>27</sup> UN Human Rights Committee, *Concluding Observations: Croatia*, UN Doc CCPR/CO/71/HRV (30 April 2001) [14].
- <sup>28</sup> Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/ Rev.1 at 33 (10 April 1992) [5].
- <sup>29</sup> UN General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Publication, UN Doc. A/CONF/611 (30 August 1955), as amended by ‘the Nelson Mandela Rules’, UN Doc A/RES/70/175 (17 December 2015).
- <sup>30</sup> The Body of Principles were adopted by the UN General Assembly in *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 6<sup>th</sup> Comm, 43<sup>rd</sup> sess, 76<sup>th</sup> plen mtg, Agenda Item 138, UN Doc A/43/49 (9 December 1988) Annex.
- <sup>31</sup> UN General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Publication, UN Doc. A/CONF/611 (30 August 1955), as amended by ‘the Nelson Mandela Rules’, UN Doc A/RES/70/175 (17 December 2015), preliminary observation 2(1), 7.
- <sup>32</sup> Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [5].
- <sup>33</sup> Human Rights Committee, *Mukong v Cameroon*, Communication No. 458/1991, UN Doc CCPR/C/51/458/1991 (21 July 1994) 11 [9.3]; Human Rights Committee, *Potter v New Zealand*, Communication No. 632/1995, UN Doc CCPR/C/60/D/632/1995 (18 August 1997) 6 [6.3]. See also, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: United States of America*, UN GAOR, Supp No 40, UN Doc A/50/40 (3 October 1995) 55 [285], 57 [299].
- <sup>34</sup> Human Rights and Equal Opportunity Commission, *CD v Commonwealth (Department of Immigration and Multicultural Affairs)*, [2006] AusHRC 36 (1 August 2006).
- <sup>35</sup> *Crimes Act 1914* (Cth), s 4AA (definition of ‘penalty unit’) as it stood at 8 November 2016.
- <sup>36</sup> *Summary Offences Act 1988* (NSW), s 5.
- <sup>37</sup> Minister for Immigration and Border Protection, *Direction No. 63 – Bridging E visas – Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)*, 4 September 2014, at 5(2).

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- <sup>38</sup> Minister for Immigration and Border Protection, *Direction No. 63 – Bridging E visas – Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)*, 4 September 2014, at 6(1)(a).
- <sup>39</sup> Minister for Immigration and Border Protection, *Direction No. 63 – Bridging E visas – Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)*, 4 September 2014, at 7.
- <sup>40</sup> Minister for Immigration and Border Protection, *Direction No. 63 – Bridging E visas – Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)*, 4 September 2014, at 5(3).
- <sup>41</sup> Migration Regulations 1994 (Cth), reg 4.10(2)(a).
- <sup>42</sup> Australian Human Rights Commission, *Review process associated with visa cancellations made on criminal grounds*, submission to the Joint Standing Committee on Migration, 27 April 2018 at [145]–[149], at <https://www.aph.gov.au/DocumentStore.ashx?id=92c3250b-7f7f-44a7-be0e-148869775611&subId=565322>.
- <sup>43</sup> Migration Act, s 119–120.
- <sup>44</sup> Migration Act, s 121(3).
- <sup>45</sup> See Migration Regulations 1994 (Cth), reg 2.44 which prescribes periods for the purposes of ss 121(2) and (4) but not s 121(3).
- <sup>46</sup> *Chiu v Minister for Immigration* [2014] FCCA 2596 at [56].
- <sup>47</sup> *Chiu v Minister for Immigration* [2014] FCCA 2596 at [66].
- <sup>48</sup> *Chiu v Minister for Immigration* [2014] FCCA 2596 at [104].
- <sup>49</sup> *Chiu v Minister for Immigration* [2014] FCCA 2596 at [104].
- <sup>50</sup> *Zhaou v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 748 at [78] (Kenny J).
- <sup>51</sup> *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 344 at [19] (Finn, Mansfield and Gyles JJ); *Zhao v Minister for Immigration and Multicultural Affairs* [2000] FCA 1235 at [25]–[26] (French, Hill and Carr JJ).
- <sup>52</sup> *Alam v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FMCA 583 at [29]–[30] (Barnes FM); *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FMCA 440 at [18]–[19] (Raphael FM).
- <sup>53</sup> Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130 at [83]–[84]. Available at: <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention>.
- <sup>54</sup> Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130 at [94].
- <sup>55</sup> Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, August 2016, p 52, at <https://www.homeaffairs.gov.au/reports-and-pubs/files/dcr-final-report.pdf>.
- <sup>56</sup> Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, August 2016, p 16, recommendation 4.
- <sup>57</sup> Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection and Mr Roman Quaedvlieg APM, Commissioner, Australian Border Force, *Written Opening Statement*, Legal and Constitutional Affairs Legislation Committee, Estimates Hearing, 27 February 2017, pp 4–5, at [https://www.aph.gov.au/~/\\_media/Committees/legcon\\_ctte/estimates/add\\_1617/DIBP/Tabled/DIBP\\_ABF\\_Opening\\_statement.pdf](https://www.aph.gov.au/~/_media/Committees/legcon_ctte/estimates/add_1617/DIBP/Tabled/DIBP_ABF_Opening_statement.pdf).
- <sup>58</sup> Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, August 2016, p 41.
- <sup>59</sup> Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, August 2016, p 42.
- <sup>60</sup> Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, August 2016, p 43. This category was referred to as ‘high security detention’ when first

proposed, but appears to be called 'held detention' in versions of the CPAT used in practice that the Commission has seen.

- <sup>61</sup> Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, August 2016, p 43.
- <sup>62</sup> Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, August 2016, p 44.
- <sup>63</sup> Robert Cornall AO, *Independent Detention Case Review*, Report to the Secretary for Home Affairs and the Commissioner of the Australian Border Force, March 2020, p 34.
- <sup>64</sup> Robert Cornall AO, *Independent Detention Case Review*, Report to the Secretary for Home Affairs and the Commissioner of the Australian Border Force, March 2020, pp 34–35.
- <sup>65</sup> EY, *MIR: Status Resolution – Review of Decision Support Tools: Workstream 3 – Post-implementation review of the proof of concept cohort, Final Report*, 3 August 2016, p 19.
- <sup>66</sup> EY, *MIR: Status Resolution – Review of Decision Support Tools: Workstream 3 – Post-implementation review of the proof of concept cohort, Final Report*, 3 August 2016, pp 12–13.
- <sup>67</sup> EY, *MIR: Status Resolution – Review of Decision Support Tools: Workstream 3 – Post-implementation review of the proof of concept cohort, Final Report*, 3 August 2016, p 16.
- <sup>68</sup> EY, *MIR: Status Resolution – Review of Decision Support Tools: Workstream 3 – Post-implementation review of the proof of concept cohort, Final Report*, 3 August 2016, p 17.
- <sup>69</sup> EY, *MIR: Status Resolution – Review of Decision Support Tools: Workstream 3 – Post-implementation review of the proof of concept cohort, Final Report*, 3 August 2016, p 17.
- <sup>70</sup> Department of Home Affairs, *Alternatives to Held Detention Program, stakeholder meeting – briefing notes and presentation*, 8 August 2022, at <https://www.homeaffairs.gov.au/foi/files/2022/fa-220901228-document-released.PDF>.
- <sup>71</sup> Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130 at [75]–[109].
- <sup>72</sup> Griffith Criminology Institute, *Final Report: Improving Risk Assessment of Immigration Detainees*, November 2019, p 117, at <https://www.homeaffairs.gov.au/foi/files/2020/fa-200200255-document-released.PDF>.
- <sup>73</sup> Commonwealth Ombudsman, Letter to the Hon David Coleman MP dated 22 March 2019 re Assessments under s 486O of the Migration Act 1958, Attachment A, row 15, at [https://www.ombudsman.gov.au/data/assets/pdf\\_file/0010/106021/s-486O-assessments-tabled-9-September-2019-part-3-A1834731.pdf](https://www.ombudsman.gov.au/data/assets/pdf_file/0010/106021/s-486O-assessments-tabled-9-September-2019-part-3-A1834731.pdf).
- <sup>74</sup> Australian Human Rights Commission, *Inspections of Australia's immigration detention facilities 2019 Report*, December 2020, p 23, at <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention>.
- <sup>75</sup> Australian Human Rights Commission, *Inspections of Australia's immigration detention facilities 2019 Report*, December 2020, p 23.
- <sup>76</sup> Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130 at [32] and [173]–[181].
- <sup>77</sup> *Migration Act 1958* (Cth), s 5(1) (definition of 'officer', paragraph (g)).
- <sup>78</sup> *Migration Act 1958* (Cth), s 5(1) (definition of 'immigration detention', paragraph (b)(ii)).
- <sup>79</sup> *Migration Act 1958* (Cth), s 5(1) (definition of 'immigration detention', paragraph (b)(v)).
- <sup>80</sup> *Commonwealth of Australia Gazette*, No. GN 36, 13 September 2000, p 2517.
- <sup>81</sup> *SU v Commonwealth of Australia and anor; BS v Commonwealth of Australia and anor* [2016] NSWSC 8 at [22]–[25] and [41].
- <sup>82</sup> *SU v Commonwealth of Australia and anor; BS v Commonwealth of Australia and anor* [2016] NSWSC 8 at [47].

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- <sup>83</sup> Cf. *SU v Commonwealth of Australia and anor*; *BS v Commonwealth of Australia and anor* [2016] NSWSC 8 at [47].
- <sup>84</sup> *BZAAB v Minister for Immigration and Citizenship* [2011] FCA 429 at [3].
- <sup>85</sup> Human Rights Committee, *General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007), at [36]; Human Rights Committee, *Mbenge v Zaire*, Communication No. 16/1977 (24 April 1979) at [14.1]–[14.2]; and more recently see *Khudayberdiev v Kyrgyzstan*, Communication No. 2522/2015, UN Doc CCPR/C/127/D/2522/2015 (19 February 2020) at [9.5]–[9.6] and the dissenting opinion of Committee member Shuichi Furuya at [2]–[6].
- <sup>86</sup> Human Rights Committee, *Sadykov v Kazakhstan*, Communication No. 2431/2014, UN Doc CCPR/C/127/D/2431/2014 (4 December 2019), at [3.6] and [7.2].
- <sup>87</sup> Human Rights Committee, *Dorofeev v Russian Federation*, Communication No. 2041/2011, UN Doc CCPR/C/111/D/2041/2011 (26 August 2014) at [10.6].
- <sup>88</sup> Assessment by the Commonwealth Ombudsman to the Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, Ombudsman ID 1002999-O1, at [https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/48a1387a-b472-4499-a4c1-5b7faaa80a14/upload\\_pdf/migration%20act%20-%20report%20no.%209%20of%202020.pdf;fileType=application%2Fpdf#search=%2246%22](https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/48a1387a-b472-4499-a4c1-5b7faaa80a14/upload_pdf/migration%20act%20-%20report%20no.%209%20of%202020.pdf;fileType=application%2Fpdf#search=%2246%22).
- <sup>89</sup> AHRC Act, s 29(2)(a).
- <sup>90</sup> AHRC Act, s 29(2)(b).
- <sup>91</sup> AHRC Act, s 29(2)(c).
- <sup>92</sup> *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at 360 [34] (Kiefel J).
- <sup>93</sup> For example, *Forbes v Commonwealth* [2003] FMCA 140 at [34] (Driver FM) and *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160 at [95] (Driver FM).
- <sup>94</sup> *Jones v Toben* [2002] FCA 1150 at [106], referring to Hely J in *Jones v Scully* (2002) 120 FCR 243 at 308 [245].
- <sup>95</sup> Legal Services Directions 2017 (Cth), Appendix B, clause 2(i).
- <sup>96</sup> D Shelton, *Remedies in International Human Rights Law* (2000), p 151.
- <sup>97</sup> Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (Cth).
- <sup>98</sup> Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) [3.7]. At [https://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0026/42596/December-2016-Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf](https://www.ombudsman.gov.au/_data/assets/pdf_file/0026/42596/December-2016-Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf).
- <sup>99</sup> For an overview of application conditions applying to different kinds of decisions, see [aat.gov.au](http://aat.gov.au); see also *Administrative Appeals Tribunal Act 1975* (Cth), s 29(2).
- <sup>100</sup> Migration Act, s 338(4)(b) and Migration Regulations 1994 (Cth), reg 4.10(2)(a).
- <sup>101</sup> Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) [3.17].
- <sup>102</sup> Attorney-General's Department, A new system of federal administrative review, at <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>.
- <sup>103</sup> Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) [6.7].
- <sup>104</sup> Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) [5.2].
- <sup>105</sup> Department of Finance, *Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act 2013 (RMG 401)*, at

<https://www.finance.gov.au/publications/resource-management-guides/requests-discretionary-financial-assistance-under-public-governance-performance-and-accountability-act-2013-rmg-401>; Department of Finance, *Scheme for Compensation for Detriment caused by Defective Administration (RMG 409)*, at <https://www.finance.gov.au/publications/resource-management-guides/scheme-compensation-detriment-caused-defective-administration-rmg-409>.