



Australian
Human Rights
Commission

AZ v

The Commonwealth
(Department of
Home Affairs)

[2018] AusHRC 122

© Australian Human Rights Commission 2018.

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication and endorses the use of the **Australian Governments Open Access and Licensing Framework** (AusGOAL).



All material presented in this publication is licensed under the **Creative Commons Attribution 4.0 International Licence**, with the exception of:

- the Commission's logo, any branding or trademarks; and
- where otherwise indicated.

To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/legalcode>.

In essence, you are free to copy, communicate and adapt the publication, as long as you attribute the Australian Human Rights Commission and abide by the other licence terms.

Please give attribution to: © Australian Human Rights Commission 2018.

ISSN 1837-1183

Further information

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

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

Design and layout Dancingirl Designs

Printing Masterprint Pty Limited

AZ v The Commonwealth (Department of Home Affairs)

[2018] AusHRC 122

Report into arbitrary detention

Australian Human Rights Commission 2018

The Hon. Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into a complaint made by Mr AZ against the Commonwealth of Australia — Department of Home Affairs (formerly the Department of Immigration and Border Protection) (department).

Mr AZ complains that his detention in an immigration detention facility since 6 October 2014 is arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the failure of the Minister for Immigration and Border Protection (Minister) to consider exercising his discretions under s 195A and s 197AB of the *Migration Act 1958* (Cth) (Migration Act) was, and continues to be, inconsistent with or contrary to article 9(1) of the ICCPR.

In light of my findings, I made one recommendation to the Minister and one to the department. A summary of my recommendations, given in full in Part 5 of this report, is as follows:

1. The Minister indicate to the department that he will consider a further submission about the exercise of his powers under s 195A and/or s 197AB of the Migration Act in relation to Mr AZ, and persons in comparable situations.

In the event that the Minister is concerned that Mr AZ may pose some real risk if allowed to reside in the community, he direct the department to prepare a detailed submission addressing a number of relevant matters.

2. The Minister amend his guidelines in respect of sections 197A and 197AB of the Migration Act to address a number of matters identified in this inquiry.

The department provided a response to my findings and recommendations on behalf of itself and the Minister on 12 December 2017. That response can be found in Part 6 of this report.

Yours sincerely,

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

February 2018

Contents

- 1 Introduction..... 7**
- 2 Background..... 7**
- 3 Legislative framework..... 9**
 - 3.1 *Functions of the Commission*..... 9**
 - 3.2 *What is an ‘act’ or ‘practice’* 9**
 - 3.3 *What is a human right?* 9**
- 4 Arbitrary detention 10**
 - 4.1 *Law* 10**
 - 4.2 *Act or practice of the Commonwealth?* 10**
 - 4.3 *Inconsistent with or contrary to any human right* 12**
- 5 Recommendations 15**
 - 5.1 *Power to make recommendations*..... 15**
 - 5.2 *Discussion*..... 15**
 - 5.3 *Ministerial Guidelines*..... 16**
- 6 The department’s response to my findings and recommendations 19**

1 Introduction

1. This is a notice setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mr AZ against the Commonwealth of Australia (Department of Home Affairs — formerly the Department of Immigration and Border Protection) (the department). Mr AZ has been detained in immigration detention facilities since 7 May 2012. He complains that his detention is arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).¹
2. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. As a result of this inquiry, I find that the Minister's failure to consider exercising his discretions under s 195A and s 197AB of the *Migration Act 1958* (Cth) (Migration Act) was inconsistent with or contrary to article 9(1) of the ICCPR.
4. Mr AZ has requested that his name not be published in connection with this inquiry. I consider that the preservation of his anonymity is necessary to protect his human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and refer to him by the pseudonym 'AZ' in this document.

2 Background

5. Mr AZ is a national of Afghanistan. He arrived in Australia at Christmas Island on 7 May 2012 aboard the boat 'suspected illegal entry vessel (SIEV) 326 "Ebor", and was detained under s 189(3) of the Migration Act.
6. On 20 June 2012, he was transferred to the mainland and detained under s 189(1) of the Migration Act at Wickham Point Immigration Detention Centre. On 10 July 2012, he was transferred to Yongah Hill Immigration Detention Centre in Western Australia. He has been detained under s 196 of the Migration Act in various immigration detention facilities on the Australian mainland since that time.
7. On 5 November 2012, the then Minister for Immigration and Citizenship exercised his discretion under s 46A(2) of the Migration Act to allow Mr AZ to apply for a protection visa. Mr AZ made such an application on 19 February 2013.

8. The processing of Mr AZ's protection visa application has been protracted, and the subject of a number of decisions and appeals. The Commonwealth has now assessed that there is a real risk that Mr AZ would suffer significant harm if returned to Afghanistan, and that he is not currently entitled to protection in any third country. Despite that fact, as a result of the criminal conviction discussed below, his application for a protection visa was refused by a delegate of the Minister on 25 August 2016. Mr AZ has appealed the delegate's decision to the Administrative Appeals Tribunal. At the time of writing, the Tribunal has not delivered its decision. The fact that Mr AZ would be exposed to a real risk of suffering significant harm if returned to Afghanistan means that, if his application for a temporary protection visa is ultimately unsuccessful, it is likely that he will be unable to be removed from Australia. In that case, unless the Minister exercises one of his discretionary powers in the Migration Act, Mr AZ would be liable to remain in immigration detention indefinitely.
9. On 29 August 2013, Mr AZ was charged with one count of organising or facilitating the bringing or coming to Australia of a non-citizen who had no lawful right to come to Australia, contrary to s 233A of the Migration Act. On 5 September 2014, he was convicted of that offence. On 6 October 2014 he was sentenced to a term of imprisonment of three years and six months, to be released after serving two years and five months of that sentence on entry into a 12 month good behaviour bond. In recognition of the fact that Mr AZ had been detained since his arrival in Australia, the sentence was backdated and Mr AZ's custodial term ended on the date of his sentencing — 6 October 2014.
10. In his sentencing remarks, the trial judge observed that Mr AZ was convicted of helping to arrange the passage of one person to Australia by boat. He did so as part payment for his own passage to Australia on the same boat. The trial judge accepted that Mr AZ was 'a low-level participant in the facilitation of' the bringing of this second person to Australia.
11. Throughout the criminal proceedings, Mr AZ remained held in immigration detention. He has remained so held since the completion of his custodial sentence on 6 October 2014. His complaint of arbitrary detention relates to his detention after that date.

3 Legislative framework

3.1 Functions of the Commission

12. 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.
13. 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.

3.2 What is an 'act' or 'practice'

14. 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.
15. 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.
16. 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.²

3.3 What is a human right?

17. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR, or recognised or declared by any relevant international instrument.
18. Article 9(1) of the ICCPR appears to be relevant to this inquiry. That article 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.

4 Arbitrary detention

19. Mr AZ complains about his continuing detention in immigration detention facilities. As his detention prior to 6 October 2014 was made part of a retrospective criminal sentence, he complains about his detention after that date. Mr AZ's complaint raised for consideration the question of whether his detention after 6 October 2014 was arbitrary within the meaning of article 9(1) of the ICCPR, and therefore whether it has been inconsistent with or contrary to that right.

4.1 Law

20. 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 detention³
 - (b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances⁴
 - (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 predictability⁵
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁶
21. In *van Alphen v The Netherlands* the UN Human Rights Committee (UNHRC) 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.⁷
22. The UNHRC has held in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.⁸

4.2 Act or practice of the Commonwealth?

23. Since the expiry of his custodial sentence, Mr AZ has been detained by the Commonwealth for over three years, from 6 October 2014 until the time of writing.
24. As he arrived in Australia by boat without a valid visa, Mr AZ was an 'unlawful non-citizen,' and therefore the Migration Act required that he be detained.

25. However, there are a number of powers that the Minister could have exercised either to grant Mr AZ a visa, or to allow Mr AZ to be detained in a less restrictive manner than in an immigration detention centre.
26. Under s 195A of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under s 189 of the Migration Act.
27. Alternatively, the Minister may make a residence determination. Section 197AB of the Migration Act provides:

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).
28. The making of a residence determination may allow a person to reside in the community, in 'community detention'.
29. Accordingly, the Minister could have granted a visa to Mr AZ under s 195A of the Migration Act, or could have made a residence determination in relation to him under s 197AB.
30. On 18 March 2015, the department forwarded a submission to the Minister asking whether he wished to consider exercising his power under s 195A of the Migration Act to grant Mr AZ a bridging visa. At the time this submission was made, Mr AZ had been detained for some five months after the expiration of his criminal sentence. The Minister indicated on 23 March 2015 that he did not wish to consider exercising this power.
31. On 21 September 2016, the department forwarded a further submission to the Minister, asking whether he wished to consider exercising his powers under either s 197AB or s 195A of the Migration Act. At the time this submission was made, Mr AZ had been detained for almost two years after the expiration of his criminal sentence. On 26 October 2016, the Minister indicated that he did not wish to consider exercising the relevant powers.
32. The Minister's decisions described above were not decisions not to exercise his powers under s 195A and s 197AB. They were, expressly, decisions not to *consider* exercising these powers. The failure to consider the exercise of these powers was not mandated by law. I am satisfied that they were 'acts' for the purposes of the AHRC Act.

4.3 *Inconsistent with or contrary to any human right*

33. The department has given the following reason for the continued detention of Mr AZ:

Following the finalisation of his criminal matter on 6 October 2014, Mr AZ, as a person who is not an Australian citizen or permanent resident and does not hold a valid visa, was returned to immigration detention pending the resolution of his Protection visa application.

34. The department has further submitted that Mr AZ's detention is lawful under the Migration Act and that it is 'proportionate to achieving the legitimate objectives of maintaining the integrity of the immigration programme and upholding the Act'.
35. The references in the department's response to Mr AZ not being an Australian citizen or permanent resident, and not holding a valid visa, are taken to be references to the requirement in ss 196 and 189 of the Migration Act that unlawful non-citizens be detained. However, as I have discussed above, the Minister has discretionary powers under ss 195A and 197AB of the Migration Act that would have allowed Mr AZ to be granted a visa or be held in a less restrictive form of detention.
36. In its submission to the Minister dated 18 March 2015, the department identified the following factors as potentially relevant to the Minister's decision about whether to consider the exercise of his powers under s 195A:
- Mr [AZ] has been found to be owed protection through a Refugee Review Tribunal decision and the Department is waiting on the outcome of a PIC [Public Interest Criterion] 4002 security assessment;
 - On 6 October 2014, Mr [AZ] was found guilty of a people smuggling offence and was sentenced to three years and six months imprisonment;
 - Departmental systems indicate that there are unresolved security concerns related to Mr [AZ], however, this alert is related to Mr [AZ]'s people smuggling conviction;
 - Mr [AZ] has been held in immigration detention for almost three years;
 - Mr [AZ] has a history of mental health problems and it has been recommended by the IHMS Psychologist that Mr [AZ] be moved to a less restrictive environment to prevent further deterioration in his mental health; and
 - Mr [AZ] has provided the Department with identity documents.

37. The submission stated that in the event Mr AZ were granted a visa pursuant to s 195A, he would have been required to:
- ... abide by the associated conditions, which broadly cover reporting and the expected behaviour in the community. ... Should Mr [AZ] breach any of the associated conditions, he would be liable for consideration of discretionary visa cancellation under section 116 of the Act.
38. The satisfaction of 'PIC 4002' was prescribed by the *Migration Regulations 1994* as a precondition for the grant of a protection visa. The relevant regulation was found to be invalid in 2012.⁹ An equivalent requirement was subsequently introduced into the body of the Migration Act.¹⁰ However, the fact that a person's security clearance for the purposes of the grant of a protection visa is outstanding is not a reason they should not be placed in community detention or granted another category of visa under s 195A. Separate advice can be sought by the department from Australian Security Intelligence Organisation (ASIO) about the security implications of the exercise of those powers. This matter has been discussed in detail by previous Presidents of the Commission in reports resulting from previous human rights inquiries.¹¹ The department did in fact later consult ASIO about whether Mr AZ could be placed in the community.
39. The only factor identified by the department that might be seen to weigh against the exercise of the discretion to grant Mr AZ a visa under s 195A was the fact that Mr AZ had been convicted of a people smuggling offence. The submission did not:
- provide any detail about the conduct leading to Mr AZ's conviction, or the basis on which he was sentenced
 - provide any material which might have allowed the Minister to assess whether Mr AZ might pose a risk of re-offending if allowed to reside in the community.
40. In its further submission to the Minister dated 21 September 2016, the department noted, in relation to Mr AZ's conviction, that the trial judge had found that 'Mr AZ's role was a low level assistant', and that it was 'necessitated by his own circumstances'. The department also advised that it had sought advice from ASIO 'in relation to the potential risk posed by Mr AZ given his criminality', and that 'ASIO advised the department that the grant of a bridging visa or temporary visa to Mr AZ is permissible'.

41. In light of the nature and circumstances of Mr AZ's offending, as described by the sentencing judge, I do not consider that the fact of his conviction supports an inference that he would engage in further similar offences if allowed to live in the community. Further, it could not found a reasonable inference that Mr AZ would be likely to engage in any other criminal conduct if allowed to live in the community. While I have not been provided with a copy of the advice from ASIO, the description provided by the department supports the view that Mr AZ was unlikely to pose any significant risk if allowed to reside in the community.
42. The Minister was not required to give reasons for his decision not to consider the exercise of his discretions under s 195A or s 197AB. His decisions in each case were recorded by his endorsement of the departmental submission by circling the words 'not consider'. In response to a document sent to the Minister and the department containing the former President's preliminary findings in relation to Mr AZ's complaint, the Minister informed me that he had decided not to consider the exercise of his discretionary power 'based on factors I considered in Mr AZ's specific circumstances'. However neither the Minister nor the department have identified any factors further to those identified in the departmental submissions referred to above. There is no evidence the Minister had other grounds to believe Mr AZ would have posed a risk to the community if released from closed immigration detention. Further, the department had, in its submission to the Minister, indicated that Mr AZ would, if granted a bridging visa under s 195A, have been subject to conditions including reporting conditions. Neither the department nor the Minister have submitted that those conditions would have been insufficient to mitigate any risk that Mr AZ might have posed had he been granted a visa that allowed him to reside in the community. Indeed, apart from the consultation with ASIO referred to above, they have not indicated that any personalised risk assessment was conducted with respect to allowing Mr AZ to reside in the community.
43. In any event, as noted above, it is not the case that the Minister considered whether to exercise his power under s 195A, and, having considered that matter, refused to do so. Rather, the Minister indicated that he did not wish to consider exercising his power at all.
44. In light of the above, I find that the failure of the Minister to consider exercising his discretionary powers under s 195A and s 197AB of the Migration Act resulted in the continued detention of Mr AZ, in circumstances where the justification for that detention was not considered in light of the particular circumstances of Mr AZ's case. I therefore consider that the continuing detention of Mr AZ in immigration detention facilities has not been demonstrated to be proportionate to achieving any legitimate objective that may be advanced for immigration detention.
45. For these reasons, I find that Mr AZ's continuing detention in closed facilities is arbitrary for the purposes of article 9(1) of the ICCPR.

5 Recommendations

5.1 Power to make recommendations

46. 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.¹² The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹³ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.¹⁴

5.2 Discussion

47. As discussed above, a delegate of the Minister has now found that there is a real risk that Mr AZ would suffer significant harm if returned to Afghanistan, and that he is not entitled to protection in any third country. That means that unless he successfully appeals the decision to refuse him a temporary protection visa, he will be liable to remain in immigration detention indefinitely. Mr AZ has already been detained for over three years since the expiration of his prison term. That ongoing detention is 'arbitrary' under international law, as it has not been demonstrated to be proportionate to achieving any legitimate objective of immigration detention, in Mr AZ's unique circumstances.
48. I therefore make the following recommendation:

Recommendation 1

1. The Minister indicate to the department that he will consider a further submission about the exercise of his powers under s 195A and/or s 197AB in relation to Mr AZ, and persons in comparable situations.
2. In the event that the Minister is concerned that Mr AZ may pose some real risk if allowed to reside in the community (such as a risk of re-offending), he direct the department to prepare a detailed submission including the following:
 - (a) a personalised assessment of the existence and/or extent of any such risk, including a detailed description of the nature of the risk and of the evidence and reasons leading to the assessment
 - (b) a description of what measures might be implemented to ameliorate any risk in the event Mr AZ were allowed to reside in the community, for example the imposition of conditions such as a requirement to reside at a specified location, curfews, travel restrictions, reporting requirements or a surety

- (c) an assessment of whether any risk, if present, could be satisfactorily addressed by the identified measures.

This assessment should take into account Mr AZ's specific circumstances. To the extent necessary, it should include consultation with relevant external agencies.

3. The department prepare a fresh submission to the Minister about the exercise of his discretionary powers in relation to Mr AZ, including (if relevant) any matters referred to in the paragraph above.
4. The Minister consider the exercise of his discretionary powers in light of the fresh departmental submission.

5.3 Ministerial Guidelines

49. The Minister has issued guidelines about when and how the department should refer cases to him inviting him to consider the exercise of his powers under s 197AB and s 195A.
50. It appears that these guidelines may operate to prolong the detention of people in the position of Mr AZ. That is because they may be interpreted to exclude from consideration categories of person without allowing for an individualised assessment of whether their detention continues to be justified from time to time. That is so, even when those people have been detained for extended periods, or when their detention appears likely to continue for a significant period.
51. The s 197AB guidelines¹⁵ stipulate a limited number of circumstances in which the department should refer cases to the Minister. In the case of single adults, these include cases where:
 - disability or illness (including mental illness) requires ongoing medical intervention
 - there are unique or exceptional circumstances.
52. The s 197AB guidelines state that the department should, in general, not refer cases to the Minister where (*inter alia*):
 - the person's asylum claims have been finally determined and rejected (ie all avenues of appeal have been exhausted)
 - the person presents character issues that indicate they may fail the character test under s 501 of the Migration Act.

53. The s 195A guidelines¹⁶ also stipulate a limited number of circumstances in which the department should refer cases to the Minister. In the case of single adults, these include cases where:
- the person has individual needs that cannot be properly cared for in closed immigration detention
 - there are strong compassionate circumstances where continued detention would cause irreparable harm to an Australian citizen or 'family unit'
 - the person has no outstanding merits review process but cannot be removed from Australia
 - there are other compelling or compassionate circumstances, and there is no other intervention power available.
54. The s 195A guidelines state that the department should, in general, not refer cases to the Minister where (*inter alia*):
- the person's visa has been refused or cancelled under s 501 of the Migration Act
 - the Minister has previously considered the person under any intervention power, if there has been no change to their circumstances.
55. At present, Mr AZ would not appear to meet the criteria in the s 197AB guidelines:
- As he has been sentenced to a term of imprisonment of 12 months or more, he would fail the character test.¹⁷ The fact that a person has failed the character test does not always mean that a person must be refused a visa or have their visa cancelled. Nor does it mean that the person has been assessed to pose a risk to the Australian community. It is unclear why this criterion should be applied in a blanket way to exclude people from consideration under s 197AB.
 - He does not obviously meet the positive criteria for referral. The department has indicated that it does not consider that the protracted length of Mr AZ's detention amounts to 'unique or exceptional circumstances'.¹⁸
56. It also appears that, at present, Mr AZ would not meet the criteria for referral in the s 195A guidelines:
- Despite the fact he has been detained in immigration detention facilities since May 2012, his visa application has not been finally determined.

- The Minister has considered, and rejected, two previous submissions in relation to Mr AZ under ss 197AB and 195A.
- It is unclear whether the protracted detention of Mr AZ would be considered by the department or the Minister to amount to ‘compelling or compassionate circumstances’.

57. The final resolution of Mr AZ’s temporary protection visa application may be protracted. In the event his application were ultimately unsuccessful, his case might again be eligible for referral to the Minister under the s 195A guidelines (as his circumstances would have materially changed). On the other hand, it is possible his case would be affected by s 501 of the Migration Act. In that event, the guidelines might be interpreted to exclude Mr AZ from eligibility for referral. As he cannot be removed from Australia, it appears that would render him liable to indefinite detention. For the reasons given in the body of this document, such detention will be arbitrary unless necessary and proportionate in all the circumstances of each individual case.

58. I therefore make the following recommendation:

Recommendation 2

1. The Minister amend his s 197AB and s 195A guidelines to indicate to the department:
 - (a) That people in immigration detention are eligible for referral under s 197AB and s 195A where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period (whether by explicitly including these considerations within the definitions of ‘unique and exceptional circumstances’ and ‘compelling or compassionate circumstances’ or otherwise).
 - (b) That people in immigration detention are eligible for referral under s 197AB and s 195A whether or not they have had a visa cancelled or an application for a visa refused under s 501 of the Migration Act, or it appears they may fail the character test in s 501.
 - (c) Where the Minister has previously decided not to consider exercising his powers under either s 197AB or s 195A in relation to a person, or has considered exercising those powers and declined to do so, the department may nevertheless re-refer that person to the Minister if the person has remained in closed detention for a further protracted period.

- (d) 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 (whether for reasons relevant to the 'character test' in the Migration Act or otherwise), the department include in any submission to the Minister under s 197AB or s 195A:
- 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 any identified risk could be satisfactorily mitigated if the person were allowed to reside in the community (for instance by the imposition of residence requirements, reporting obligations, sureties or other conditions), 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.

6 The department's response to my findings and recommendations

59. On 12 December 2017 the department provided the following response to my findings and recommendations:

Finding

That the failure of the Minister to consider exercising his discretionary powers under s195A and s197AB of the Migration Act resulted in the continued detention of Mr AZ, in circumstances where the justification for that detention was not considered in light of the particular circumstances of Mr AZ's case. I therefore consider that the continuing detention of Mr AZ in immigration detention facilities has not been demonstrated to be proportionate to achieving any legitimate objective that may be advanced for immigration detention.

For these reasons, I find that Mr AZ's continuing detention in closed facilities is arbitrary for the purposes of article 9(1) of the ICCPR.

Department's response

The Department notes the findings of the AHRC in this case.

The Department takes its obligations under the *International Covenant on Civil and Political Rights* (ICCPR) seriously. The Department maintains that Mr AZ's placement in a detention centre was appropriate, reasonable and justified, in the individual circumstances of his case.

Since October 2014, Mr AZ's case has been reviewed on 31 occasions by his case manager. These reviews considered a number of factors including whether detention continues to be appropriate, whether the right level of case management intervention is being applied and re-consideration of the detainee's detention placement. Through these reviews Mr AZ's case was referred for assessment against the guidelines for section 195A of *Migration Act 1958* (the Act) on three occasions and the guidelines for section 197AB of the Act on one occasion.

In addition, Mr AZ's case has been referred for Ministerial consideration under section 195A and section 197AB of the Act on three occasions. In March 2015 and September 2016, the Minister declined to intervene in Mr AZ's case and a third submission is currently being considered by the Minister.

Recommendation 1

...

On 20 September 2017, the Department assessed Mr AZ's case as meeting the guidelines for referral under section 195A and section 197AB of the Act. On 15 November 2017, the Department referred Mr AZ's case under section 195A and section 197AB of the Act for the Minister's personal consideration. The submission outlines Mr AZ's specific circumstances and has included consultation with relevant stakeholders. The submission is currently being considered by the Minister.

The Department notes that the Minister's intervention power under section 195A and 197AB of the Act allows him to grant a visa to a person, or place them in a residence determination, if he thinks it is in the public interest to do so. The Minister's public interest powers are non-delegable and non-compellable and he is not required to exercise or consider exercising his power. Further, what is in the public interest is a matter for the Minister to determine.

Recommendation 2

...

The Department is considering this recommendation and, if appropriate, will provide advice to the Minister.

As noted in the response to Recommendation 1, the Minister's intervention powers under section 195A and 197AB of the Act allows him to grant a visa to a person, or place them in a residence determination, if he thinks it is in the public interest to do so. The Minister's public interest powers are non-delegable and non-compellable and he is not required to exercise or consider exercising his power. Further, what is the public interest is a matter for the Minister to determine.

60. I report accordingly to the Attorney-General.

Emeritus Professor Rosalind Croucher AM

President

Australian Human Rights Commission

February 2018

¹ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

² 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.

³ UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (2014) (Replaces General Comment No.8). See also UN Human Rights Committee, *Communication No. 560/1993*, 59th Sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*'); UN Human Rights Committee, *Communication No. 900/1999*, 67th Sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('*C v Australia*'); UN Human Rights Committee, *Communication No 1014/2001*, 78th Sess, CCPR/C/78/D/1014/2001 (2003) ('*Baban v Australia*').

⁴ UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th 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*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

⁵ *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*, 39th Sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('*Van Alphen v The Netherlands*'); UN Human Rights Committee, *Communication No. 560/1993*, 59th Sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*'); UN Human Rights Committee, *Communication No. 631/1995*, 67th Sess, UN Doc CCPR/C/67/D/631/1995 (1999) ('*Spakmo v Norway*').

⁶ UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (2014); UN Human Rights Committee, *Communication No. 560/1993*, 59th Sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*') (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); UN Human Rights Committee, *Communication No. 900/1999*, 67th Sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('*C v Australia*').

⁷ UN Human Rights Committee, *Communication No. 305/1988*, 39th Sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('*Van Alphen v The Netherlands*').

⁸ UN Human Rights Committee, *Communication No. 900/1999*, 67th Sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('*C v Australia*'); UN Human Rights Committee, *Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90th Sess, UN Doc CCPR/C/90/D/1255/2004 (2007) ('*Shams & Ors v Australia*'); UN Human Rights Committee, *Communication No 1014/2001*, 78th Sess, CCPR/C/78/D/1014/2001 (2003) ('*Baban v Australia*'); UN Human Rights Committee, *Communication No. 1050/2002*, 87th Sess, CCPR/C/87/D/1050/2002 (2006) ('*D and E and their two children v Australia*').

⁹ *Plaintiff M47 v Director-General of Security* (2012) 251 CLR 1.

¹⁰ Section 36(1B).

¹¹ See the following reports of the Commission: [2012] AusHRC 56 at [48]-[70]; [2013] AusHRC 64 at [33]ff.

¹² AHRC Act, s 29(2)(a).

¹³ AHRC Act, s 29(2)(b).

¹⁴ AHRC Act, s 29(2)(c).

¹⁵ Issued on 29 March 2015.

¹⁶ Issued in November 2016.

¹⁷ *Migration Act 1958* (Cth), ss 501(6)-(7).

¹⁸ In a submission dated 10 February 2017.