



Australian
Human Rights
Commission

Mr FF v Commonwealth of Australia (Department of Home Affairs)

[2024] AusHRC 156

January 2024

ABN 47 996 232 602
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
National Info Service 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Mr FF v Commonwealth of Australia (Department of Home Affairs)

[2024] AusHRC 156

Report into arbitrary detention and a safe place of detention

Australian Human Rights Commission 2024

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

Mr FF complains that the Department breached his human rights by detaining him arbitrarily and failing to provide him with a safe place of detention, in contravention of articles 9 and 10 of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the failure of the Department to refer Mr FF's case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under sections 195A or 197AB of the *Migration Act 1958* (Cth) is an act of the Commonwealth inconsistent with, or contrary to, article 9(1) of the ICCPR. However, I am not satisfied that the Department failed to provide Mr FF with a safe place of detention in breach of article 10(1) of the ICCPR.

Pursuant to s 29(2)(b), I have included one recommendation to the Department.

On 21 November 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 12 January 2024. 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
January 2024

Contents

1	Introduction to this inquiry.....	6
2	Summary of findings and recommendations	7
3	Background	7
3.1	<i>Procedural history of complaint.....</i>	7
3.2	<i>Visa history</i>	8
3.3	<i>Criminal history</i>	9
3.4	<i>Incidents in detention.....</i>	10
3.5	<i>Medical issues.....</i>	13
3.6	<i>Decision of the United Nations Working Group on Arbitrary Detention</i>	15
4	Legal framework.....	16
4.1	<i>Functions of the Commission</i>	16
4.2	<i>Scope of ‘act’ and ‘practice’</i>	16
4.3	<i>What is a human right?.....</i>	16
5	Arbitrary detention	17
5.1	<i>Law on article 9 of the ICCPR.....</i>	17
5.2	<i>Act or practice of the Commonwealth.....</i>	18
5.3	<i>Assessment</i>	19
6	Safe place of detention	23
6.1	<i>Law on article 10 of the ICCPR.....</i>	23
6.2	<i>Act or practice of the Commonwealth.....</i>	26
6.3	<i>Assessment</i>	26
7	Recommendations.....	31
7.1	<i>Referral to Minister for consideration</i>	31
8	The Department’s response to my findings and recommendations ..	32

1 Introduction to this inquiry

1. The Australian Human Rights Commission (the Commission) has conducted an inquiry into a complaint by Mr FF against the Commonwealth of Australia, Department of Home Affairs (Department) alleging a breach of his human rights. The inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr FF has spent more than 6 years in closed immigration detention facilities, and continues to be detained. He complains about the fact of his detention, and his safety while detained at the Villawood Immigration Detention Centre (VIDC). This complaint raises issues of arbitrary detention and safety in detention under articles 9(1) and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR).¹
3. 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, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.²
4. 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.
5. 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'.
6. This document comprises a report of my findings in relation to this inquiry and my recommendations to the Commonwealth.
7. Sensitive information regarding Mr FF's personal, medical and criminal history has come to light in the course of this inquiry, and I consider it necessary for the protection of Mr FF's privacy and human rights to make a direction under section 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

2 Summary of findings and recommendations

8. As a result of this inquiry, I find that the failure of the Department to refer Mr FF's case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under sections 195A or 197AB of the *Migration Act 1958* (Cth) (Migration Act) is an act of the Commonwealth inconsistent with, or contrary to, article 9(1) of the ICCPR.
9. I am not satisfied that the Department failed to provide Mr FF with a safe place of detention in breach of article 10(1) of the ICCPR.
10. I make the following recommendation:

Recommendation 1

The Department should conduct an individualised risk assessment regarding Mr FF, and if they are of the view that he poses a risk to the Australian community, consider whether the imposition of any particular conditions on his release might ameliorate that risk. Following this assessment, the Department should refer Mr FF's case to the Minister as a priority for consideration under section 195A or section 197AB of the Migration Act.

3 Background

3.1 Procedural history of complaint

11. Mr FF made a complaint to the Commission on 7 November 2017. He complained about his detention in the high security compound at VIDC, known at the time as Blaxland compound. Mr FF stated that he had severe mental health issues, which had deteriorated significantly due to his detention in Blaxland compound, and that he was being targeted for violence and abuse by other detainees.
12. On 19 June 2018, Mr FF amended his complaint to include a claim that, during that same month, he had been assaulted by other detainees, and was not being provided with a safe place of detention.
13. The Department was unwilling to participate in conciliation of the complaint.
14. On 25 July 2023, I provided the Department and Mr FF with my preliminary view of Mr FF's complaint.

15. The Department responded to my preliminary view on 18 October 2023.

3.2 Visa history

16. Mr FF is an Iranian citizen. He arrived in Australia by sea on 16 December 2012.

17. Mr FF was held in immigration detention from the date of his arrival to 22 May 2013, when the Minister³ intervened to allow for the grant of a Bridging E visa (BVE) to Mr FF.

18. Subsequent BVEs were granted by the Department on 31 October 2014 and 15 August 2015, following a section 46A bar lift by the Minister on 9 October 2014.

19. On 11 September 2015, Mr FF's BVE was cancelled under section 116(1)(g) of the Migration Act as a result of criminal charges against him. These are outlined in section 3.3 below.

20. Mr FF lodged an application for review of the visa cancellation with the Administrative Appeals Tribunal (AAT) on 18 September 2015.

21. On 30 October 2015, Mr FF was released from remand, and immediately detained as an unlawful non-citizen pursuant to section 189(1) of the Migration Act. The place of his detention at the time was the VIDC.

22. The AAT affirmed the Department's decision to cancel Mr FF's visa on 19 November 2015.

23. On 1 December 2015, the Minister intervened again in Mr FF's case, this time to allow him to lodge an application for a Temporary Protection visa (TPV) or Safe Haven Enterprise visa (SHEV).

24. A criminal justice stay certificate was issued with respect to the ongoing criminal case against Mr FF by the NSW Director of Public Prosecutions. A delegate of the Department refused however to grant an associated criminal justice stay visa on 28 June 2016.

25. On 28 June 2016, Mr FF lodged an application for a SHEV. The Department refused his application on 10 October 2016.

26. The Immigration Assessment Authority affirmed the Department's decision on 17 January 2017. Mr FF lodged an application for judicial review of this decision in the Federal Circuit Court, but later withdrew it.

27. Mr FF was referred for removal thereafter in either August or October 2017, however for a variety of reasons, removal from Australia was not possible.
28. An email appears on records released to Mr FF from the Department dated 9 June 2020:

Email forwarded to allocation/Logistics section to advise that Mr [FF] is still involuntary and that removal is unable to progress as Iranian Consulate refuses to issue travel documents to involuntary detainees.
29. The Department informed the Commission that it considered Mr FF for the grant of a BVE on 21 March 2023.
30. The Status Resolution Assistant Director who considered the exercise of the discretion identified as factors relevant to their assessment:
 - Mr FF's criminal history
 - only one incident in the past five years of immigration detention, where Mr FF was reported to have pushed past a Serco officer
 - his engagement in activities at the detention centre and attendance at all appointments with the status resolution team
 - risk of indefinite detention due to protracted removal process.
31. The Department decided against consideration for the grant of a BVE because of Mr FF's extensive criminal record.

3.3 Criminal history

32. On 26 August 2015, Mr FF was remanded in custody for offences which included:
 - aggravated break and enter with intent to inflict actual bodily harm
 - steal property in dwelling/house
 - aggravated break and enter.
33. One of the offences Mr FF was charged with, namely the offence of aggravated break and enter with intent to inflict actual bodily harm, was withdrawn, however the remaining charges proceeded to trial.

34. On 30 August 2018, following the revocation of his bail, Mr FF was transferred to Silverwater prison. On 14 December 2018, he was convicted of aggravated break and enter and commit serious indictable offence, and sentenced to five years and six months of imprisonment.
35. He was returned to immigration detention on 24 March 2019.
36. He was remanded again in criminal custody on 6 August 2019, following additional charges.
37. On 28 November 2019, Mr FF was convicted of affray and sentenced to nine months imprisonment. He was convicted of further offences of affray on 15 January 2020 and 5 February 2020 and sentenced to imprisonment for one year and six months and nine months respectively. Each of these convictions related to incidents which took place within immigration detention.
38. There are also mentions on the Departmental records of charges or convictions for creating and/or possessing prohibited goods (18 October 2015), fighting (16 November 2018), and failing to attend muster, but as I have no more information about these, I have not considered them further.
39. Upon his release from criminal custody on 5 May 2020, Mr FF was again detained at VIDC, but later transferred to Yongah Hill IDC.

3.4 Incidents in detention

Summary of periods spent in immigration detention

Date detained	Date released	Period of time
16 December 2012	20 May 2013 (on bridging visa)	5 months, 4 days
30 October 2015	30 August 2018 (to criminal custody)	2 years, 10 months
24 March 2019	6 August 2019 (to criminal custody)	4 months, 13 days
5 May 2020	N/A	3 years, 5 months ⁴

40. The complaint does not extend to the period upon Mr FF's first arrival in Australia, but rather to the periods following the cancellation of his visa. Excluding the periods spent in criminal custody, this amounts to over 6 years and 7 months in closed immigration detention facilities.
41. From the time of his detention on 30 October 2015, and at the time relevant to his complaint (22 February 2017 to 22 June 2018), Mr FF was held at VIDC.
42. VIDC is classed as a high security detention facility. The highest security compound at VIDC at the time of Mr FF's detention there was Blaxland compound. Hotham, Mitchell and Mackenzie are self-contained, medium security compounds within VIDC. There are two lower security compounds for adult men, La Trobe and Lachlan.⁵
43. On 21 February 2017, while accommodated in Mackenzie compound, the Department says that Mr FF was the alleged offender in an assault on another detainee, which resulted in an ambulance being called. Mr FF was found to be in possession of an improvised item used as a weapon. It does not appear that any criminal charges were laid as a result of this incident.
44. On 22 February 2017 Mr FF was transferred within VIDC to Blaxland compound.
45. A number of incidents between Mr FF and other detainees at Blaxland compound took place while he was accommodated there. The following summaries derive from incident reports provided by the Department to the Commission:
 - 27 March 2017, Mr FF and another detainee were verbally aggressive towards one another.
 - 2 May 2017, Mr FF and another detainee were yelling and fighting.
 - 21 October 2017, there was a fight between detainees. Mr FF was not named as a main aggressor and his involvement is unclear.
 - 29 January 2018, fight between detainees.
 - 18 February 2018, fight between detainees.

- 11 June 2018, during a fight between Mr FF and another detainee, Mr FF sustained a fractured thumb and an injury to his head, requiring staples.
 - 14 June 2018, during another fight, Mr FF's hand was further injured requiring him to undergo surgery on 20 June 2018.
46. During this time, Mr FF submitted at least eight requests for transfer out of Blaxland compound into what he described as the 'main centre'. In some, he claimed that being at Blaxland was harmful to his mental health, and in others that he felt unsafe. He was transferred to Hotham compound for one night only on 7 October 2017.
 47. Mr FF reported to a NSW Service for Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) counsellor on 3 December 2017 that he was feeling unsafe at Blaxland.
 48. On 20 June 2018, the International Health and Medical Service (IHMS) Area Medical Director noted that consideration should be given to relocating Mr FF to somewhere that posed the least risk of abuse from other detainees, to prevent further trauma related injuries.
 49. Mr FF was moved to Hotham compound on 22 June 2018. He remained there until 30 August 2018. He also spent relatively shorter periods in Hotham from 29 March 2019 to 4 April 2019, and from 5 August 2019 to 6 August 2019 (when he was taken into criminal custody).
 50. On 16 June 2020, Mr FF was transferred to Yongah Hill IDC where he now remains.
 51. There are two tools used by the Department and Serco to assess risk with respect to detainees, and their suitability for release into the community.
 52. The Community Protection Assessment Tool (CPAT) generates a risk category or 'tier' that corresponds to a recommended placement for a detainee. In this context, placement refers to whether the non-citizen resides in the community (either on a bridging visa or subject to a residence determination arrangement) or in held immigration detention.
 53. The most recent CPAT provided to the Commission, conducted on 10 February 2023, noted that:

Mr [FF] was involved in numerous incidents before 2020 however he appears to have settled and has shown positive coping skills since that time. In the past 3 years Mr [FF] has been involved in the following incidents;...

- 1 x Damage Minor

- 1 x Abusive/Aggressive Behaviour
 - 1 x Assault Minor
54. Despite this, and based on his criminal history, the CPAT recommendation was that Mr FF remain in held detention (tier 3). The Department clarified that this was due to his 'high' rating due to his criminal history and not due to his behaviour impacting others while in immigration detention, which was rated as 'low'.
55. The Security Risk Assessment Tool (SRAT) is a document produced by Serco which uses a series of risk indicators which then impact the placement of a detainee within the immigration detention network, and, for example, whether or not restraints are used by Serco on transfers within and outside of immigration detention.
56. The most recent SRAT similarly identifies Mr FF as a high risk due to his criminal profile and incident history.
57. From the SRAT, it can be identified that the minor damage identified in the CPAT (paragraph 51) refers to a missing smoke detector, and the incident described as abusive/aggressive behaviour and assault minor both relate to Mr FF pushing past a Serco officer and being verbally abusive, when asked to remove food from his jacket.
58. There were no other incidents of concern during his most recent time in immigration detention from 5 May 2020 to date.

3.5 Medical issues

59. IHMS records dated 2017 and 2018 record Mr FF self-reporting mental health diagnoses in Iran. He reported using drugs for self-medication, and described himself as being impulsive with anger management problems, with a history of self-harm.
60. IHMS psychiatrists in 2017 and 2018 identified that Mr FF had post-traumatic stress disorder, borderline personality disorder, general anxiety disorder with panic attacks, polysubstance use disorder, and episodes of psychosis when under stress. Some of the IHMS psychiatrist reports suggest that Mr FF did not appear objectively anxious and suggested instead that he was malingering to obtain medication.
61. Mr FF was on a methadone program throughout his time in immigration detention and undergoing treatment for Hepatitis C.

62. IHMS and Serco records show that Mr FF self-harmed, or threatened self-harm, multiple times between 2015 and 2019 while in immigration detention, but no incidents are noted from 2020 onwards. According to notes taken by an IHMS psychiatrist, this was often due to impulsivity and frustration. For example, he reported to the psychiatrist that an incident on 12 December 2016 when he cut his neck, was in order to hurry the process for his methadone prescription. Alternatively, IHMS also recorded this as being done in response to a break-up with his girlfriend.
63. With respect to the injuries sustained by Mr FF in June 2018 that occurred during the alleged assaults which are the subject of this complaint, the Department informed the Commission of the following chronology:
- 11 June 2018
- Mr [FF] was involved in an alleged assault and was transferred to Bankstown Hospital. An x-ray showed that Mr [FF] had a fracture of his left thumb. He was provided with a hand splint, and follow-up x-ray in ten days' time was arranged.
- 14 June 2018
- Mr [FF] was involved in an alleged assault and was transferred to Bankstown Hospital. X-rays of his left hand showed the pre-existing left thumb fracture... and a new left index finger fracture... Mr [FF] was provided with splints, was encouraged to elevate his hands, and the specialist noted that they would have internal discussions regarding possible surgery.
- 20 June 2018
- Mr [FF] was admitted to Bankstown Hospital for surgical management of his multiple hand fractures.
64. A STARTTS counsellor on 26 July 2018 reported that:
- Mr [FF]'s mental health appeared fragile. Even though he denied any suicidality at the time of the treatment, his mental health could deteriorate if he continues to be detained for an indefinite period.
65. On 27 March 2019, three days after his release from criminal custody, IHMS psychiatrist notes indicate that Mr FF was starting to feel better. He was 'determined he wants to stay away from trouble and focus on getting his release'.
66. Mr FF was unhappy about plans to move him to Yongah Hill IDC in April 2019 and expressed concern about it to the IHMS psychiatrist.
67. On 6 May 2019, Mr FF requested medication from IHMS to 'manage life in detention'.

68. On 1 July 2020, after his release from further criminal custody, Mr FF reported to the IHMS psychiatrist that he had been having nightmares, which the psychiatrist identified were 'likely to have roots in traumatic experiences'.
69. On 4 February 2021, the IHMS psychiatrist identified that Mr FF was 'more stable in his mood and behaviour in recent years', and 'continues to be dysthymic regarding his situation but no acute distress'.
70. Mr FF thereafter did not attend a series of psychiatrist review appointments, but requested a referral to the Association for Services to Torture and Trauma Survivors from an IHMS counsellor on 28 June 2022.
71. At the psychiatric review on 5 January 2023, the IHMS psychiatrist makes the following impression:

mental state remains similar to previous, long term dysthymia secondary to prolonged detention on a background of a cluster B personality disorder. I understand he had some PTSD symptoms following an incident at YHIDC earlier this year, however these symptoms have now resolved.

On heavy sedation, doesn't want this changed. Denies illicit drug use.

Low risk of self-harm/suicide currently.

Diagnosis is drug dependence and history of Borderline/Antisocial Personality which appears more contained in recent years with the methadone/sedatives.

72. On 5 April 2023, Mr FF reported to an IHMS GP that he had been experiencing nightmares due to the passing of a friend in detention the prior year.

3.6 Decision of the United Nations Working Group on Arbitrary Detention

73. In 2018, the UN Working Group on Arbitrary Detention issued an opinion regarding Mr FF.
74. The Australian government argued that Mr FF's detention during the initial two years and 10 months he had been detained since 30 October 2015 was not arbitrary because he was an unlawful non-citizen and had outstanding criminal matters.

75. Despite this, the Working Group found that Mr FF's detention was arbitrary, and it recommended that Mr FF be released immediately and provided with reparations.

4 Legal framework

4.1 Functions of the Commission

76. 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.
77. 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.
78. 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 Scope of 'act' and 'practice'

79. 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.
80. 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.
81. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or those acting on its behalf.⁶

4.3 What is a human right?

82. The rights and freedoms recognised by the ICCPR are, among others, 'human rights' within the meaning of the AHRC Act.⁷

5 Arbitrary detention

5.1 Law on article 9 of the ICCPR

83. 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.

84. 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 detention⁸
- (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 system⁹
- (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 predictability¹⁰
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.¹¹

85. 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.¹² Similarly, the UN HR Committee considered that detention during the processing of asylum claims for periods of three months in Switzerland was 'considerably in excess of what is necessary'.¹³

86. The UN HR Committee has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.¹⁴

87. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the UN HR Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.¹⁵

88. Under international law, the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, continuing immigration detention) must be necessary and proportionate to a legitimate aim of the State party (in this case, the Commonwealth of Australia) in order to avoid being 'arbitrary'.¹⁶
89. It will be necessary to consider whether the detention of Mr FF in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system, and therefore 'arbitrary' under article 9 of the ICCPR.

5.2 Act or practice of the Commonwealth

90. At the time of his detention, Mr FF was an unlawful non-citizen within the meaning of the Migration Act, which required that he be detained.
91. There are a number of powers that the Minister could have exercised either to grant a visa, or to allow the detention in a less restrictive manner than in a closed immigration detention centre.

92. Section 197AB of the Migration Act permits the Minister, where they think 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.
93. In addition to the power to make a residence determination under section 197AB, the Minister also has a discretionary non-compellable power under section 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
94. These powers in the context of detainees who had visas cancelled or refused, and the legislative framework within the Migration Act regarding the character test, were outlined in the Commission's 2021 report *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*.¹⁷
95. A discretion also exists for the Department to consider Mr FF for the grant of a BVE pursuant to regulation 2.25 of the Migration Regulations, as they did in March 2023. In assessing Mr FF for a BVE, the Department would be required to consider his eligibility for the visa based on various grounds set out in clause 050.212 of Schedule 2 to the Migration Regulations.
96. Since 22 May 2017, when Mr FF withdrew his judicial review application, he would not have met any of the criteria within subclause 050.212 contained within schedule 2 of the Migration Regulations. I do not see therefore how the act of considering or failing to consider Mr FF for a BVE is contributing to his ongoing detention, and I have accordingly not inquired into it.
97. I consider the following act of the Commonwealth as relevant to this inquiry:
- the failure of the Department to refer Mr FF's case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under sections 195A or 197AB of the Migration Act.

5.3 Assessment

98. As outlined above, the Minister has available two discretionary powers that could have been utilised to release Mr FF from detention on a

bridging visa, or into community detention pursuant to a residence determination.

99. The guidelines on the Minister's residence determination power under section 197AB issued 10 October 2017 indicate that cases to be referred to the Minister according to the guidelines include:

single adults if they have any of the following circumstances:

- ...
- ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention; ...¹⁸

100. A further basis for possible referral, this time under the section 195A guidelines signed in November 2016, was when removal was not reasonably practicable for reasons including where it is not possible to return the person to their country of origin because of the country's policy regarding involuntary removals.¹⁹
101. The first time that Mr FF was considered by the Department for referral was in September 2020. This was despite the Department knowing since at least 2016 that his removal from Australia was not going to be possible, either in the short term due to the issuance of a criminal justice stay certificate, or in the longer term, due to a policy of the Iranian government that it would not accept involuntary removals.
102. I acknowledge that, during the first period of detention, Mr FF had pending charges for serious criminal matters. Mr FF was however entitled to the presumption of innocence during this time, and this does not appear to have been reflected in the Department's assessment of him. He was detained for two years and 10 months without any referral by the Department to the Minister for consideration of alternatives to held detention.
103. On 5 May 2020, Mr FF was released from criminal custody, and had no pending charges. He had by this time served all sentences of imprisonment imposed by various courts.
104. On 4 September 2020, a status resolution officer referred Mr FF for assessment against the section 195A and section 197AB guidelines due to his risk of indefinite detention. The assessment was completed on 22 April 2021. I am of the view that seven months is an unduly long period of time to conduct this assessment. This is particularly so in light of the fact that Mr FF suffered significant mental health issues (as set out in the background section of the document).

105. However, when considering referral under the section 197AB guidelines, the Department has identified there being no grounds for referral for reason of ongoing illnesses, including mental health illnesses. The assessment also identifies no unique or exceptional circumstances.
106. The reason for this assessment is that IHMS is reported to have advised the Department that his mental health issues were not being exacerbated by the detention environment.
107. In response to my preliminary view, the Department responded:
- Consistent with the Department's status resolution program principles, Ministerial Intervention case officers seek to progress cases in a timely manner. Timeframes to progress cases are dependent on a number of factors including complexity of a case and associated information collection requirements; overall case volume; staff resources; and the relative priority of other cases at a given point in time.
- The guidelines assessment took Mr [FF]'s mental health issues into consideration, however it noted that the Department's contracted Detention Health Services Provider, International Health Medical Services (IHMS), advised that the detention environment did not exacerbate his condition. It also noted that Mr [FF]'s ongoing mental health issues were being appropriately monitored and managed by IHMS.
108. A further assessment was commenced by the Department against the section 195 and 197AB guidelines in June 2022. On 17 August 2022, the case was again found not to meet either guideline for referral.
109. Mr FF's mental health conditions and time spent in detention are identified as factors weighing in favour of referral, but ultimately the decision made by the Department is not to refer, in light of his criminal history, and the fact that he was not cooperating with the Department to give effect to his own removal from Australia.
110. I am of the view that both of these guidelines assessments do not appropriately weigh the impact of Mr FF's potentially indefinite detention on the decision whether or not to refer his case to the Minister. Mr FF has a history of serious mental health conditions which have been impacted by his prolonged detention. Removal to Iran has not been possible for many years due to a policy held by that country which is outside of his control. Detention in circumstances where removal from Australia is not practicable in the reasonably foreseeable future may in some circumstances be unlawful,²⁰ although I express no views as to whether Mr FF's detention is unlawful.

111. In response to my preliminary view, the Department wrote:

A guidelines assessment necessarily takes a number of case factors into consideration. The April 2021 and August 2022 sections 195A and 197AB guidelines assessments undertaken for Mr [FF]'s case were undertaken in a holistic manner and clearly demonstrate that the officer actively engaged with, and balanced, relevant factors. Mr [FF]'s mental health was taken into consideration in the guidelines assessment ... as was his criminal history and 'removal readiness'.

112. In addition, the CPATs and SRATs used by the Department and Serco reflect that Mr FF's behaviour in immigration detention has improved with no significant incidents in detention occurring since 2020. It seems, however, that Mr FF was unable to improve his risk rating as assessed by these tools due to his criminal history and previous incidents in detention. Issues with respect to the quality of risk assessments arising from the CPAT and SRAT have been discussed in previous Commission reports.²¹ One issue is that once incidents are recorded on the SRAT, they stay there. It does not appear that there is any process by which incidents that occurred a significant period of time ago are eventually removed from a risk rating.

113. A further assessment against the guidelines for referral to the Minister was commenced on 23 March 2023 but remained ongoing at the time of the Department's communication with the Commission.

114. I find that the failure of the Department to refer Mr FF's case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under sections 195A or 197AB of the Migration Act contributed to Mr FF's detention becoming arbitrary, contrary to article 9(1) of the ICCPR. Mr FF's case has not been referred by the Department to the Minister to consider alternatives to detention for the entire period of his detention, a period of more than 6 years, even though it appears there was scope to bring Mr FF's case within the Ministerial guidelines for referral.

115. I note the Department's response to my preliminary view indicates that Mr FF's case will be referred for Ministerial Intervention consideration under sections 195A and 197AB as part of the Department's Detention Status Resolution Review:

This review involves a streamlined referral of submissions for possible Ministerial Intervention under sections 195A and section 197AB of the Act for long-term detainees in held detention and those who will likely be subject to protracted detention due to complex removal barriers; such as where there are protection obligations engaged, significant health issues or confirmed statelessness.

6 Safe place of detention

6.1 Law on article 10 of the ICCPR

116. Australia has obligations under articles 9(1) and 10(1) of the ICCPR, respectively, to uphold the right to security of person, and to ensure that people in detention are treated with humanity and respect for the inherent dignity of the human person.
117. The right to security of person protects individuals against intentional infliction of bodily or mental injury, including where the victim is detained.²² The right to personal security also obliges States parties to take appropriate measures to protect individuals from foreseeable threats to life or bodily integrity proceeding from private actors. States parties must take both measures to prevent future injury and retrospective measures, such as enforcement of criminal laws, in response to past injury.
118. All people, including those held in immigration detention centres,²³ whether that facility is operated privately or by a State,²⁴ have the right to be treated with humanity and respect for the inherent dignity of the human person pursuant to article 10(1) of the ICCPR. Article 10(1) requires Australia to ensure that people held in immigration detention are treated fairly and reasonably, and in a manner that upholds their dignity.
119. Australia's common law imposes similar obligations on immigration detention centre owners and operators, and the Department and its service providers legally owe a 'duty of care' to people held in immigration detention.
120. With reference to article 10(1) of the ICCPR, the UN HR Committee stated in General Comment 21 that:
- Article 10(1) imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the [ICCPR]. Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons.²⁵
121. The UN HR Committee's comment recognises that detained persons are particularly vulnerable. This vulnerability arises because detained persons

are wholly reliant on the authority responsible for their detention, or that authority's service providers, to provide for their basic needs,²⁶ and that provision is central to their humanity and dignity. This, together with the positive obligation imposed by article 10(1), has been echoed in the UN HR Committee's jurisprudence,²⁷ and by internationally recognised human rights lawyer Professor Manfred Nowak, who stated:

In contrast to article 7, article 10 relates only to the treatment of persons who have been deprived of their liberty. Whereas article 7 primarily is directed at specific, usually violent attacks on personal integrity, article 10 relates more to the general state of a detention facility or some other closed institution and to the specific conditions of detention. As a result, article 10 primarily imposes on States parties a positive obligation to ensure human dignity. Regardless of economic difficulties, the State must establish a minimum standard for humane conditions of detention (requirement of humane treatment). In other words, it must provide detainees and prisoners with a minimum of services to satisfy their basic needs and human rights (food, clothing, medical care, sanitary facilities, education, work, recreation, communication, light, opportunity to move about, privacy, etc). ... Finally it is again stressed that the requirement of humane treatment pursuant to article 10 goes beyond the mere prohibition of inhuman treatment under article 7 with regard to the extent of the necessary 'respect for the inherent dignity of the human person'.²⁸

122. These conclusions are also evident in the jurisprudence of the UN HR Committee, which discusses the positive obligation on relevant authorities to treat detainees with humanity and respect for their dignity.²⁹
123. Joseph, Schultz and Castan point out that article 10(1) obliges State parties to provide protection for detainees from other detainees. In reaching that conclusion, the authors cited comments made by the UN HR Committee in its 'Concluding Observations on Croatia' when it stated that the:

Committee is concerned at reports about abuse of prisoners by fellow prisoners and regrets that it was not provided with information by the State party on these reports and on the steps taken by the State party to ensure full compliance with article 10 of the [ICCPR].³⁰

124. The content of article 10(1) has been developed through a number of UN instruments that articulate minimum international standards in relation to people deprived of their liberty,³¹ including:
 - the Nelson Mandela Rules,³² and
 - the Body of Principles for the Protection of all Persons under Any Form of Detention (Body of Principles).³³

125. In 2015, the Mandela Rules were adopted by the United Nations. They provide a restatement of a number of United Nations instruments that set out the standards and norms for the treatment of prisoners, and represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.³⁴
126. The UN HR Committee invites State parties to indicate in their periodic reviews the extent to which they are applying the Mandela Rules and the Body of Principles.³⁵ At least some of those principles have been determined to be minimum standards regarding the conditions of detention that must be observed, regardless of a State's level of development.³⁶
127. Several of the Mandela Rules are relevant to the safety of detainees in respect of the behaviour of other detainees, and the general security and good order of detention facilities, including the following:
- Rule 1: All prisoners shall be treated with the respect due to their inherent dignity and value as human beings ... the safety and security of prisoners ... shall be ensured at all times.
- Rule 2: ... prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings.
- Rule 12: ... Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the prison.
- Rule 36: Discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well ordered community life.
128. From the above, the following conclusions may be drawn:
- article 10(1) of the ICCPR imposes a positive obligation on State parties to take action to ensure that detained persons are treated with humanity and dignity
 - the threshold for establishing a breach of article 10(1) of the ICCPR is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR, which is a negative obligation to refrain from such treatment
 - article 10(1) of the ICCPR may be breached if a detainee's rights,

protected by one of the other articles of the ICCPR, are breached—unless that breach is necessitated by the deprivation of liberty

- minimum standards of humane treatment must be observed in detention conditions, including immigration detention
- article 10(1) of the ICCPR requires that detainees and prisoners are provided with a minimum of services to satisfy their basic needs.

6.2 Act or practice of the Commonwealth

129. Mr FF complains about his detention in the Blaxland compound of VIDC in light of his mental health issues, and says that he was being targeted for violence and abuse by other detainees.
130. Mr FF also complains about a series of assaults on him in June 2018 by other detainees, and alleges that he was not being provided with a safe place of detention.
131. The act or practice relevant to Mr FF's complaint is the decision by Serco – the detention services provider of the Commonwealth – to place Mr FF in Blaxland compound on 22 February 2017, and to keep him there until 22 June 2018.

6.3 Assessment

132. Mr FF was placed in the Blaxland compound on 22 February 2017. Incident reports indicate that the transfer to Blaxland followed an incident that occurred on 21 February 2017, while accommodated in Mackenzie compound, where Mr FF was the alleged offender in an assault on another detainee, which resulted in the calling of an ambulance. Mr FF was found to be in possession of an improvised item used as a weapon.
133. The Commission inspected VIDC in 2017, and made a number of observations and recommendations that are relevant to Mr FF's complaint.³⁷
134. The Commission noted that:

safety was a near-universal concern among people interviewed in Blaxland and Mackenzie compounds. Many people in these higher-security compounds shared stories of violent incidents including fights and serious assaults.

Some felt that staff had not taken adequate steps to protect their safety following incidents of threatened or actual violence. For example, a number of people reported that they had made requests to be moved to different compounds to ensure their safety, but that these requests had been rejected.³⁸

135. With regard to Blaxland compound, the Commission noted that it had previously raised concerns about the conditions of detention within it, especially as it was the last compound within VIDC to undergo redevelopment. In 2017, the Commission recommended that the Department cease using the Blaxland compound for detention urgently.³⁹
136. Blaxland compound was closed in March 2020.⁴⁰
137. In its response to Mr FF's complaint, the Department provided the Commission with a response on 15 May 2018, which stated:

Mr [FF] is currently accommodated in Blaxland compound, Dorm 3. Department records confirm that he was transferred to Blaxland on 22 February 2017.

...

Mr [FF]'s placement remains suitable as per his "HIGH" Security Risk Assessment (attached). Mr [FF] is not suitable for placement in other VIDC compounds due to incident related detention history.

...

Departmental records do not confirm lodgement of complaints by Mr [FF] specific to his concerns about being targeted for abuse and violence by other detainees.

Departmental records confirm lodgement of several Detainee Request Forms for placement change, some of which do mention safety concerns and problems which he does not specify.

...

Departmental records confirm Mr [FF]'s involvement in various incidents relating to disturbances and assaults. These are attached for your information, noting that Mr [FF]'s role has been confirmed as either involved or the alleged offender.

...

Mr [FF]'s placement has changed over the time he has been accommodated at VIDC. This is reflective of maintaining his or others safety, dependent on the nature of the specific incident, or related circumstances, balanced against overall management of the centre. Detainees are connected with Detention Services Provider, International Health Medical Services (IHMS) for health and wellbeing support, including assessment against Psychological Support Programs. Serco Welfare Officers engage with detainees for continued welfare and wellbeing support.

138. I agree with the Department's assessment of Mr FF's request forms for transfer away from Blaxland. They are framed in general terms and raise issues of safety, but also of mental health with respect to the limited space for free movement in the compound. They do not identify that Mr FF considers himself to be at risk of harm from any particular individuals.
139. Mr FF's representative submitted to the Commission that Serco, IHMS and/or ABF should have confirmed with Mr FF the reasons why he felt unsafe in light of his poor level of English and known mental health issues.
140. Those safety concerns were shared by many detained within Blaxland compound, as identified by the Commission during its inspection of VIDC.⁴¹
141. Mr FF has a range of mental health conditions that needed to be managed by the Department, but I have no evidence before me that his mental health worsened while in Blaxland or that he could not access treatment. The reports identified in the background section above do not support this contention.
142. An Individual Management Plan completed by the Department in consultation with Mr FF on 28 February 2018 does not raise concerns about Mr FF's detention at Blaxland. Some excerpts from the plan include statements such as:

Detainee is on the methadone program and attends BHSC Clinic daily morning and night medication without fail. Detainee has been receiving Hep C treatment over a month and claims he is getting major side effects with increased anxiety, stress and depression.

Detainee has a network of friends in Dorm 3 who are also Iranian. Detainee feels safe and comfortable within his network and usually discloses his mental health issues with his Iranian room mate.
143. These statements suggest that mental health issues, while serious, may have been exacerbated from factors other than being detained specifically within Blaxland.

144. With respect to the complaint that Mr FF was not provided with a safe place of detention, the Department provided the Commission with incident reports spanning the dates from 27 March 2017 to 14 June 2018. As noted above, Mr FF makes a broad claim that he was not provided with a safe place of detention while at Blaxland, but he also complains specifically about a series of alleged assaults by other detainees in June 2018.
145. The incident reports make clear that Mr FF was indeed involved in a number of altercations, but do not suggest that he was always a victim of the assaults or aggression. While the other detainees' names have been redacted from the incidents reports, they do not show any patterns that might suggest that Mr FF should have been identified by the Department as vulnerable to further attacks.
146. For example, in the incident report relating to a fight between Mr FF and another individual on 29 January 2018, the incident report states that both detainees 'agreed that the fight was stupid and stated that they have no problem between each other'.
147. Similarly, the incident report relating to a fight between Mr FF and another individual on 18 February 2018 identifies both detainees as declining medical treatment or a referral to the police. It states 'Both detainees say it was nothing other than an argument and that they have no issue with each other'.
148. While I accept the submission made by Mr FF's representative that detainees may be afraid of reprisals that could arise from reporting incidents, it is impossible to impart specific knowledge of any threat against Mr FF on the basis of these two incident reports.
149. Two assaults then occurred in June 2018 which became the subject of Mr FF's amended complaint to the Commission. The Commission has relied on incident reports by Serco and provided by the Department in response to the complaint. Mr FF has not provided the Commission with his own version of events or any related documents, and he did not dispute the facts contained within the incident reports.
150. On 11 June 2018, Mr FF was one of a number of detainees found to be acting in an aggressive manner that indicated they might commence fighting. In the incident report, Mr FF is reported to have grabbed the shirt of another detainee, and pulled him to the ground. Serco officers separated them from one another. Medical reports from IHMS show that

Mr FF sustained a fracture to his left thumb during this incident and an injury to his head but it is not clear from the incident reports how exactly these injuries happened.

151. Similarly, the incident reports of 14 June 2018 describe a fight breaking out between Mr FF and another individual in the visitor's area. For this incident only, cctv footage was also provided to the Commission. As there is no sound on the footage, it is difficult to understand the context of how the fight commenced. Mr FF was sitting at a table with a group of other people in the visitor's area. Another detainee appears to have stood up from the table and approached Mr FF in an aggressive manner, and Mr FF then responded, by standing up and then hitting or otherwise impacting the back of the other detainee's head.
152. The incident reports reflect witnesses stating to Serco that Mr FF used either a pen or a wooden stick to stab the other detainee in the back of the head, and that the detainee was bleeding from his injury. An implement of that nature was located on the floor of the visitor's area. Again, the IHMS medical reports show that Mr FF sustained a further fracture, this time to his left index finger, and that he subsequently underwent surgery to his hand. I understand the other detainee also required medical treatment for his injuries.
153. The IHMS Area Medical Director recommended to the Department and/or Serco on 20 June 2018 that Mr FF should be relocated within VIDC 'to a location where Mr FF is at least risk of abuse from other detainees preventing further trauma related injuries'.
154. The Department moved Mr FF out of Blaxland to Hotham compound on 22 June 2018 in accordance with this advice.
155. The language of the IHMS Area Medical Director does suggest that Mr FF was considered by that time to be at risk of further abuse. In this respect, I agree with the submission made by Mr FF's representative. However, no other information before me suggests when this risk may have been identified. IHMS clinical records for the period during which Mr FF was detained in Blaxland were provided to the Commission, and nothing appears on them to indicate that IHMS considered him to be at risk prior to 20 June 2018.
156. Mr FF's representative submits that, as a person with significant mental health issues, it should have been reasonable to assume that a person with Mr FF's 'presentation would be targeted for planned and random acts of violence'. I am not persuaded by this submission. Generalised issues of safety within Blaxland were well known to the Department, but I do not

consider that sufficient to find that they breached Mr FF's human rights by detaining him there.

157. I am of the view that there is insufficient evidence before me to suggest that Mr FF was not being provided with a safe place of detention while in the Blaxland compound, or that his mental health deteriorated while accommodated there. The reasons for transferring Mr FF into that compound appear to be reasonable, and the Department moved Mr FF out of the Blaxland compound when it was advised by IHMS that he may be at risk of further violence. Mr FF was indeed involved in a number of altercations with other detainees during his placement in Blaxland, but the incident reports do not suggest that he was always a victim of the assaults or aggression, nor do they show any patterns that might suggest that Mr FF should have been identified as vulnerable to further attacks. Accordingly, in my view, Mr FF's complaint alleging a breach of article 10(1) has not been made out.
158. I do, however, recognise that Mr FF felt unsafe in Blaxland, and note (as set out above) that 'safety was a near-universal concern among people interviewed by the Commission in Blaxland' during its inspection of that compound. It is pleasing that the compound is no longer in use.

7 Recommendations

159. 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.⁴² The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.⁴³ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.⁴⁴

7.1 Referral to Minister for consideration

160. Given Mr FF remains in detention, I consider it appropriate to make a recommendation based on his particular circumstances, rather than recommendations addressing issues facing persons in immigration detention more generally. I do, however, again draw the Department's attention to recommendations made in past reports, and in particular within *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*.⁴⁵

161. It is pleasing to note that Mr FF will be referred to the Minister as part of the Department's Detention Status Resolution Review. As no time frame on this referral was included in the Department's response to my preliminary view, I urge this to be done as a priority in light of the amount of time Mr FF has already spent in immigration detention.
162. Prior to the referral being made, I recommend that an individualised risk assessment of Mr FF be carried out, in light of the concerns raised with respect to the CPATs and SRATs highlighted above.
163. The risk assessment should consider:
- the limited number of incidents Mr FF has been involved in while in immigration detention since May 2020
 - the amount of time that has passed since Mr FF's last criminal conduct
 - the extent to which his offending may have been influenced by his drug dependency and any other factors
 - medical advice from IHMS regarding the positive management of his drug dependency and mental health issues
164. If the Department remain concerned about any risk posed by Mr FF to the community, then they should consider whether the imposition of any particular conditions to either a community detention placement or a BVE might ameliorate this risk.

Recommendation 1

The Department should conduct an individualised risk assessment regarding Mr FF, and if they are of the view that he poses a risk to the Australian community, consider whether the imposition of any particular conditions on his release might ameliorate that risk. Following this assessment, the Department should refer Mr FF's case to the Minister as a priority for consideration under section 195A or section 197AB of the Migration Act.

8 The Department's response to my findings and recommendations

165. On 21 November 2023, I provided the Department with a notice of my findings and recommendations.

166. On 12 January 2024, 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) in inquiring 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 an act that was inconsistent with, or contrary to, article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

Recommendation 1 –Partially Agree

The Department should conduct an individualised risk assessment regarding Mr FF, and if they are of the view that he poses a risk to the Australian community, consider whether the imposition of any particular conditions on his release might ameliorate that risk. Following this assessment, the Department should refer Mr FF's case to the Minister as a priority for consideration under section 195A or section 197AB of the Migration Act.

Under the Alternatives to Held Detention (ATHD) program the Department was considering an Independent Assessment Capability (IAC), to advise on risk mitigation (including support needs) for detainees being considered for community placement. The ATHD program has been impacted by the High Court decision of 8 November 2023 in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (NZYQ). Planning for the IAC has paused while the Department considers the implications of the High Court decision on the direction and priorities of the ATHD. The Department continues to actively review processes and assess individual cases as appropriate.

The Department completes an individual Community Protection Assessment Tool (CPAT) at regular intervals, including every six months for detainees who have had a section 501 cancellation and three months for all other detainees. The CPAT presents a nationally consistent risk assessment tool which provides a placement recommendation based on a point in time assessment of the level of risk of harm a person poses to the Australian community. It does this through a set of defined parameters underpinned by the CPAT's four harm indicators (National Security, Identity, Criminality and Behaviour Impacting Others). When completing a CPAT, Status Resolution Officers consider additional factors as part of the placement assessment, including potential vulnerabilities and strength based factors, such as community support and employable skills that might support a community placement, notwithstanding an individual's criminal history.

The Department is currently reviewing its status resolution tools, including the CPAT, with the view to focus on a person's status resolution pathway and their most appropriate placement while their pathway is being pursued.

The Minister for Immigration, Citizenship and Multicultural Affairs has agreed for the Department to refer detainees in identified cohorts for consideration under sections 195A and/or 197AB of the *Migration Act 1958 (Cth)* (the Act); known as the Detention Status Resolution Review. Consistent with this authority, Mr FF's case will be referred for Ministerial Intervention consideration under sections 195A and 197AB of the Act.

167. I report accordingly to the Attorney-General.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM FAAL
President
Australian Human Rights Commission
January 2024

Endnotes

- ¹ 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).
- ² *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.
- ³ Refers to the Minister for Immigration, Citizenship and Multicultural Affairs, or another minister with responsibility for the immigration portfolio at the relevant time.
- ⁴ At 31 October 2023.
- ⁵ Australian Human Rights Commission, *Inspection of Villawood Immigration Detention Centre Report*, 20 December 2017, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-villawood-immigration-detention-centre>.
- ⁶ See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- ⁷ The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- ⁸ United Nations Human Rights Committee, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).
- ⁹ United Nations Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- ¹⁰ *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UNHRC in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
- ¹¹ *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
- ¹² United Nations Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).
- ¹³ United Nations Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
- ¹⁴ United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Shams & Ors v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003); *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006).
- ¹⁵ United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].
- ¹⁶ United Nations Human Rights Committee, General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6].
- ¹⁷ [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, pp 21-24

-
- ¹⁸ Department of Home Affairs, 'Minister's residence determination power', 10 October 2017, accessed through LEGENDcom on 8 June 2023.
- ¹⁹ Department of Home Affairs, 'Minister's detention intervention power', 18 August 2017, accessed through LEGENDcom on 8 June 2023.
- ²⁰ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154.
- ²¹ For example, see the discussion of the SRAT contained within Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130, pp 34-41.
- ²² United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014), [9].
- ²³ United Nations Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992), [2].
- ²⁴ United Nations Human Rights Committee, *Views: Communication No. 1020/2001*, 78th sess, UN Doc CCPR/C/78/D/1020/2001 (7 August 2003), 15 [7.2] ('*Cabal and Bertran v Australia*').
- ²⁵ United Nations Human Rights Committee, *General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)* 44th sess, UN Doc HRI/GEN/1/Rev.1 (10 April 1992), [3].
- ²⁶ United Nations Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992), [3].
- ²⁷ United Nations Human Rights Committee, *Views: Communication No. 639/1995*, 60th sess, UN Doc CCPR/C/60/D/639/1995 (28 July 1997) ('*Walker and Richards v Jamaica*'); Human Rights Committee, *Views: Communication No 845/1998*, 74th sess, UN Doc CCPR/C/74/D/845/1998 (26 March 2002) ('*Kennedy v Trinidad and Tobago*'); Human Rights Committee, *Views: Communication No 684/1996*, 74th sess, UN Doc CCPR/C/74/D/684/1996 (2 April 2002) ('*R.S. v Trinidad and Tobago*').
- ²⁸ Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel, 2nd ed, 2005) 250.
- ²⁹ Melissa Castan, Jennifer Schultz & Sarah Joseph, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) 318.
- ³⁰ United Nations Human Rights Committee, *Concluding Observations: Croatia*, UN Doc CCPR/CO/71/HRV (30 April 2001), [14].
- ³¹ Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/ Rev.1 at 33 (10 April 1992) [5].
- ³² UN General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Publication, UN Doc. A/CONF/611 (30 August 1955), as amended by 'the Nelson Mandela Rules', UN Doc A/RES/70/175 (17 December 2015).
- ³³ The Body of Principles were adopted by the UN General Assembly in *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 6th Comm, 43rd sess, 76th plen mtg, Agenda Item 138, UN Doc A/43/49 (9 December 1988) Annex.
- ³⁴ UN General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Publication, UN Doc. A/CONF/611 (30 August 1955), as amended by 'the Nelson Mandela Rules', UN Doc A/RES/70/175 (17 December 2015), preliminary observation 2(1), 7.
- ³⁵ Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [5].
- ³⁶ Human Rights Committee, *Mukong v Cameroon*, Communication No. 458/1991, UN Doc CCPR/C/51/458/1991 (21 July 1994) 11 [9.3]; Human Rights Committee, *Potter v New Zealand*, Communication No. 632/1995, UN Doc CCPR/C/60/D/632/1995 (18 August 1997) 6 [6.3]. See also, Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article*

40 of the Covenant: *United States of America*, UN GAOR, Supp No 40, UN Doc A/50/40 (3 October 1995) 55 [285], 57 [299].

³⁷ Australian Human Rights Commission, *Inspection of Villawood Detention Centre: Report*, 20 December 2017, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-villawood-immigration-detention-centre>.

³⁸ *Ibid*, p 13-14.

³⁹ *Ibid*, p 17.

⁴⁰ Australian Human Rights Commission, *Inspections of Australia's immigration detention facilities 2019: Report*, 3 December 2020, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspections-australias-immigration-detention>, 103.

⁴¹ Australian Human Rights Commission, *Inspection of Villawood Detention Centre: Report*, 20 December 2017, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-villawood-immigration-detention-centre>.

⁴² AHRC Act, s 29(2)(a).

⁴³ AHRC Act, s 29(2)(b).

⁴⁴ AHRC Act, s 29(2)(c).

⁴⁵ [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, pp 92-100.