Australian Human Rights Commission

Brown v Commonwealth of Australia

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Brown v Commonwealth of Australia (Department of Immigration and Citizenship)

Report into arbitrary detention, the right to be treated with humanity and with respect for the inherent dignity of the human person and the right to be free from arbitrary interference with and to protection of the family.

[2012] AusHRC 51

Australian
Human Rights
Commission

Australian Human Rights Commission

March 2012

The Hon Nicola Roxon MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I attach my report of an inquiry into the complaint made pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) by Ms Maria Brown.

I have found that the acts and practices of the Commonwealth breached Ms Brown's right not to be subject to arbitrary detention, her right to be treated with humanity and with respect for her inherent dignity and her right to protection of, and freedom from arbitrary interference with, her family.

By letter dated 27 January 2012 the Department of Immigration and Citizenship provided its response to my findings and recommendations. I have set out the response of the Department in its entirety in part 12 of my report.

Yours sincerely

Catherine Branson
President
Australian Human Rights Commission

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1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission and the reasons for those findings following an inquiry by the Commission into a complaint lodged by Ms Maria Brown that her treatment by the Commonwealth of Australia – Department of Immigration and Citizenship (DIAC) involved acts or practices inconsistent with or contrary to human rights.

2 Summary

2.1 Summary of findings

2. I have found that the Commonwealth breached Ms Brown's human rights.

(a) Detention in Villawood Immigration Detention Centre

3. I find that the detention of Ms Brown in Villawood Immigration Detention Centre (VIDC) was not necessary and not proportionate to the Commonwealth's legitimate aim of protecting the Australian community from non-citizens who pose an unacceptable risk to the Australian community.

4. The failure of the Minister to place Ms Brown in community detention or other less restrictive form of detention after Ms Brown's visa was cancelled was inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

(b) Treatment in detention

5. I find that the decision to place Ms Brown, an unaccompanied female, in accommodation predominantly occupied by males amounted to a failure to treat Ms Brown with humanity and with respect for the inherent dignity of the human person. I find that after her son left immigration detention, Ms Brown should have been placed in the women only accommodation available at VIDC. Accordingly, I find that this conduct breached article 10(1) of the ICCPR.

(c) Interference with and protection of the family

6. I find that the interference with Ms Brown's family caused by her detention was not reasonable and was not proportionate to the Commonwealth's legitimate aim of protecting the Australian community from non-citizens who pose an unacceptable risk to the Australian community.

7. Accordingly, I find that the failure to place Ms Brown in community detention or other less restrictive form of immigration detention arbitrarily interfered with her family in breach of articles 17(1) and 23(1) of the ICCPR.

2.2 Summary of recommendations

8. In light of my findings regarding the acts and practices of the Commonwealth I make the following recommendations:

- That the Commonwealth pay financial compensation to Ms Brown in the amount of $450 000.
- That the Commonwealth provide a formal written apology to Ms Brown for the breaches of her human rights identified in this report.
- That the Commonwealth change its policies and practices in the ways identified below.

3 The complaint by Ms Brown

3.1 Background

9. On or about 27 April 2009 Ms Brown complained to the Commission that the failure of the Minister to place her in a less restrictive form of detention than in VIDC amounted to breaches of articles 9(1), 10(1), 17(1) and 23(1) of the ICCPR.
10. Both Ms Brown and the Commonwealth have provided submissions in this matter.
11. Ms Brown and the Commonwealth have also had the opportunity to respond to my preliminary or 'tentative' view of 24 June 2010 which set out the acts or practices raised by the complaint that appeared to be inconsistent with or contrary to human rights.
12. The Commonwealth has also had an opportunity to respond to my amended preliminary view on the application of article 10(1) of the ICCPR which was outlined in my letter of 20 July 2011.
13. My function in investigating complaints of breaches of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with the human rights defined and protected by the ICCPR.
14. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of that international instrument and by international jurisprudence about their interpretation.

3.2 Findings of Fact

15. I consider the following statements about the circumstances which have given rise to Ms Brown's complaint to be uncontentious.
16. In May 1997 Ms Brown arrived in Australia and was granted a TY–444 visa, a type of visa automatically granted to New Zealand citizens who arrive in Australia and do not hold a permanent visa.
17. On 14 March 2001 Ms Brown was convicted of a range of criminal offences committed in 1999.
18. On 21 June 2004 Ms Brown was convicted of two offences committed in 2003.
19. On 16 February 2006 Ms Brown was convicted of 'stalk/intimidate with intent to cause fear physical/mental harm' (committed in October 2005). She was sentenced to 9 months imprisonment. Ms Brown appealed this conviction.
20. On 11 May 2006 Ms Brown was convicted of six counts of 'supply a prohibited drug' (committed in July 2005).
21. On 1 June 2006 Ms Brown's conviction for 'stalk/intimidate with intent to cause fear physical/mental harm' was confirmed but her sentence was reduced to 9 months imprisonment suspended on entry into a nine month good behaviour bond.
22. On 3 November 2008 Ms Brown's visa was cancelled pursuant to section 501 of the *Migration Act 1958* (Cth) (character grounds).
23. On 14 November 2008 Ms Brown was detained in VIDC.

24. On 20 November 2008 Ms Brown lodged an application for review of the decision to cancel her visa in the Administrative Appeals Tribunal (AAT). On 6 February 2009 the AAT affirmed the decision of the Minister's delegate to cancel Ms Brown's visa.

25. On 6 March 2009 Ms Brown applied to the Federal Court of Australia for judicial review of the decision of the AAT.

26. In April 2009 Ms Brown was convicted of the offence of affray (committed in or about October 2008) and was fined $300.

27. On 19 May 2009 Ms Brown requested that she be placed in community detention.

28. On 29 September 2009 the Federal Court dismissed Ms Brown's application for judicial review. On 20 October 2009 Ms Brown filed a Notice of Appeal in relation to the Federal Court's decision. On 20 April 2010 the Full Federal Court dismissed Ms Brown's appeal.

29. On 18 March 2010 Ms Brown's request to be placed in community detention was conveyed to the Minister. On 27 April 2010 the Minister refused Ms Brown's request to be placed in community detention.

30. In November 2010 the Minister declined Ms Brown's request that the Minister exercise his public interest power under s 417 of the Migration Act (Minister may substitute a more favourable decision).

31. On 23 May 2011 Ms Brown voluntarily returned to New Zealand.

4 The Commission's human rights and inquiry and complaints function

32. Section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) gives the Commission the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right.

33. Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.

4.1 The Commission can inquire into acts or practices of the Commonwealth

34. The expressions '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 under an enactment.

35. Section 3(3) of the AHRC Act also provides that a reference to, or the doing of, an act includes a reference to a refusal or failure to do an act.

36. An 'act' or 'practice' only invokes the human rights complaints jurisdiction of the Commission where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

37. As a judge of the Federal Court in *Secretary, Department of Defence v HREOC, Burgess & Ors,*[1] I found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Therefore, if a law requires that the act or practice be done by or on behalf of the Commonwealth, its officers or agents, and there is no discretion involved, the act or practice done pursuant to that statutory provision will be outside the scope of the Commission's human rights inquiry jurisdiction.[2]

38. Ms Brown was placed in VIDC on 14 November 2008. Her detention in VIDC ended when she voluntarily returned to New Zealand on 23 May 2011.

39. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens. After cancellation of her visa on 3 November 2008 Ms Brown became an unlawful non-citizen and as such was required to be detained. However, the Migration Act did not require that Ms Brown be detained in an immigration detention centre.

40. Section 197AB of the Migration Act states:

> If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a ***residence determination***) to the effect that one or more specified persons to whom this subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1).

41. Further, the definition of 'immigration detention' includes 'being held by, or on behalf, of an officer in another place approved by the Minister in writing'.[3]

42. The Commonwealth claims that the Minister considered a broad range of factors before concluding that it was not in the public interest that Ms Brown be placed in community detention. The Commonwealth states that it cannot agree that the Minister's decision not to exercise his power to make a residence determination amounts to a failure of a duty to place Ms Brown in a less restrictive form of detention.

43. The Minister could have made a residence determination in relation to Ms Brown under s 197AB of the Migration Act or could have approved that Ms Brown reside in a place other than VIDC, but did not do so. I consider that the failure by the Minister to place Ms Brown in a less restrictive form of detention amounts to an act under the AHRC Act.

4.2 'Human rights' relevant to this complaint

44. The expression 'human rights' is defined in section 3 of the AHRC Act and includes the rights and freedoms recognised in the ICCPR, which is set out in Schedule 2 to the AHRC Act.

45. The articles of the ICCPR that are of particular relevance to this complaint are:

- article 9(1) (prohibition on arbitrary detention);
- article 10(1) (humane treatment of people deprived of their liberty);
- article 17(1) (prohibition against arbitrary interference with family); and article 23 (protection of family).

(a) Article 9(1) of the ICCPR

46. 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.

47. The requirement that detention not be 'arbitrary' is separate and distinct from the requirement that detention be lawful.[4]

48. In order to avoid the characterisation of arbitrariness, detention should not continue beyond the period for which a state party can provide appropriate justification.[5]

49. In *A v Australia*[6] the United Nations Human Rights Committee (UNHRC) said:

> … the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.[7]

50. The UNHRC further stated:

> ... the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of co-operation, which justify detention for a period. Without such factors, detention may be considered arbitrary, even if entry was illegal.[8]

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

52. In *C v Australia*[9] the UNHRC found that the detention was arbitrary because:

> [t]he State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition.[10]

(b) Article 10(1) of the ICCPR

53. Article 10(1) provides:

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

54. Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons.[11] However, to establish a breach of article 10(1) a complainant must demonstrate an additional exacerbating factor beyond the usual incidents of detention.[12]

55. In particular, the alleged breach of article 10(1) must impact on one or more human needs other than liberty or freedom.[13] For example, failing to respect the rights and interests of detainees to light, sanitation and bedding,[14] to maintain family connections,[15] to know one's own personal information,[16] to company and personal space[17] and to be free from hunger.[18]

56. The content of article 10(1) has also been developed with the assistance of a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty, including the Standard Minimum Rules for the Treatment of Prisoners[19] (Standard Minimum Rules) and the Body of Principles for the Protection of all Persons under Any Form of Detention[20] (the Body of Principles).

57. The Third Committee of the General Assembly in its 1958 report on the drafting of the ICCPR stated that the Standard Minimum Rules should be taken into account when interpreting and applying article 10(1).[21] The UNHRC has also indicated that compliance with the Standard Minimum Rules and the Body of Principles is the minimum requirement for compliance with the obligations imposed by the ICCPR that people in detention are to be treated humanely under article 10(1).[22]

58. As a matter of international law, the Standard Minimum Rules and Body of Principles are not binding of themselves on Australia. However, the Standard Minimum Rules and the Body of Principles do elaborate the standard which the international community considers acceptable and are relevant to interpreting the scope and content of the protection given to persons deprived of their liberty in article 10 of the ICCPR.

59. Rule 8(a) of the Standard Minimum Rules provides:

> Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate.

60. In General Comment 28, the UNHRC stated

> As regards articles 7 and 10, States parties must provide all information relevant to ensuring that the rights of persons deprived of their liberty are protected on equal terms for men and women. In particular, states parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards.[23]

61. In Australian Human Rights Commission Report 36,[24] the Commission considered a complaint brought by a female detainee who claimed to have been sexually harassed and assaulted whilst in immigration detention. The detainee and her daughter were of a religious minority compared to the other detainees and were the only females detained amongst a large group of male detainees.

62. In its report, the Commission found that the Commonwealth's failure to move the detainee to different place of detention despite her having complained of sexual harassment, physical assault and an attempted sexual assault amounted to a failure to provide the complainant with a safe place of detention in breach of article 10(1) of the ICCPR.[25]

(c) Article 17(1) and 23(1) of the ICCPR

63. Article 17(1) of the ICCPR provides:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

64. Article 23(1) provides:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

65. Professor Manfred Nowak has noted that:

> [T]he significance of Art. 23(1) lies in the protected existence of the institution "family", whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.[26]

66. For the reasons set out in Australian Human Rights Commission Report 39[27] the Commission is of the view that in cases alleging a State's arbitrary interference with a person's family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person's family, it will usually follow that that breach is in addition to (or in conjunction with) a breach of article 23(1).

67. In its General Comment on article 17(1), the UNHRC confirmed that a lawful interference with a person's family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.[28]

68. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness.[29] In relation to the meaning of 'reasonableness', the UNHRC stated in *Toonen v Australia:*

> The [UNHRC] interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.[30]

5 Forming my opinion

69. In forming an opinion as to whether any act or practice was inconsistent with or contrary to any human right I have carefully considered all of the information provided to me by the parties, including the Commonwealth's submission dated 16 September 2011 responding to my revised preliminary view of the application of article 10(1) to Ms Brown's complaint.

6 Arbitrary detention

70. Ms Brown claims that her detention in VIDC was arbitrary within the meaning of article 9(1) of the ICCPR.

71. The Commonwealth states that it considers that there was a legitimate and justifiable basis for the continuation of Ms Brown's detention pending her removal from Australia, which did not progress whilst she had outstanding applications and litigation matters.

72. The Commonwealth advises that according to DIAC's Immigration Detention Values, unlawful non-citizens who present unacceptable risks to the community will be subject to mandatory detention. The Commonwealth states that Ms Brown has a history of violent offences and that the Minister received advice from New South Wales Police that Ms Brown's presence in the community was undesirable based on her character concerns.

73. Ms Brown was placed in immigration detention on 14 November 2008 after the Minister cancelled her visa on character grounds. She left VIDC on 23 May 2011 when she decided to return to New Zealand.

74. On 19 May 2009 Ms Brown requested that the Minister make a residence determination and place her in community detention. DIAC advises that in March 2010 Ms Brown's request to be placed in community detention was referred to the Minister and on 27 April 2010 the Minister declined to place Ms Brown in community detention.

75. It took DIAC approximately 10 months to refer Ms Brown's request that she be placed in community detention to the Minister. I note that DIAC advises that this occurred because of the triage approach taken to the assessment and referral of cases (priority is given to persons diagnosed with mental illness, children in detention and long term detainees) and because a number of staff from the Case Management and Review Branch were deployed to Christmas Island at this time.

76. DIAC's lengthy delay in referring Ms Brown's request to be placed in community detention to the Minister, whatever its cause, was not consistent with Ms Brown's right not to be arbitrarily detained.

77. In considering whether Ms Brown's detention in VIDC was arbitrary, I am required to consider whether detention in an immigration detention centre was proportionate to the Commonwealth's legitimate aim of protecting the Australian community from non-citizens who pose an unacceptable risk to the Australian community and was necessary in all of the circumstances of the case. I must also consider whether there were other less invasive means of achieving the same ends available to the Commonwealth.

78. The Commonwealth could have detained Ms Brown in a less restrictive manner. The Minister could have made a residence determination in relation to Ms Brown under s 197AB of the Migration Act or could have approved that Ms Brown reside in a place other than VIDC.

79. I note that Ms Brown has been convicted of several criminal offences. However, I do not consider that Ms Brown's criminal record of itself was a sufficient basis on which to justify the deprivation of her liberty in an immigration detention centre.

80. The Commonwealth states that it considers that Ms Brown was placed in "the least restrictive form of immigration detention appropriate to her background of violent and socially disruptive behaviour". The Commonwealth's reference to violent and socially disruptive behaviour must be understood as a reference to the conduct giving rise to Ms Brown's criminal convictions. In assessing the reasonableness of the Commonwealth's approach I note that, subject to one sentence that was successfully appealed, no judicial officer giving consideration to that conduct required Ms Brown to serve a period of imprisonment. I conclude that none of the judicial officers regarded Ms Brown as such a risk to the community that she should be incarcerated.

81. Further, the Commonwealth could have placed Ms Brown in community detention subject to conditions, such as reporting requirements, travel restrictions or a curfew, to allay any concerns it had about the risk that Ms Brown posed to the community. It is unclear why the Minister considered that any risk that Ms Brown posed to the community could not be mitigated in the ways identified above.

82. I consider that Ms Brown's detention in VIDC was not reasonable, necessary or proportionate to the Commonwealth's legitimate aim of protecting the Australian community from non-citizens who pose an unacceptable risk to the Australian community. I consider that any reasonable concerns that the Commonwealth had about the risk that Ms Brown posed to the community could have been addressed by imposing conditions on her placement in community detention.

83. For the reasons mentioned above, I find that Ms Brown's detention in VIDC was arbitrary in breach of article 9(1) of the ICCPR.

7 Treatment in detention

84. Ms Brown claims that the Commonwealth breached her right to be treated with humanity and with respect for her dignity under article 10(1) of the ICCPR in a number of ways.

7.1 Circumstances of initial detention

85. Ms Brown claims that the circumstances surrounding her initial detention were unnecessarily stressful, excessive and humiliating.

86. Ms Brown claims that:

- Approximately 10-20 police officers carrying firearms, including shotguns, arrived at her friend's house (where she had stayed overnight) in order to take her to VIDC.
- Multiple firearms were pointed at her.
- She was handcuffed and physically dragged by five police officers down a staircase and into a police vehicle.
- She was taken into detention in a very public manner and in the presence of a young child.
- She was not permitted to get dressed and was taken to the police station wearing only her night attire.
- She was told that she was being arrested rather than that she was being taken into immigration detention.
- Her rights of appeal in respect of her visa cancellation were not explained to her.
- When she arrived at the police station, she was taken into a small room with four officers who attempted to elicit her consent to her immediate removal from Australia.

87. The Commonwealth has provided a DVD which shows New South Wales Police taking Ms Brown into immigration detention. The DVD shows that four uniformed police officers, two males and two females, were directly involved in escorting Ms Brown from her friend's house into the police van. It appears that a plain clothes policeman was standing against the front fence of the house, another two plain clothes policemen were waiting at the van and one further plain clothes police woman was waiting at another car. In total, it appears that eight police officers were involved in taking Ms Brown into immigration detention.

88. The Commonwealth states that while it cannot comment on New South Wales Police operational guidelines, 'the presence of a small group of New South Wales police officers would not appear to be unreasonable in view of Ms Brown's criminal history, in particular the fact that Ms Brown had been convicted on two separate occasions of assault occasioning actual bodily harm, as well as intimidating a police officer in the execution of his or her duty, assaulting an officer in the execution of his or her duty, resisting an officer in the course of his or her duty and stalking or intimidating with the intent to cause fear of physical or mental harm.'

89. The DVD does not show the use of firearms by any police officer involved in taking Ms Brown into police custody.

90. The DVD does not show that the police officers dragged Ms Brown into the police van and does not show that Ms Brown was handcuffed. One male and one female police officer walked Ms Brown to the police van whilst holding onto her arms. One officer walked behind the other officers and Ms Brown.

91. It does not appear that Ms Brown was taken into detention in an unduly public manner. In her statutory declaration of 30 July 2010 Ms Brown advises that the police arrived at her friend's house between 6 and 7 am. From the DVD it appears that few, if any, members of the public observed Ms Brown being taken into police custody. A child cannot be seen or heard in the DVD.

92. The DVD shows that Ms Brown was taken into custody whilst she was wearing a singlet and a sarong. However, Ms Brown advises that her fiancé brought clothes to her at the police station.

93. Whilst the DVD shows that Ms Brown was told that she was under arrest, it is also audible that Ms Brown was told more than once that she was being taken to the police station to be interviewed by the Department of Immigration. Further, the Detention Review Manager (DRM) Reports in relation to Ms Brown indicate that she was issued with a Notice of Intention to Cancel (NOIC) her visa on 3 June 2008 and that she provided a response to the NOIC on 29 August 2008. The DVD does not support a view that Ms Brown was not told why she was being taken into police custody.

94. Based on the material currently before me, I am not satisfied that New South Wales police, acting on behalf of the Commonwealth, treated Ms Brown without humanity or without respect for her inherent dignity within the meaning of article 10 of the ICCPR.

7.2 Detention in Blaxland

95. From 14 November 2008 until 27 February 2009 Ms Brown was detained within VIDC 'Dorm 2' in the area formerly known as 'Stage 1' and now known as Blaxland. Blaxland is the highest security area within VIDC. Ms Brown was initially housed in the same room as her adult son, who was already in immigration detention, and was then transferred into a separate room in Dorm 2.

96. Ms Brown claims that she was automatically detained in Blaxland because her son was detained there and that she was not given the option of being detained in a lower security area. Ms Brown claims that she was told that she was the only woman to have ever been detained in Blaxland.

97. Ms Brown claims that in Blaxland her interaction with people other than her son was restricted. Ms Brown alleges that she was only able to interact with other people when her family came to visit or when VIDC officers checked on her. Ms Brown claims that her movement was also restricted within Blaxland. Ms Brown claims that she was not able to leave Dorm 2 in the same way that other Blaxland detainees were able to leave their dorms. In particular, Ms Brown says that she was only able to use the gym after midnight whereas other detainees could access the facilities during the day. Ms Brown claims that she was detained in Blaxland for a number of weeks after her son was removed from Australia.

98. The Commonwealth claims that Ms Brown was detained in Blaxland because she made a 'specific request' to be housed with her son, who was detained in Blaxland because he was considered to be a high risk detainee.

99. The Commonwealth claims that Ms Brown and her son were detained within a discrete unit in Blaxland and that Ms Brown was allowed to visit the Hughes area during the day. In support of this claim, the Commonwealth provides an email from Florin Tago of GSL Australia Pty Ltd (GSL) to Cath Buckland of DIAC dated 22 December 2008 which states

> Louise (DGM) spoke with her [Ms Brown] in regards to having a room in stage 2 during the day and facilitating her visits down there and that we would organise for her son [name omitted] to go down to the visits area when they had visitors but she said no. She is only willing to go down to visit Client [name omitted] and [name omitted] for a little while but prefers to spend most of her time up here in the family unit. She does not want her visits to take place anywhere else and is still no [sic] willing to be separated from her son.

100. In relation to Ms Brown's claim that she remained in Blaxland for a number of weeks after her son was removed from Australia, the Commonwealth advises that Ms Brown's son was removed from Australia on 24 February 2009 and that DRM reports in relation to Ms Brown state that she was removed from Blaxland on 27 February 2009.

101. It appears that whilst she was in Blaxland, Ms Brown's ability to interact with other detainees and to access VIDC facilities was more limited than that of detainees housed in the area formerly known as Stage 2 and now known as Hughes. Hughes is a lower security area than Blaxland. However, the material that has been provided to the Commission suggests that Ms Brown was permitted to access the Hughes area during the day and was given some access to the Blaxland facilities, albeit at an unsuitable time. Based on the information before me, I am not satisfied that Ms Brown's detention with her son in a discrete unit in the Blaxland area amounts to a breach of article 10 of the ICCPR.

7.3 Detention in Hughes

(a) Placement in Hughes

102. From 27 February 2009 until 18 June 2009 Ms Brown was detained in the Shoalhaven building within the Hughes area. Ms Brown was the only occupant of the Shoalhaven building. Ms Brown states that it was lonely and 'creepy' to be housed in a large empty building by herself. The Commonwealth has advised that whilst Ms Brown was able to lock the door her room in the Shoalhaven building, she was not able to lock the building so as to exclude other detainees from the building.

103. From 18 June 2009 until she left VIDC on 23 May 2011, Ms Brown was housed in the 'Lachlan' building within the Hughes area. The Lachlan building is mixed gender accommodation. Ms Brown and her roommate were able to display a poster indicating that their room was a room occupied by women and the door to the room could be locked from the inside. Ms Brown claims that she and her roommate were the only women residing in the Lachlan building whilst she was detained there.

104. Ms Brown says that she should have been housed in the building formerly known as Lima and now known as Banksia. Only women are detained in Banksia. Ms Brown claims that she was advised that she could not stay in Banksia because she was a high risk detainee.

105. The Commonwealth agrees that Ms Brown was housed within the Lachlan building and that Lachlan is mixed gender accommodation. By email of 12 April 2011 the Commonwealth advised that as at 11 March 2011, there were 25 males and two females housed in the Lachlan building. The Commonwealth claims that Ms Brown could have been housed in Banksia but chose to be housed in the mixed accommodation area because she had friends living there.

106. Ms Brown's claim that she was told that she could not reside in the women only accommodation because she was a high risk detainee is consistent with DIAC's records. The Client Placement Assessment Report (the Report) in relation to Ms Brown dated 25 February 2009 recommends that Ms Brown be placed in Stage 2 or Lima. However, the Report also notes that Ms Brown's visa was cancelled under section 501 of the Migration Act, and that she was an 'extremely high risk detainee' with a 'considerable criminal history' who posed a risk of being harmed by or harming others.

107. Having regard to the totality of the material before me, I am not satisfied that Ms Brown chose to be placed in the Lachlan building. The Report indicates that the officers from the company managing VIDC at the time, G4S, were going to talk to Ms Brown to find out her preferences for placement. However, there is no record of this discussion having occurred, nor have I been referred to anything that indicates that any preference expressed by Ms Brown would have been determinative of her placement. On the other hand, as noted above, consistent with Ms Brown's account that she was told that she could not be housed in the women only accommodation because she was a high risk detainee, the Report indicates that G4S regarded Ms Brown as 'extremely high risk' and a danger to other detainees.

108. Standard Minimum Rule 8(a) states that men and women shall, so far as possible, be detained in separate institutions. Ms Brown was an unaccompanied woman who in substance was housed in mixed accommodation from the time that she was placed in the Shoalhaven building on 27 February 2009 until she left VIDC on 23 May 2011. Whilst Ms Brown was the only detainee in the Shoalhaven building, she was unable to exclude male detainees from the building, in the way that they are excluded from the women only accommodation. Though the Commonwealth has not provided evidence of the composition of the Lachlan building populace throughout the period that Ms Brown was housed there, it does not appear to be disputed that the male detainees housed in the Lachlan building substantially outnumbered the women detained there.

109. The particular vulnerability of women prisoners who are detained with men is well recognised.[31] Women in mixed immigration detention facilities are also in a vulnerable position. The existence of women-only accommodation at VIDC and the general practice of housing unaccompanied women within the women-only accommodation is a recognition of this vulnerability.

110. In response to my letter of 20 July 2011 outlining my amended preliminary view on Ms Brown's claims of breach of article 10, the Commonwealth noted that Ms Brown made written requests to be placed in Immigration Residential Housing and in community detention but made no written requests to be transferred to the women only accommodation. The Commonwealth also claims that Ms Brown indicated to her case managers that she had no concerns with her placement in Lachlan building. The Commonwealth submits that these factors indicate that Ms Brown was content with her placement in the Lachlan building.

111. I note that the statements of VIDC officers Ms Noelene Alley, Ms Carmel Cavanough, and the email from VIDC officer Ms Teresa Witt indicate some recollection of a request by Ms Brown to be placed in the women only accommodation.

112. The Commonwealth claims that in June 2010 Ms Brown advised Ms Alley that she 'does not wish to be moved from her room and is happy with her current placement'.

113. On 2 May 2010 Ms Brown complained that her room was located next to someone who had been convicted of serious criminal offences. Ms Alley's statement indicates that in response to her complaint, Ms Brown was offered 'placement in an alternate room in Hughes so as to be accommodated further from the convicted criminal ...'. The information before the Commission indicates that DIAC offered to move Ms Brown to a new room within the same compound and, in light of this choice, Ms Brown elected to stay in her old room. There is no information to suggest that DIAC offered to move Ms Brown to the women-only accommodation.

114. I note that Ms Brown appears not to have made written requests to be moved to the women only accommodation. However, there is material which indicates that she made verbal requests to be moved to the women only accommodation. I also note that Ms Brown claims that she was told that she could not reside in the women only accommodation because her visa was cancelled pursuant to section 501 of the Migration Act. I am of the view that, on the assumption that she was to be detained in VIDC, Ms Brown should have been housed in the women only accommodation as soon as her son left VIDC. Accordingly, I find that the Commonwealth breached article 10 of the ICCPR by housing Ms Brown in Lachlan rather than in the women only accommodation.

(b) Incidents alleged to have occurred in the Lachlan building

115. Ms Brown claims that a number of incidents occurred whilst she was housed in the Lachlan building. Ms Brown claims that male detainees made frequent comments of a sexual nature to her and around her and that male detainees exposed themselves to her. Ms Brown claims that on one occasion, when she was in the gym area, a male detainee grabbed her from behind and made an inappropriate comment to her. Ms Brown alleges that she made complaints about these incidents to VIDC officers.

116. Ms Brown also claims that her room in the Lachlan building was broken into and that some of her belongings were stolen. Ms Brown claims that these events made her feel unsafe in the Lachlan building.

117. The Commonwealth states that while Ms Brown made a number of written complaints about her circumstances in VIDC, she made no written complaints about being treated inappropriately by male detainees.

118. The Commonwealth has provided statements from some of the VIDC officers to whom Ms Brown claimed she made complaints about the inappropriate behaviour of male detainees. Aside from the statement of officer Nise Iosefo, which indicates that Ms Brown made a complaint about a male detainee having behaved inappropriately towards her after she caught a male and female detainee in an intimate act, the statements from VIDC officers do not support Ms Brown's allegation that she made repeated complaints about the conduct of male detainees.

119. Whilst I find that the Commonwealth breached Ms Brown's human rights by detaining her in accommodation predominantly occupied by men, I am not satisfied that Ms Brown experienced repeated inappropriate treatment by male detainees whilst she was detained in the Lachlan building, or at all.

8 Interference with and protection of the family

120. Ms Brown claims that her detention in VIDC interfered with her family in breach of articles 17(1) and 23(1) of the ICCPR. Ms Brown advises that she has eight siblings, four children, five grandchildren and a fiancé living in the Australian community from whom she was separated because of her detention.

121. The Commonwealth claims that Ms Brown's detention was lawful and proportionate and therefore maintains that the interference with family which resulted from Ms Brown's detention was reasonable in the circumstances and as such was not a breach of article 17 or 23 of the ICCPR.

122. The Commonwealth claims that a finding of arbitrary detention does not necessarily equate to arbitrary interference with the family; it is necessary to have regard to the nature of the relationships between the detained person and members of his or her family. In relation to Ms Brown's grandchildren, the Commonwealth notes that when considering the best interests of the child for the purpose of reviewing the decision to cancel her visa, the AAT found that there was 'little evidence of any kind to show the existence of a close relationship' between Ms Brown and her grandchildren.

123. The Commonwealth further states that Ms Brown was detained in the immigration detention centre closest to the Campbelltown region where her family resides and that this allowed her to receive regular visits from various family members, including her teenage son and her fiancé. The Commonwealth also notes that on one occasion Ms Brown was allowed to visit her son at her sister's home.

124. In considering whether any interference with Ms Brown's family was arbitrary, I must consider whether it was reasonable and proportionate to DIAC's legitimate aim of ensuring that non-citizens who pose an unacceptable risk to the Australian community are not released into the Australian community.

125. Ms Brown and her family were separated for 30 months as a result of Ms Brown's detention in VIDC. This could have been avoided had Ms Brown been placed in community detention.

126. Whilst family members were able to visit Ms Brown in VIDC, I find that Ms Brown's lengthy detention in VIDC interfered with her ability to maintain a relationship with her family. I consider that Ms Brown's detention is likely to have had a particularly negative impact on her relationship with her fiancé and with her youngest son who was 12 years old when she was placed in VIDC.

127. For the above-mentioned reasons, I find that Ms Brown's detention arbitrarily interfered with her family in breach of articles 17 and 23 of the ICCPR.

9 Findings and recommendations

9.1 Power to make recommendations

128. 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.[32] The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.[33]

129. The Commission may also recommend:

- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
- the taking of other action to remedy or reduce the loss or damage suffered by a person.[34]

9.2 Consideration of compensation

130. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.

131. However, in making a recommendation for compensation under section 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.[35]

132. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.[36]

133. The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR. This is because an action for false imprisonment cannot succeed where there is lawful justification for the detention, whereas a breach of article 9(1) will be made out where it can be established that the detention was arbitrary, irrespective of legality.

134. Notwithstanding this important distinction, the damages awarded in false imprisonment provide an appropriate guide for the award of compensation for a breach of article 9(1). This is because the damages that are available in false imprisonment matters provide an indication of how the courts have considered it appropriate to compensate for loss of liberty.

135. The principal heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).[37]

136. I note that the following awards of damages have been made for injury to liberty and provide a useful reference point in the present case.

137. In *Taylor v Ruddock* the District Court at first instance considered the quantum of general damages for the plaintiff's loss of liberty for two periods of 161 days and 155 days during which the plaintiff was in 'immigration detention' under the Migration Act but held in NSW prisons.[38]

138. Although the award of the District Court was ultimately set aside by the High Court, it provides a useful indication of the calculation of damages for a person being unlawfully detained for a significant period of time.

139. The Court found that the plaintiff was unlawfully imprisoned for the whole of those periods and awarded him $50 000 for the first period of 161 days and $60 000 for the second period of 155 days. For a total period of 316 days wrongful imprisonment, the Court awarded a total of $110 000.

140. In awarding Mr Taylor $110 000 the District Court took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.[39]

141. On appeal, the Court of Appeal of New South Wales considered that the award was low but in the acceptable range.[40] The Court noted that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish'.[41]

142. In *Goldie v Commonwealth of Australia (No 2)* Mr Goldie was awarded damages of $22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days.[42]

143. In *Spautz v Butterworth* Mr Spautz was awarded $75 000 in damages for his wrongful imprisonment as a result of failing to pay a fine. Mr Spautz spent 56 days in prison and his damages award reflects the length of his incarceration. His time in prison included seven days in solitary confinement.[43]

9.3 Recommendation that compensation be paid

144. I have found that on or about 14 November 2008, rather than being placed in VIDC, Ms Brown should have been placed in community detention. The failure to release Ms Brown from VIDC was inconsistent with her right not to be arbitrarily detained in breach of article 9(1) of the ICCPR. It also arbitrarily interfered with her family in breach of articles 17(1) and 23(1) of the ICCPR.

145. I have also found that housing Ms Brown, an unaccompanied female, in a place of detention predominantly occupied by men was a breach of her right to be treated with humanity and with respect for the inherent dignity of the person under article 10(1) of the ICCPR.

146. In submissions made on behalf of Ms Brown it is argued that the compensation awarded to Ms Brown should be at the higher end of the range. It is suggested that based on the relevant authorities, the range is from $214 777.70 to $3 393 500.00 for the following reasons:

- Although Ms Brown has criminal convictions, unlike Mr Taylor she had not previously lost her liberty and the disgrace and humiliation experienced by her was heightened by her close connection with her large family in Sydney.
- At the point of her detention she had completed a 9 month good behaviour bond and had resided in the community without further convictions for some time.
- The circumstances of her being taken into immigration detention were particularly confrontational, humiliating and hurtful.

- Four police officers attempted to elicit a signature from her to consent to her immediate removal from Australia without providing her with an opportunity to seek legal advice or to apply for a review of the cancellation decision.
- Ms Brown was conveyed to VIDC in an unnecessarily distressing manner.
- She was detained in the maximum security area of VIDC without her having been informed of the existence of any other option.
- Ms Brown was detained with the general male population rather than with female detainees.
- There was a lack of action by DIAC in respect of Ms Brown's application to be placed in community detention.
- DIAC's approach to applications for community detention generally is an aggravating factor. Detention in VIDC is the default position unless the detainee demonstrates a need that could not be met in VIDC. This approach inverts the approach required by article 9 of the ICCPR.
- A further aggravating factor is a comment made on behalf of DIAC at the directions hearing that Ms Brown was in detention because of the need to protect the community from her, despite the members of the judiciary having found that incarceration was unnecessary.

147. DIAC contended that it was not appropriate for me to apply a 'daily rate' to determine a recommendation for compensation. DIAC noted that in common law proceedings, the quantum of damages for matters such as pain and suffering is tested on the basis of submissions from both parties on these issues.

148. I consider that the Commonwealth should pay to Ms Brown an amount of compensation to reflect the loss of liberty caused by her detention at VIDC, rather than in community detention, and the consequent interference with her family. Had Ms Brown been transferred to community detention she would still have experienced some curtailment of her liberty, and I have taken this into account when assessing her compensation.

149. I have also found that the decision to detain Ms Brown in accommodation predominantly occupied by men was a breach of her right under article 10(1) of the ICCPR to be treated with humanity and with respect for the inherent dignity of the human person. Accordingly, the amount of compensation to be paid to Ms Brown should reflect this further breach of her rights. It is relevant to an assessment of the amount of compensation that should be paid to Ms Brown for the breach of her rights under article 10(1) that I am not satisfied on the basis of the evidence before me that Ms Brown was treated inappropriately by male detainees whilst she was detained in the mixed accommodation Lachlan complex, or at all.

150. I do not consider that any of the other above-mentioned factors noted on behalf of Ms Brown are relevant to assessing an appropriate amount of compensation to be paid to Ms Brown.

151. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Taking into account the guidance provided by the decisions referred to above I consider that payment of compensation in the amount of $450 000 is appropriate.

10 Apology

152. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Ms Brown for the breaches of her human rights identified in this report. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.[44]

11 Policy

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

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

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

156. The guidelines relating to the Minister's residence determination power should be amended to require that a decision by DIAC not to refer a person to the Minister for consideration of making a residence determination should be a decision that is made only after an individualised assessment of the person's circumstances and based on reliable and documented evidence. The guidelines should expressly provide that a criminal record is insufficient evidence of itself that an individual is a flight risk or poses an unacceptable risk to the Australian community.

157. The Commonwealth should ensure that both low security and high security immigration detention facilities have appropriate women only accommodation areas.

158. If, after an individual assessment, it is determined that an unaccompanied woman must be held in an immigration detention facility, she should be held in the least restrictive place of detention appropriate to her individual circumstances and she should be held in a women only area.

159. Where an unaccompanied woman elects to be housed in mixed accommodation, this election should be recorded in writing. The Commonwealth should implement measures to ensure to the greatest extent possible that women housed in mixed accommodation areas are free from harassment, abuse or intimidation.

12 Department's response to recommendations

160. On 16 December 2011, I provided the Commonwealth with a Notice under s 29(2)(a) of the AHRC Act outlining my findings and recommendations in relation to the complaint made by Ms Maria Brown against the Commonwealth.

161. By letter dated 27 January 2012 the Commonwealth provided the following response to my findings and recommendations:

> ***The Department's response on behalf of the Commonwealth of Australia to the findings and commendation of the AHRC with regard to Ms Maria Emelia Brown.***
>
> *1.That the Commonwealth pay financial compensation to Ms Brown in the amount of $450,000.*
>
> While we note your findings, in the Department's view Ms Brown was detained lawfully in accordance with the *Migration Act 1958* (Cth) (the Act') and her detention has not been and was not arbitrary.
>
> Accordingly, the Department advises the Commission that there will be no action taken with regard to this recommendation.
>
> *2.That the Commonwealth provide a formal written apology to Ms Brown for the breaches of her human rights identified in this report.*
>
> The Department disagrees with this recommendation.
>
> Ms Brown did not hold a valid visa to remain in Australia due to the cancellation of her visa under section 501 of the Act. Her immigration detention was therefore lawful in accordance with section 189 of the Act. The Minister considered the circumstances of Ms Brown's case under ss 197AB and 417 of the Act and decided it was not in the public interest to intervene.
>
> Also, Ms Brown chose to be accommodated in mixed-gender accommodation (Hughes) and represented to her Case Manager that she was satisfied with her accommodation in Hughes. The option to apply for a transfer to the women-only accommodation was open to Ms Brown. However, she made no such application.
>
> The Department advises the Commission that there will be no action taken with regard to this recommendation.
>
> *3.That the Commonwealth change its policies and practices in the ways identified below:*
>
> *The need to detain in an immigration detention facility should be assessed on a case-by-case basis taking into consideration individual circumstances. That assessment should be conducted when a person is taken into immigration detention or as soon as possible thereafter. A person should only be held in an immigration detention facility if they are assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved.*

The decision to detain an individual is made on the basis of that individual's circumstance which is assessed on a case-by-case basis. Under section 196(1) of the Act, unlawful non-citizens detained under section 189 must be kept in immigration detention until that individual is removed under section 198 or section 199, deported from Australia under section 200 or granted a visa.

All persons detained under section 189 of the Act (other than minors and minors with their families) who are deemed to require higher management, for example, on character grounds, persons with unconfirmed identity, health requirements, high security and high flight risk, may be detained in an immigration detention centre (IDC).

Ms Brown was assessed as having a high client placement risk by both the Detention Service Provider (DSP) and the Department. The Department assesses an individual's placement risk level through the use of a risk assessment matrix that balances the likelihood of the risk posed by a particular person in immigration detention, against the expected consequences of such a risk. The matrix provides an overall risk rating for the person in immigration detention. The risk rating obtained then informs the decision regarding the appropriate placement of the individual.

Persons who may be placed in an IDC also include those individuals whose visas have been cancelled under section 501 of the Act. The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test. Ms Brown's visa was cancelled pursuant to section 501 of the Act (character grounds) on 3 November 2008.

In considering Ms Brown's circumstances, particularly her high risk client placement rating and visa cancellation under section 501, the Department considered detention in an IDC as being appropriate for Ms Brown.

The Department considers that alternative placements were not feasible.

Ms Brown applied for placement in community detention on 19 May 2009. Under s 197AB the Minister applied his non-compellable power and on 27 April 2010, this request was refused.

Additionally, placement in Immigration Residential Housing was evaluated as an option for Ms Brown and a risk assessment undertaken. Nevertheless such placement requires that an individual possess a low risk client placement assessment rating. Ms Brown failed that assessment.

Therefore, having not met either the character or security requirements of less restrictive detention facility, it was not feasible to place Ms Brown in an alternative place of detention.

DIAC should conduct regular reviews of detention for all people in immigration detention facilities. This review should focus on whether continued detention in an immigration detention facility is necessary, reasonable and proportionate in each individual's specific circumstances. The Department undertakes continued reviews of a client's placement. These incorporate whether continued detention is necessary, reasonable and proportionate in each individual's specific circumstances.

Current case management policy requires that each client is initially reviewed within five days of case management engagement. A complete case assessment is to be completed within 28 days of case management engagement. Thereafter, case reviews are undertaken on a monthly basis and the outcomes of the reviews are documented in the client's case management record. The regular reviews aim to establish that detention remains appropriate and that progress towards the client's immigration status is being made.

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

AND

The guidelines relating to the Minister's residence determination power should be amended to require that a decision by DIAC not to refer a person to the Minister for consideration of making a residence determination should be a decision that is made only after an individualised assessment of the person's circumstances and based on reliable and documented evidence. The guidelines should expressly provide that a criminal record is insufficient evidence of itself that an individual poses a flight risk or an unacceptable risk to the Australian community.

Section 197AB of the Act is a non-delegable and non-compellable Ministerial intervention power. The Minister issues guidelines to the Department regarding the circumstances under which he is minded to exercise his power. These guidelines form the basis on which cases are assessed by the Department in order to ascertain if they should or should not be referred to the Minister. Those cases not formally referred are provided to the Minister at regular intervals on a schedule. The Department will ensure that the views of the AHRC are drawn to the attention of the Minister for his consideration.

The Commonwealth should ensure that both low security and high security immigration detention facilities have appropriate women-only accommodation areas.

The Department maintains a duty of care to all persons in all types of immigration detention facilities. This duty of care carries an obligation to exercise reasonable care to prevent a person from suffering reasonably foreseeable harm.

In order to ensure that the Department maintains this duty of care, regular reviews of a client's placement in immigration detention facilities are conducted. These reviews are conducted on a monthly basis and aim to establish that detention placement is appropriate for the client. The appropriateness of the current accommodation placement is assessed. It should be the least restrictive place of detention according to the person's individual circumstances, subject to the availability of accommodation. Factors taken into account in making the placement decision will include the person's gender, age, demeanour, their level of health and well being, the status of their security clearance and immigration pathway and the person's own views.

If, after an individual assessment, it is determined that an unaccompanied woman must be held in an immigration detention facility, she should be held in the least restrictive place of detention appropriate to her individual circumstances and she should be held in a women-only area.

The appropriateness of a client's current accommodation placement is assessed and should be the least restrictive place of detention according to the person's individual circumstances, subject to the availability of accommodation. Factors taken into account in making the placement decision will include the person's gender, age, demeanour, their level of health and well being, the status of their security clearance and immigration pathway and the person's own views.

Under departmental and DSP policy, Ms Brown was accommodated in the most appropriate detention facility in accordance with her particular circumstances.

Where an unaccompanied woman elects to be housed in mixed accommodation, this election should be recorded in writing. The Commonwealth should implement measures to ensure to the greatest extent possible that women housed in mixed accommodation areas are free from harassment, abuse or intimidation.

Current departmental policy is that information in relation to the resolution of a person's immigration status and their management while in immigration detention is recorded in the client's departmental record. All instances of client contact including case assessments, regular case reviews, questions and issues raised by the client and activities, assessments and decisions about the client's immigration status and management are recorded. It follows that a client's wish to be placed in a certain accommodation would be noted in this record. Where considered appropriate, it is possible for the department to attach a written document to the client record. The Department and its service provider have policies in place to ensure that clients are free from harassment, abuse or intimidation.

162. I report accordingly to the Attorney-General.

Catherine Branson
President
Australian Human Rights Commission

March 2012

1 (1997) 78 FCR 208.

2 Ibid.

3 *Migration Act 1958* (Cth), s 5.

4 In *Van Alphen v the Netherlands,* the UNHRC said 'arbitrariness is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.' Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988.

5 *C v Australia,* Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 [8.2]; *D and E v Australia,* Communication No 1050/2002, UN Doc CCPR/C/87/D/1050/2002 [7.2]; *Omar Sharif Baban v Australia,* Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001 [7.2]; *Bakhtiyari v Australia,* Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 [9.2].

6 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993.

7 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 [9.2].

8 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 [9.4].

9 Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999.

10 *C v Australia,* Communication No 900/1999, UN Doc CCPR/C/76/D/900/1999 [8.2]. See also *D and E v Australia,* Communication No 1050/2002, UN Doc CCPR/C/87/D/1050/2002 [7.2]; *Omar Sharif Baban v Australia,* Communication No 1014/2001, UN Doc CCPR/C/78/D/1014/2001 [7.2]; *Bakhtiyari v Australia,* Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002 [9.2].

11 United Nations Human Rights Committee, General Comment 21, Article 10 (44th sess, 1992), from *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,* UN Doc HRI/GEN/1/Rev.6 (2003), 153.

12 *Jensen v Australia,* Communication No 762/1997, UN Doc CCPR/C/71/D/762/1997.

13 *Taunoa v Attorney-General* [2008] 1 NZLR 429.

14 See *Daley v Jamaica,* Communication No 750/1997, UN Doc CCPR/C/63/D/750/1997 [7.6]; *Teesdale v Trinidad and Tobago,* Communication No 677/1996, UN Doc CCPR/C/74/D/677/1996 [9.1].

15 *Miguel Angel Estrella v Uruguay,* Communication No 74/1980, UN Doc CCPR/C/18/D/74/1980.

16 *Tatiana Zheludkova v Ukraine,* Communication No 726/1996, UN Doc CCPR/C/76/D/726/1996.

17 *McTaggart v Jamaica,* Communication No 748/1997, UN Doc, CCPR/C/67/D/748/1997 [8.5].

18 *Michael and Brian Hill v Spain,* Communication No 526/1993, UN Doc CCPR/C/59/D/526/1993.

19 The Standard Minimum Rules were approved by the UN Economic and Social Council in 1957. They were subsequently adopted by the UN General Assembly in Resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1.

20 The Body of Principles was adopted by by General Assembly Resolution 43/173 of 9 December 1988.

21 United Nations, Official Records of the General Assembly, 13th sess, Third Committee, 16 September to 8 December 1958, pages 160-173 and 227-241.

22 United Nations Human Rights Committee, General Comment No 21 Article 10 (44th sess.1992), [5], from *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,* UN Doc HRI/GEN/1/Rev.6 (2003), 153. See also *Mukong v Cameroon,* Communication No 458/1991, UN Doc CCPR/C/51/458/1991 [9.3].

23 United Nations Human Rights Committee, *General Comment 28, Equal rights of men and women,* UN Doc CCPR/C/21/Rev. 1/Add.10.

24 Human Rights and Equal Opportunity Commission, *CD v Commonwealth (Department of Immigration and Multicultural Affairs),* [2006] AusHRC 36 (1 August 2006).

25. Ibid [44].

26 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 518.

27 Human Rights and Equal Opportunity Commission, *Nguyen and Okoye v Commonwealth (Department of Immigration and Multicultural and Indigenous Affairs) and GSL (Australia) Pty Ltd* [2008] AusHRC 39 (1 January 2008), [80]-[88].

28 United Nations Human Rights Committee, General Comment 16, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation U.N. Doc. HRI/GEN/1/Rev.1 [4].

29 S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004) 482-3.

30 Communication No. 488/1992 UN Doc CCPR/C/50/D/488/1992 [8.3]. Whilst this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.

31 See United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). United Nations General Assembly 6 October 2010.

32 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(a).

33 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(b).

34 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(c).

35 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).

36 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).

37 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].

38 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).

39 Ibid, [140].

40 *Ruddock v Taylor* (2003) 58 NSWLR 269.

41 Ibid.

42 [2004] FCA 156.

43 *Spautz v Butterworth* (1996) 41 NSWLR 1 (Clarke JA).

44 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

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