



Australian  
Human Rights  
Commission

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

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**[2023] AusHRC 154**

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November 2023

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

[2023] AusHRC 154

*Report into arbitrary detention and arbitrary interference with family*

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 DC, alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr DC complains that the Department breached his human rights by arbitrarily detaining him contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR). Mr DC also complains that his detention arbitrarily interfered with his family and his family life, contrary to articles 17 and 23 of the ICCPR.


As a result of this inquiry, I have found that Mr DC was arbitrarily detained, contrary to article 9(1) of the ICCPR. I have also found that the interference with Mr DC's family and family life was the direct consequence of his detention. Accordingly, I have found that Mr DC's detention arbitrarily interfered with his family and family life, contrary to articles 17(1) and 23(1) of the ICCPR.

Pursuant to s 29(2)(b), I have included 2 recommendations to the Department. The Department has partially agreed to both recommendations.

On 25 July 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 7 November 2023. That response can be found in Part 8 of this report.

I enclose a copy of my report.

Yours sincerely,



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

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# 1 Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint by Mr DC against the Commonwealth of Australia (Department of Home Affairs) (Department), alleging a breach of his human rights. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr DC was detained following the cancellation of his Bridging E visa (BVE) after he was arrested and charged for dishonestly obtaining financial advantage by deception. He was subsequently convicted and sentenced to imprisonment for 16 months. Upon his release from criminal custody, he was detained under s 189(1) of the *Migration Act 1958* (Cth) (Migration Act) and transferred to Villawood Immigration Detention Centre (IDC). He was detained in Villawood IDC until he departed Australia on 12 May 2021.
3. Mr DC was married with eight children under 13 years of age during this period. His family were living in the Australian community. His family departed Australia with him on 12 May 2021.
4. Mr DC complains that the length of time that he was held in closed immigration detention is arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup>
5. Mr DC also complains that his detention arbitrarily interfered with his family and his family life, contrary to articles 17 and 23 of the ICCPR.
6. The right to liberty and freedom from arbitrary detention is not directly protected in the Australian Constitution or in legislation. As a result, there are limited avenues for an individual to challenge the lawfulness of their detention, outside seeking a writ of *habeas corpus*, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.<sup>2</sup>
7. 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.
8. To avoid detention being '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'.

9. This document comprises a notice of my findings in relation to this inquiry and my recommendations to the Commonwealth.
10. I have decided to make a direction pursuant to s 14(2) of the AHRC Act prohibiting the disclosure of Mr DC's identity in relation to this inquiry. While he has not specifically requested me to do so, I am mindful that my report into his case discloses the fact that he has made a claim for protection in Australia. I consider it necessary for Mr DC's privacy and human rights that his name not be published.

## 2 Summary of findings and recommendations

11. As a result of the inquiry, I find that the following act of the Commonwealth is inconsistent with, or contrary to, article 9(1) of the ICCPR:

The decision of the Department not to refer Mr DC's case to the Minister to consider exercising his discretion under s 195A and s 197AB of the Migration Act to consider allowing Mr DC to reside outside a closed immigration detention centre.
12. Further, the interference with Mr DC's family and family life was the direct consequence of his detention. I find that Mr DC's detention arbitrarily interfered with his family and family life, contrary to articles 17(1) and 23(1) of the ICCPR.
13. I make the following recommendations:

### **Recommendation 1**

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated
- the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement
- increasing community-based placements for low and medium risk detainees, through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

## Recommendation 2

The Commission recommends that the Minister's s 195A and s 197AB guidelines should be amended to provide that:

- all people in closed immigration detention are eligible for referral under s 195A and s 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period
- in the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility, the Department include in any submission to the Minister:
  - a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment.
  - an assessment of whether an identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment.
- in the event that the Minister decides not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every 6 months and re-refer the case to the Minister to ensure that detention does not become indefinite.

## 3 Background

14. Mr DC is from Iraq and arrived at Christmas Island by boat on 14 July 2013 with his wife and children. They were detained under s 189(3) of the Migration Act.
15. On 8 August 2013, Mr DC and his family were transferred to an Alternative Place of Detention in Darwin and detained under s 189(1) of the Migration Act.
16. On 22 August 2013, Mr DC and his family were released from immigration detention after being granted a Humanitarian Stay (Temporary) (Subclass 449) visa which was valid until 29 August 2013. After that date, they were granted a series of BVEs.



17. On 2 May 2017, Mr DC was arrested and charged with numerous counts of dishonestly obtaining financial advantage by deception and he was remanded in criminal custody awaiting his court appearance.
18. On 24 May 2017, Mr DC's BVE was cancelled under s 116(1)(g) of the Migration Act, for the grounds within regulation 2.43(1)(p)(ii) of the *Migration Regulations 1994*. This ground is invoked in consequence of criminal charges laid against the holder of certain bridging visas. As a result, he became an unlawful non-citizen.
19. On 25 May 2017, Mr DC was convicted and sentenced to three years, 11 months and 28 days imprisonment, commencing 3 May 2017.
20. On 26 May 2017, Mr DC lodged an appeal against his sentence in the Liverpool Local Court.
21. On 14 August 2017, Mr DC was released from criminal custody, pending his sentence appeal, and he was detained under s 189(1) of the Migration Act and transferred to Villawood IDC.
22. On 20 June 2017, Mr DC's wife lodged an application for a Safe Haven Enterprise (Subclass 790) visa (SHEV) and included Mr DC and his children as dependent applicants. The family were found not to engage Australia's protection obligations and a delegate of the Minister refused their SHEV application. The matter was referred to the Immigration Assessment Authority (IAA) for review, and the IAA affirmed the delegate's refusal decision. The family subsequently sought judicial review of the IAA's decision at the Federal Circuit Court of Australia (FCC). On 2 August 2019, the FCC upheld the IAA's decision.
23. On 31 July 2018, the Liverpool Local Court determined Mr DC's appeal and his sentence was varied to 16 months imprisonment, with a non-parole period of 10 months. He was taken back into criminal custody by NSW Corrections.
24. On 29 November 2019, Mr DC was released from criminal custody, detained under s 189(1) of the Migration Act and transferred to Villawood IDC.
25. On 29 January 2020, Mr DC's case was referred for assessment against the Minister's guidelines for possible Ministerial consideration under s 195A of the Migration Act. On 1 July 2020, the Department assessed Mr DC's case as not meeting the Minister's guidelines and his case was not referred to the Minister for further consideration.
26. On 10 October 2020, Mr DC's case was again referred for assessment against the Minister's guidelines, this time against both the s 195A and s 197AB guidelines. On 4 January 2021, Mr DC's case was assessed as not meeting either of the guidelines and his case was not referred to the Minister for further consideration.
27. Mr DC was detained in Villawood IDC until he departed Australia on 12 May

2021, via a removal pathway.

28. The relevant period of detention covered by his complaint is:
  - (a) 14 August 2017–31 July 2018, while he was awaiting the appeal of his sentence and would have been residing in the community but for the cancellation of his BVE under s 116(1)(g) of the Migration Act
  - (b) from 29 November 2019 when he was released from criminal custody and taken to Villawood IDC to 12 May 2021 when he left Australia.
29. This period of detention is cumulatively approximately 2 years and 4 months.

## **4 Legislative framework**

### **4.1 Functions of the Commission**

30. 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.
31. 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.
32. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

### **4.2 What is an 'act' or 'practice'**

33. 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.
34. 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.
35. 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.<sup>3</sup>

### **4.3 What is a human right?**

36. The phrase 'human rights' is defined in s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
37. 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.
38. 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.
39. Article 23(1) of the ICCPR provides:
- The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

## **5 Arbitrary detention**

40. Mr DC complains about his detention in an IDC. This requires consideration to be given to whether his detention was arbitrary contrary to article 9(1) of the ICCPR.

### **5.1 Law on article 9 of the ICCPR**

41. 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>4</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>5</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>6</sup>
  - (d) detention should not continue beyond the period for which a

State party can provide appropriate justification.<sup>7</sup>

42. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two 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>8</sup>
43. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than closed 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>9</sup>
44. The United Nations Working Group on Arbitrary Detention has expressed the view that the use of administrative detention for national security purposes is not compatible with international human rights law where detention continues for long periods or for an unlimited period without effective judicial oversight.<sup>10</sup> A similar view has been expressed by the UN HR Committee:

if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law ... information of the reasons must be given ... and court control of the detention must be available ... as well as compensation in the case of a breach.<sup>11</sup>
45. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.<sup>12</sup>
46. A short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, closed detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.<sup>13</sup>
47. Under international law, the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, closed immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth) in order to avoid being arbitrary.<sup>14</sup>

48. Accordingly, where alternative places or modes of detention that impose a lesser restriction on a person's liberty are reasonably available, and in the absence of particular reasons specific to the individual, prolonged detention in an immigration detention centre may be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.
49. It is therefore necessary to consider whether the detention of Mr DC in a closed immigration facility can 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 considered 'arbitrary' under article 9 of the ICCPR.

## 6 Findings

### 6.1 Act or practice of the Commonwealth?

50. When Mr DC's BVE was cancelled he became an unlawful non-citizen, meaning the Migration Act required that he be detained.
51. However, there are a number of powers that the Minister could have exercised, including to grant a visa, or to allow detention in a less restrictive manner than in a closed immigration detention centre.
52. Section 197AB of the Migration Act permits the Minister, where the Minister thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. The residence determination may be made subject to other conditions such as reporting requirements.
53. In addition to the power to make a residence determination under s 197AB, the Minister also has a discretionary non-compellable power under s 195A of the Migration Act to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
54. I consider the following 'act' of the Commonwealth as relevant to this inquiry:

The decision of the Department not to refer Mr DC's case to the Minister for the Minister to assess whether to exercise his discretionary powers under s 195A or s 197AB of the Migration Act.
55. On 21 October 2017, the Hon Peter Dutton MP, Minister for Home Affairs, reissued guidelines to explain the circumstances in which he may wish to

consider exercising the residence determination power under s 197AB of the Migration Act.

56. These guidelines provide that the Minister would not expect referral of cases where a person does not meet the character test under s 501 of the Migration Act unless there were exceptional circumstances. While Mr DC's visa was not cancelled pursuant to s 501, after his visa was cancelled, he was sentenced to a term of imprisonment which would objectively have caused him to fail the character test.
57. The guidelines also state that the Minister will consider cases where there are 'unique or exceptional circumstances'.
58. The phrase 'unique or exceptional circumstances' is not defined in any of the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.<sup>15</sup> In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
  - (a) circumstances that may bring Australia's obligations as a party to the ICCPR into consideration
  - (b) circumstances that may bring Australia's obligations as a party to the Convention on the Rights of the Child (CRC) into consideration
  - (c) the length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community
  - (d) compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person.
59. Similarly, guidelines have been published in relation to the exercise of the Minister's power under s 195A of the Migration Act to grant a visa to a person in immigration detention.
60. In November 2016, Minister Dutton issued the s 195A guidelines, which are the current guidelines in use by the Department. These guidelines provide that the Minister would not expect referral of cases where a person does not meet the character test under s 501 of the Migration Act. Although there is no exception for unique or exceptional circumstances – unlike the other ministerial intervention guidelines referred to above – under these guidelines, the Minister will consider cases where there are compelling or compassionate circumstances.

## **6.2 The decision of the Department not to refer Mr DC's case to the Minister**

61. The relevant period of detention covered by Mr DC's complaint is:

- (a) 14 August 2017–31 July 2018 while he was awaiting his appeal of his sentence and would have been residing in the community but for the cancellation of his BVE
- (b) From 29 November 2019, when he was released from criminal custody and taken to Villawood IDC, to 12 May 2021 when he left Australia.

62. I acknowledge that Mr DC committed a serious crime and has served his sentence for it. However, it is concerning that Mr DC spent more time in immigration detention than in prison serving the criminal sentence that triggered his visa cancellation.

63. In response to the Commission's questions regarding whether alternative, less restrictive detention options had been considered for Mr DC, the Department responded on 5 May 2020 as follows:

The Department notes that it is not a legal requirement that a detention case be considered for assessment against Ministerial Intervention guidelines, or be referred to the Minister for consideration of his personal intervention powers. There are no requirements that a case should be reviewed against the guidelines or referred to the Minister within a certain timeframe or at regular intervals. Mr [DC]'s case has never been referred for consideration under the section 197AB Ministerial Intervention guidelines.

...

The Department only refers cases to the Minister where it is determined that a case meets the Ministerial Intervention guidelines. The Department only refers a case that the Minister has previously declined to consider or declined to intervene when there are significant, or compassionate and compelling changes to the case circumstances. The Ministers powers are non-compellable, meaning the Minister cannot be compelled to consider exercising or to exercise their personal intervention powers. The personal and non-compellable power exercised by the Minister includes making two distinct decisions: a procedural decision, to consider whether to make a substantive decision; and a substantive decision to grant a visa. The Minister is not under obligation to make either decision, nor are they required to provide a reason for their decision. The Department notes that it is not a legal requirement that a detention case be considered for assessment against Ministerial Intervention guidelines, or be referred to the Minister for consideration of his personal intervention powers. There are no requirements that a case should be reviewed against the guidelines or referred to the Minister within a certain timeframe or at regular intervals.

64. The Department did not assess Mr DC's case against the s 197AB guidelines for consideration of community detention until 10 October 2020, and then found him not to meet the guidelines.

65. This is concerning in circumstances when, for the first year of his detention, a court determined him to be an appropriate candidate to be released from



criminal custody and live in the community, pending the outcome of his sentence appeal.

66. In its response to my preliminary view, the Department states that Mr DC did not request ministerial intervention between 14 August 2017 and 31 July 2018. This does not change my view on the matter, as it was open to the Department to initiate consideration of a referral at any time during this period without a specific request to do so.
67. Similarly, the Department states that, after his release from criminal detention, Mr DC did not make any request for ministerial intervention between 29 November 2019 and 12 May 2021.
68. In his complaint, Mr DC referred to having made a request to be considered for community detention in late 2019. However, the Department informed the Commission that there were no departmental records reflecting such a request.
69. For the same reason, this does not change my view on Mr DC's complaint. The Department was aware of Mr DC's wish to be with his children at that time because of his request to be placed in a detention centre located in the same state as them, and it was open to the Department to consider him for a residence determination without his specific request. Indeed, under international human rights law the Commonwealth must be able to demonstrate that there was not a less invasive way than closed detention to achieve the aims of its immigration policy, to avoid the conclusion that detention was 'arbitrary'.
70. On 29 January 2020, the Department commenced a Ministerial Intervention process for Mr DC's case to be assessed against the Minister's s 195A guidelines. Five months later, on 1 July 2020, the Department decided that Mr DC's case did not meet the s 195A guidelines and his case was not referred to the Minister.
71. In his complaint to the Commission dated 6 January 2020, Mr DC alleged that his children were not being cared for properly during his period of immigration detention. In its response, the Department shared information to cast doubt on that allegation, so I have disregarded this submission made by Mr DC for the purpose of this inquiry.
72. Mr DC had a wife and eight young children living in the community during his period of detention. Mr DC had resided with his family immediately prior to his detention, and none of the information provided by the Department in its response to my preliminary view gives rise to an indication that he would not continue to do so, in the event that he was released from detention. Indeed, Mr DC's family were removed from Australia with him, and based on his most recent communications with the Commission, they continue to reside together as a family unit.
73. Arguably, there were compelling and compassionate circumstances, namely



that Mr DC's continued detention might result in irreparable harm and continued hardship to his wife and eight children, warranting consideration by the Department and the Minister to assess Mr DC's suitability to reside outside a closed immigration detention centre.

74. In addition, Mr DC had been detained for a prolonged period of time (2 years and 4 months by the time he was removed from Australia), without the Minister considering at any time whether there may be alternatives to closed immigration detention.
75. In my view there was scope to bring Mr DC's case within the Ministerial guidelines, considering the length of his detention and the compelling and compassionate circumstances of his case.
76. In its response to my preliminary view, the Department stated that in its considerations of whether to refer Mr DC to the Minister, it did not identify compelling or compassionate circumstances warranting referral. In its consideration it says it 'considered Australia's international obligations with reference to Mr DC's circumstances, including his wife and children'. Factors against referral identified by the Department included that he:
  - did not engage Australia's protection obligations
  - did not have ongoing immigration matters
  - could be properly cared for in an immigration detention facility
  - was not cooperating with plans for his removal
77. I note that, in its response, the Department did not raise any concerns with respect to risk posed by Mr DC in light of his criminal convictions.
78. To avoid being arbitrary, alternatives to closed detention should be routinely considered for all detainees, with conditions applied to mitigate risks as appropriate. Closed detention should only be used in exceptional circumstances where identified risks cannot be managed through less restrictive means. The Department has not provided any reasons sufficient to justify its decision not to refer Mr DC to the Minister for consideration of his Ministerial Intervention powers under s 195A and s 197AB of the Migration Act during this period.
79. Mr DC was detained in closed immigration detention facilities for more than 2 years and 4 months, without referral by the Department to the Minister to consider less restrictive alternatives to closed detention. I find that the Department's decision not to refer Mr DC's case to the Minister resulted in his detention being arbitrary, contrary to article 9 of the ICCPR.

### 6.3 Arbitrary interference with family

80. Mr DC alleges that his detention arbitrarily interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR.

81. 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.<sup>16</sup>

82. For the reasons set out in the Australian Human Rights Commission report *Nguyen and Okoye v Commonwealth* [2007] AusHRC 39 at [80]–[88], 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 the breach is in addition to (or in conjunction with) a breach of article 23(1).

#### (a) Family separation as a result of immigration detention

##### (i) 'Family'

83. The UN HR Committee has confirmed on a number of occasions that 'family' is to be interpreted broadly.<sup>17</sup> Where a nation's laws and practice recognise a group of persons as a family, they are entitled to the protections in articles 17 and 23.<sup>18</sup> However, more than a formal familial relationship is required to demonstrate a family for the purposes of article 17(1). Some degree of effective family life or family connection must also be shown to exist.<sup>19</sup> For example, in *Balaguer Santacana v Spain*,<sup>20</sup> after acknowledging that the term 'family' must be interpreted broadly, the UN HR Committee went on to say:

Some minimal requirements for the existence of a family are, however, necessary, such as life together, economic ties, a regular and intense relationships, etc.<sup>21</sup>

84. Mr DC resided with his wife and eight children immediately prior to his detention. It is clear from Mr DC's complaint, and from his request to the Department to be moved to a placement close to his family, that he had an ongoing relationship with his children. This relationship included regular telephone calls, and visits, when possible, while he was detained. I find that the relationship between Mr DC and his family falls within the class of relationship protected by that term for the purposes of articles 17(1) and 23(1).

85. In its response to my preliminary view, the Department did not dispute this characterisation of the family.

(ii) *'Interference'*

86. There is no clear guidance in the jurisprudence of the UN HR Committee as to whether a particular threshold is required in establishing that an act or practice constitutes an 'interference' with a person's family. However, in relation to one communication, the UN HR Committee appeared to accept that a 'considerable inconvenience' could suffice.<sup>22</sup>

87. Interpreting the word 'interference' using its ordinary meaning, as explained in the Commission report [2008] AusHRC 39,<sup>23</sup> I am satisfied that interference with the family unit is demonstrated by the fact that Mr DC was physically separated from his family by his placement in immigration detention.

(iii) *'Arbitrary'*

88. In its General Comment on article 17, the UN HR Committee 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 Covenant and is reasonable in the particular circumstances.<sup>24</sup>

89. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness. In relation to the meaning of reasonableness, the UN HR Committee stated in *Toonen v Australia*:

The Committee 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.<sup>25</sup>

90. While the *Toonen* case concerned a breach of article 17(1) in relation to the right of privacy, these comments would apply equally to an arbitrary interference with the family.

91. In response to the Commission's question regarding whether the Department considered the effect that Mr DC's visa cancellation and subsequent detention would have on his family, and in particular his children, the Department responded on 5 May 2020 as follows:

On 24 May 2017, the Department undertook the process of the Notice of Intention to Consider Cancellation, giving consideration to the impact the visa cancellation would have on Mr [DC]'s family unit. A decision was made that due to the seriousness of the charges the grounds for cancelling the visa outweighed the reasons not to cancel.

On 17 September 2019, a request from Mr [DC] for consideration of a transfer to Adelaide Immigration Transit Accommodation (AITA) was reviewed and subsequently declined due to capacity constraints at AITA. Mr [DC] was advised of this outcome on 18 September 2019.

In November 2019, Mr [DC]'s request to transfer to AITA was actively being considered again. However, before the placement could be finalised, Villawood IDC advised that Mr [DC]'s wife and eight children had returned to live in Sydney. As Mr [DC]'s family residence in Adelaide was the main factor towards his request to transfer to AITA, ABF confirmed with Mr [DC] whether he wished to proceed or withdraw his transfer request. Mr [DC] withdrew his request to transfer to AITA on 11 December 2019.

92. In a response dated 11 May 2022, the Department stated as follows:

This [visa] cancellation was conducted by NSW Field Operations on 24 May 2017. At that time, the officer that made the decision to cancel the visa of Mr [DC] took into account his family situation and gave a higher weight to the seriousness of the offence when making that decision.

...

On 29 November 2018, Mr [DC] participated in a Located Person Interview ... During this interview he answered yes to providing care for his children. He stated that he was applying for a visa to be with his children. The officer did not assess the grant of a BVE due to the seriousness of the offence.

93. In its response to my preliminary view, the Department repeated the above information, and expressed a view that, as Mr DC's detention was not arbitrary, the resulting interference with his family was permissible.
94. In Mr DC's case, the interference with his family and family life was the direct consequence of his detention. As outlined above, I have found that Mr DC's detention was arbitrary for the purposes of article 9(1) of the ICCPR. It follows that the significant interference with his family and family life may also be considered arbitrary for the purposes of article 17(1).
95. I find that Mr DC's detention interfered with his family and family life contrary to articles 17(1) and 23(1) of the ICCPR.

## **7 Recommendations**

96. 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>26</sup> The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.<sup>27</sup> The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.<sup>28</sup>

## 7.1 Alternatives to held detention

97. As previously highlighted by the Commission, the detention review process currently conducted by the Department considers whether there are circumstances that indicate that a detainee cannot be appropriately managed within a detention centre environment. The process does not consider whether detention is reasonable, necessary or proportionate on the basis of particular reasons specific to the individual, and in light of the available alternatives to closed detention. The Commission has expressed concern that this process does not adequately safeguard against arbitrary detention.<sup>29</sup>
98. In August 2022, the Department conducted a stakeholder briefing about its Alternatives to Held Detention program. It subsequently published a briefing note and a slide presentation in relation to that briefing.<sup>30</sup> These documents described a range of important initiatives that were being explored by the Department, including:
- **Risk assessment tools:** reviewing current tools and developing a revised risk assessment framework and tools that enable a dynamic and nuanced assessment of risk across the status resolution continuum.
  - **An ‘independent panel’:** establishing a qualified independent panel of experts to conduct a more nuanced assessment of a detainee’s risk, including risks related to their physical and mental health, and provide advice about community-based placement for detainees with complex circumstances and residual risk.
  - **Increasing community based placements:** in particular, by focusing on detainees who post a low to medium risk to the community, and managing residual risk through the imposition of bail-like conditions and the provision of post-release support services.
  - **A ‘step-down’ model:** considering transfer from held detention to a residence determination as part of a transition to living in the community.
99. Those initiatives were prompted by two reviews:
- the Independent Detention Case Review conducted by Robert Cornall AO for the Department in March 2020<sup>31</sup>
  - the Commission’s report to the Attorney-General titled *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141 in February 2021.
100. The Commission welcomes these initiatives, which reflect and build on recommendations it has made in a number of previous reports including the

one identified above. Implementation of these initiatives would increase the prospect that decisions to administratively detain an individual are limited to circumstances where detention is reasonable, necessary and proportionate on the basis of particular reasons specific to the individual, and in light of the available alternatives to closed detention.

101. The Commission encourages further work to be undertaken by the Department in each of the areas identified in the Alternatives to Held Detention program.

### **Recommendation 1**

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated
- the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement
- increasing community-based placements for low and medium risk detainees, through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

## **7.2 Referrals for ministerial consideration**

102. Following the High Court's recent judgment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, it seems clear that there will need to be amendments made to the guidelines issued by the Minister to the Department about the exercise of ministerial intervention powers, including under s 195A and s 197AB. In particular, it is no longer open to the Minister to give the Department the ability *not* to refer cases on the basis that the Department has formed the view that the cases do not have 'unique or exceptional circumstances' or that it is otherwise not in the public interest for the Minister to exercise these powers.
103. Any revised guidelines issued by the Minister should contain clear, objective criteria for referral.<sup>32</sup> It also appears from the documents published by the Department as part of the Alternatives to Held Detention program, identified above, that some intractable cases will only be able to be resolved by the Minister. As a result, there is a real need to ensure that these cases are brought to the Minister's attention so that decisions can be made by the

Minister about the potential exercise of the personal intervention powers.

104. The Commission understands from discussions with the Department that it has recently taken steps, in conjunction with the Minister, to ensure that the cases of long term and vulnerable detainees are referred to the Minister for consideration, even if they may not have met previously issued guidelines in relation to referral.
105. The cohorts of people identified in submission MS22-002407, dated 31 October 2022, released through freedom of information laws, as being referred to the Minister for intervention are:
  - detainees assessed as low risk of harm to the community through the Community Protection Assessment Tool
  - detainees in respect of whom a protection finding has been made, have no ongoing immigration matters and where it is currently not reasonably practicable to effect their removal to third countries
  - detainees who are confirmed to be stateless and have no identified right to reside in another country
  - detainees in Tier 4 health related specialised held detention placements and/or with complex care needs
  - detainees who have been in immigration detention for five years or more (where not already included in any of the above cohorts)
  - detainees who are the subject of a Residence Determination (for more than 6 months).
106. The Commission welcomes these steps, which it understands has led to the exercise of intervention powers in a significant number of cases. While it is hoped that these interventions will have a positive impact on the number of people subject to prolonged, and potentially arbitrary, detention, the Commission reiterates previous recommendations it has made for amendment of the guidelines for referral to the Minister<sup>33</sup> to ensure that the cases of all detainees whose detention has become protracted or may continue for a significant period are referred to the Minister for consideration given the temporary nature of this measure.

## **Recommendation 2**

The Commission recommends that the Minister's s 195A and s 197AB guidelines should be amended to provide that:

- all people in closed immigration detention are eligible for referral under s 195A and s 197AB where their detention has been protracted, and/or where it appears likely that their detention will



continue for any significant period, regardless of whether they have had a visa cancelled or refused

- in the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility, the Department include in any submission to the Minister:
  - a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment
  - an assessment of whether an identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment.
- in the event that the Minister decides not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every 6 months and re-refer the case to the Minister to ensure that detention does not become indefinite.

## **8 The Department's response to my findings and recommendations**

107. On 25 July 2023, I provided the Department with a notice of my findings and recommendations.
108. On 7 November 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.

The department does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, articles 9(1), 17(1) and 23(1) of the *International Covenant on Civil and Political Rights* (ICCPR).



## **Alternatives to held detention**

### ***Recommendation 1 – Partially agree***

*The Commission recommends that the department progress each of the elements of the Alternatives to Held Detention program, including:*

- *the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated*
- *the establishment of independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement*
- *increasing community-based placements for low and medium risk detainees, through necessary conditions and support services*
- *utilising residence determinations as part of a step-down model of reintegration into the community.*

The department is progressing the Alternatives to Held Detention (ATHD) program to better support the use of community-based placements for individuals at risk of facing prolonged detention. Under the ATHD program, the department is considering:

- establishing an independent assessment capability to advise on risk mitigation (including support needs) for detainees being considered for a community placement
- developing a step-down model using residence determination and visa grant with tailored support services and conditions.

The department previously considered developing an internal dynamic risk assessment tool as part of ATHD. However, current thinking has progressed towards a revised approach for a future model, which seeks to leverage off existing risk assessment capability within the Criminal Justice System.

Development of longer-term options for ATHD may require changes to legislative and policy settings (and would be subject to policy authority from Government).

The department is exploring the use of residence determination as a 'step down' from held detention and is considering options to ensure any approach also supports the achievement of status resolution outcomes.

The Minister for Immigration, Citizenship and Multicultural Affairs has agreed to the department referring detainees in identified cohorts for consideration under sections 195A and/or 197AB of the *Migration Act 1958* (the Act). Consistent with this agreement, the department continues to progress cases for Portfolio Ministers' consideration.

As at 31 August 2023, the department has referred 149 detainees for Ministerial Intervention consideration under sections 195A and/or 197AB of the Act, resulting in a number of visa grants and residence determinations where the Minister considered it in the public interest to intervene.

## **Ministerial Intervention (MI)**

### ***Recommendation 2 – Partially agree***

*The Commission recommends that the Minister's s 195A and s 197AB guidelines should be amended to provide that:*

- *all people in closed immigration detention are eligible for referral under s 195A and s 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period*
- *in the event the department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility, the department include in any submission to the Minister:*
  - i. *a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the department in forming its assessment*
  - ii. *an assessment of whether an identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the department in forming its assessment*
- *in the event that the Minister decides not to exercise their discretionary powers, the department conduct further assessments*

*of risk and mitigation options every 6 months and re-refer the case to the Minister to ensure that detention does not become indefinite.*

The department partially agrees to this recommendation, as the department is not able to amend the Ministerial Intervention instructions. It is at the discretion of the Minister what criteria they determine should be included in any new Ministerial Intervention instructions. The department will provide the Commission's recommendations for the Minister's consideration when briefing the Minister on options to review the sections 195A and 197AB Ministerial Intervention instructions.

The Minister is currently considering the implications of the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 on requests for him to exercise his personal intervention powers, including in relation to requests that have already been made. Further information about the approach will be made available in due course.

The department notes sub points i) and ii), relate also to risk assessment processes that are currently being refined through the ATHD Program and Independent Capability Assessment (see response to Recommendation One).

Further to the response to the Commission's recommendation above, the department would like to provide the following additional information in relation to the case of Mr DC.

In response to paragraph 77 to 79 of the Commission's section 29 report, we note that in the guidelines assessment completed in July 2020, the department took into consideration Mr DC's criminal offences and risk of harm to the community as noted in his Community Protection Assessment Tool (CPAT) Tier 3 – held detention recommendation, as well as the circumstances of Mr DC's case, including that he: did not engage Australia's protection obligations; did not have ongoing immigration matters; had no health conditions that could not be appropriately managed for in an immigration detention facility; his criminal offences; and family links in the community.

Ministerial Intervention is not an extension of the visa process and the relevant powers are non-delegable and non-compellable. It is for the Minister to determine what is in the public interest

Mr DC was lawfully detained as an unlawful non-citizen under section 189 of the Act and his detention was considered reasonable, necessary and proportionate in his individual circumstances.

### ***Interference with family and family life***

Articles 17 and 23 of the ICCPR do not create an absolute right. Interference with family is permissible where it is not arbitrary and where it is lawful at domestic law.

The department does not agree that Mr DC's detention interfered with his family and family life contrary to articles 17(1) and 23(1) of the ICCPR. Mr DC was lawfully detained as an unlawful non-citizen under section 189 of the Act and his detention was considered reasonable, necessary and proportionate in his individual circumstances.

All detainees, including Mr DC, are advised of personal visitor arrangements and the communication services available to them in immigration detention and how to access such services. At all times, Mr DC had access to communication services to maintain contact with his family, including audio-visual tools and personal mobile phones.

Personal visits to detainees are generally limited to once per day, subject to availability of allotted visit times, the conditions of entry and appropriate conduct for the management and good order of the immigration detention facility. The administration of these visits is undertaken by the Facilities and Detainee Service Provider, in accordance with departmental settings which explicitly state that staff will treat detainees and their visitors professionally and with dignity and respect.

When managing these visits, service provider personnel maintain a discreet presence in order to discharge their responsibilities to manage the safety and security risks to detainees, visitors and personnel at the facility.

The Department and its service providers are guided by any agreements, court orders or other legal undertakings in force that impact on the frequency and conduct of visits.

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

Recommendation number	Department's response
1	Partially agree
2	Partially agree

109. I report accordingly to the Attorney-General.

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 FAAL  
**President**  
Australian Human Rights Commission  
November 2023

## Endnotes

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- <sup>1</sup> International Covenant on Civil and Political Rights, 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> *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154.
- <sup>3</sup> See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Note in particular 212–3 and 214–5.
- <sup>4</sup> UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, *Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); UN Human Rights Committee, *Communication No 900/1999*, 67<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (2002) (*C v Australia*); UN Human Rights Committee, *Communication No 1014/2001*, 78<sup>th</sup> sess, CCPR/C/78/D/1014/2001 (2003) (*Baban v Australia*).
- <sup>5</sup> UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (2014) [18]; UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).
- <sup>6</sup> *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee, *Communication No. 305/1988*, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/305/1988 (1990) (*Van Alphen v The Netherlands*); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Communication No. 631/1995*, 67<sup>th</sup> sess, UN Doc CCPR/C/67/D/631/1995 (1999) (*Spakmo v Norway*).
- <sup>7</sup> UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (2014); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- <sup>8</sup> *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- <sup>9</sup> *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communication No 1255,1256,1259,1260,1266,1268,1270,1288/2004*, 90<sup>th</sup> sess, UN Doc CCPR/C/90/D/1255/2004 (2007) (*Shams & Ors v Australia*); *Baban v Australia*, CCPR/C/78/D/1014/2001; UN Human Rights Committee, *Communication No 1050/2002*, 87<sup>th</sup> sess, CCPR/C/87/D/1050/2002 (2006) (*D and E and their two children v Australia*).
- <sup>10</sup> Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].
- <sup>11</sup> UN Human Rights Committee, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons)*, 60<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.1 (1982) [4]. See also UN Commission on Human Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc E/CN.4/826/Rev.1 (1962) [783]–[787].
- <sup>12</sup> UN Human Rights Committee, *Communication No 1051/2002*, 80<sup>th</sup> sess, UN Doc CCPR/C/80/D/1051/2002 (2004) (*Mansour Ahani v Canada*) [10.2].
- <sup>13</sup> UN Human Rights Committee, *Communication No 794/1998*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/794/1998 (2002) (*Jalloh v the Netherlands*); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001.

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- <sup>14</sup> UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- <sup>15</sup> Department of Home Affairs, *Minister's guidelines on ministerial powers (s351, s417 and s501)*, 11 March 2016, available on LEGENDcom.
- <sup>16</sup> M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2<sup>nd</sup> ed, 2005) 518.
- <sup>17</sup> See, for example, UN Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32<sup>nd</sup> sess, (1988) at [5]; UN Human Rights Committee, *General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 99<sup>th</sup> sess, UN Doc HRI/Gen/1/Rev.6 (1990) at [2].
- <sup>18</sup> UN Human Rights Committee, *General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 99<sup>th</sup> sess, UN Doc HRI/Gen/1/Rev.6 (1990) at [2].
- <sup>19</sup> S Joseph, J Shultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004) 589.
- <sup>20</sup> UN Human Rights Committee, *Communication No 417/1990*, 51<sup>st</sup> sess, UN Doc CCPR/C/51/D/417/1990 (1994) (*Balaguer Santacana v Spain*).
- <sup>21</sup> *Balaguer Santacana v Spain*, UN Doc CCPR/C/51/D/417/1990 [10.2]. See also UN Human Rights Committee, *Communication No 68/1980*, 12<sup>th</sup> sess, UN Doc CCPR/C/OP/1 (1981) (*AS v Canada*) at 27 where the UN Human Rights Committee did not accept that the author and her adopted daughter met the definition of 'family' because they had not lived together as a family except for a period of 2 years approximately 17 years prior.
- <sup>22</sup> UN Human Rights Committee, *Communication No 35 of 1978*, 12<sup>th</sup> sess, UN Doc CCPR/C/OP/1 (1985) (*Mauritian Women v Mauritius*) 67. [9.2(b)].
- <sup>23</sup> Human Rights and Equal Opportunity Commission, *Nguyen and Okoye v Commonwealth (Department of Immigration and Multicultural Affairs) and GSL (Australia) Pty Ltd* [2008] AusHRC 39 (1 January 2008), at [95]-[97].
- <sup>24</sup> UN Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32<sup>nd</sup> sess, (1988) [4].
- <sup>25</sup> UN Human Rights Committee, *Communication No 488 of 1992*, 50<sup>th</sup> sess, UN Doc CCPR/C/D/488/1992 (1992) (*Toonen v Australia*) [8.3].
- <sup>26</sup> AHRC Act, s 29(2)(a).
- <sup>27</sup> AHRC Act, s 29(2)(b).
- <sup>28</sup> AHRC Act, s 29(2)(c).
- <sup>29</sup> Australian Human Rights Commission, *Ms RC v Commonwealth (Department of Home Affairs)* [2022] AusHRC 144, at [104].
- <sup>30</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>31</sup> A redacted copy of this report was provided to the Commission by the Department. It has not become publicly available to the Commission's knowledge.
- <sup>32</sup> *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [17] (Kiefel CJ, Gageler and Gleeson JJ) and [99] (Gordon J), cf [219] (Steward J).
- <sup>33</sup> *AZ v Commonwealth (Department of Home Affairs)* [2018] AusHRC 122, [58] at <https://humanrights.gov.au/our-work/legal/publications/az-v-commonwealth-department-home-affairs-2018>; *QA v Commonwealth (Department of Home Affairs)* [2021] AusHRC 140, [189] at <https://humanrights.gov.au/our-work/legal/publications/qa-v-commonwealth-department-home-affairs-2021>; *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, [576]-[578] at <https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>.