

# AM v Commonwealth of Australia (Department of Home Affairs)

[2018] AusHRC 124

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# AM v Commonwealth of Australia (Department of Home Affairs)

[2018] AusHRC 124

Report into arbitrary detention

**Australian Human Rights Commission 2018** 



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The Hon Christian Porter 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) into the complaint of arbitrary detention made by Mr AM against the Commonwealth of Australia — specifically, against the former Department of Immigration and Border Protection and now the Department of Home Affairs (department).

Mr AM complained that his detention in an immigration detention facility since 16 July 2012 was arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I found that:

- (a) the department's failure to refer Mr AM's matter to the Minister for Immigration and Border Protection (Minister) under s 195A of the Migration Act 1958 (Cth) (Migration Act) until August 2016, and
- (b) the department's failure to refer Mr AM's matter to the Minister under s 197AB of the Migration Act

was inconsistent with, or contrary to, article 9(1) of the ICCPR.

The department provided a response to my findings and recommendations on 14 March 2018. That response can be found in Part 9 of this report.

I understand that, on 24 November 2017, the Minister exercised his power under s 195A of the Migration Act and Mr AM was released into the community on a bridging visa.

I enclose a copy of my report.

Yours sincerely,

Emeritus Professor Rosalind Croucher AM

**President** 

Australian Human Rights Commission May 2018

Australian Human Rights Commission

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# 1 Report into this inquiry

- 1. Pursuant to s 20A of the *Australian Human Rights Commission Act 1986* (Cth), this is a report following an inquiry conducted by the Australian Human Rights Commission into a complaint by Mr AM against the Commonwealth of Australia specifically, against the former Department of Immigration and Border Protection and now the Department of Home Affairs (department) alleging breaches of his human rights.
- 2. Below is a copy of the notice issued to the Department of Home Affairs on 2 February 2018. The notice was prepared on the basis of material before the Australian Human Rights Commission at the time it was issued.

# 2 Notice of decision

- 3. This is a notice setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mr AM against the Commonwealth of Australia — specifically, against the former Department of Immigration and Border Protection and now the Department of Home Affairs (department) — alleging breaches of his human rights.
- 4. Mr AM has been detained in an immigration detention centre for over 64 months and continues to be detained. He complains that his detention is 'arbitrary', contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup>
- 5. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
- 6. This notice is issued pursuant to s 29(2) of the AHRC Act setting out the findings of the Commission in relation to Mr AM's complaint.
- 7. As a result of this inquiry, I find the following:
  - (a) the department's failure to refer Mr AM's matter to the Minister for Immigration and Border Protection (Minister) under s 195A of the *Migration Act 1958* (Cth) (Migration Act) until August 2016, and
  - (b) the department's failure to date to refer Mr AM's matter to the Minister under s 197AB of the Migration Act
  - was inconsistent with, or contrary to, article 9(1) of the ICCPR.
- 8. Mr AM 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 'AM' in this document.

# 3 Background

- Mr AM is a national of Sri Lanka who arrived by boat at Christmas Island as an undocumented maritime arrival on 16 July 2012. He was detained on Christmas Island pursuant to s 189(3) of the Migration Act.
- 10. On 13 August 2012, Mr AM was transferred to the mainland, and was thereafter detained at Wickham Point Immigration Detention Centre, pursuant to s 189(1) of the Migration Act.
- 11. As Mr AM arrived in Australia before 13 August 2012, he is not subject to regional processing arrangements.
- 12. During Mr AM's entry interview he disclosed that, as a condition of his passage on the boat to Australia, he was required to help steer the boat.
- 13. On 18 September 2012, Mr AM was found to have *prima facie* claims to engage Australia's protection obligations and was 'screened in' to the refugee status determination process.
- 14. On 24 September 2012, the then Minister exercised his power under s 46A of the Migration Act to allow Mr AM to apply for a Protection Visa (PV).
- 15. On 27 September 2012, Mr AM was transferred to Yongah Hill Immigration Detention Centre.
- 16. On 29 September 2012, Mr AM lodged an application for a PV.
- 17. On 17 October 2012, as a result of Mr AM's disclosure about steering the boat to Christmas Island, he was issued with a Criminal Justice Certificate (CJC).
- 18. The Australian Federal Police (AFP) did not interview Mr AM about his disclosure and charges were not laid. On 14 December 2012, the CJC was cancelled due to insufficient evidence.
- 19. On 21 August 2013, Mr AM's application for a PV was refused.
- 20. On 29 August 2013, Mr AM lodged an application to review the decision to refuse him a PV at the Refugee Review Tribunal (RRT).
- 21. On 1 November 2013, Mr AM was transferred to Curtin Immigration Detention Centre.
- 22. In February 2014, Mr AM was identified as a detainee affected by the unintentional release of personal information by the department. He was invited to raise concerns regarding any impact the data breach might have on his case.
- 23. On 24 February 2014, the decision to refuse Mr AM's PV application was upheld by the RRT.

- 24. On 18 March 2014, Mr AM lodged an appeal of this decision in the Federal Circuit Court (FCC).
- 25. On 28 August 2014, Mr AM was transferred back to Yongah Hill Immigration Detention Centre.
- 26. On 24 March 2015, Mr AM was transferred to Wickham Point Immigration Detention Centre.
- 27. On 17 July 2015, the FCC conducted a final hearing in Mr AM's appeal and reserved its judgment.
- 28. On 13 April 2016, the statutory bar preventing Mr AM from making a second PV application was lifted because of the data breach issues affecting a number of detainees.
- 29. On 2 August 2016, Mr AM's case was referred by the department to the Minister under s 195A of the Migration Act. On 9 September 2016, the Minister declined to consider intervening in Mr AM's matter.
- 30. On 21 December 2016, Mr AM made a valid application for a Safe Haven Enterprise visa (SHEV). The department indicated that, although his application was validly made, Mr AM had provided limited information in respect of his claimed fear of harm in Sri Lanka and therefore his application was delayed.
- 31. On 7 February 2017, Mr AM's case was referred to the Minister a second time for consideration under s 195A as part of a group submission. On 15 March 2017, he was removed from the submission at the request of the Minister's office.
- 32. On 31 March 2017, over 20 months after it reserved its judgment, the FCC handed down a decision upholding Mr AM's appeal. It referred the matter back to the Administrative Appeals Tribunal (AAT) decisions which were once reviewed by the RRT are now reviewed by the Migration and Refugee Division of the AAT to be made in accordance with the law. I have no information about when the AAT will hand down its new decision.
- 33. On 7 August 2017, Mr AM's case was referred to the Minister for the third time for consideration under s 195A of the Migration Act. The Commission understands that a decision on this matter is still outstanding.
- 34. On 8 August 2017, after receiving documents from the department obtained under the *Freedom* of *Information Act 1982* (Cth), Mr AM's appointed registered migration agent provided a detailed statement of claim in respect of his SHEV application. The interview for the SHEV was scheduled for 31 August 2017. The Commission has no further information in relation to this SHEV application or its progress.
- 35. At the date of this notice, Mr AM has remained in closed immigration detention for a period of 64 months (5 years and 4 months).

# 4 Legislative framework

# 4.1 Functions of the Commission

- 36. 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.
- 37. 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.
- 38. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

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

- 39. 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.
- 40. 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.
- 41. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.<sup>2</sup>

# 4.3 What is a human right?

- 42. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
- 43. Article 9(1) of the ICCPR relevantly 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.

# 5 Arbitrary detention

44. Mr AM complains about his continuing detention in an immigration detention centre. This requires consideration to be given to whether his detention is 'arbitrary' contrary to article 9(1) of the ICCPB.

# 5.1 Law on article 9 of the ICCPR

- 45. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
  - (a) 'detention' includes immigration detention<sup>3</sup>
  - (b) lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances<sup>4</sup>
  - (c) 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability,<sup>5</sup> and
  - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>6</sup>
- 46. In *Van Alphen v The Netherlands* the United Nations 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.<sup>7</sup>
- 47. The UNHRC has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than 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
- 48. Relevant jurisprudence of the UNHRC on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims

are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.<sup>9</sup>

- 49. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty in this case, continuing immigration detention must be necessary and proportionate to a legitimate aim of the State Party in this case, the Commonwealth of Australia in order to avoid being 'arbitrary'.<sup>10</sup>
- 50. It is therefore necessary to consider whether the detention of Mr AM in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

# 5.2 Act or practice of the Commonwealth?

- 51. From 16 July 2012 13 August 2012, Mr AM was detained by the Commonwealth pursuant to s 189(3) of the Migration Act. From 13 August 2012 onwards, he has been detained pursuant to s 189(1) of the Migration Act.
- As he arrived in Australia by boat without a valid visa, Mr AM was an 'unlawful non-citizen', and therefore the Migration Act required that he be detained.
- 53. While the Migration Act requires the detention of unlawful non-citizens, there are a number of powers that the Minister can exercise to detain Mr AM in a manner less restrictive than a closed immigration detention facility. Specifically, the Minister could have granted him a temporary visa under s 195A of the Migration Act or made a residence determination pursuant to s 197AB of the Migration Act.
- 54. I consider two acts of the Commonwealth as relevant to this inquiry:
  - (a) the department's failure to refer Mr AM's circumstances to the Minister for attention under s 195A of the Migration Act from December 2012 until August 2016, and
  - (b) the department's failure to refer Mr AM's case to the Minister under s 197AB of the Migration Act.

# 6 Department's failure to refer Mr AM's circumstances to the Minister under s 195A of the Migration Act

- 55. Pursuant to s 195A of the Migration Act, the Minister may grant a visa to a person detained under s 189 of the Migration Act if he or she forms the view that it is in the public interest to do so (whether or not the person has applied for the visa). The Minister regularly uses this power to grant bridging visas to people in immigration detention.
- 56. Successive Ministers have issued guidelines about the exercise of the discretion under s 195A and the types of matters that should be referred to the Minister by the department. On 24 March 2012, the Hon. Chris Bowen MP, then Minister for Immigration and Citizenship issued a set of guidelines (the 2012 Guidelines). These applied until 29 April 2016 when the Hon. Peter Dutton MP, Minister for Immigration and Border Protection, issued another set of guidelines (the 2016 Guidelines).
- 57. It is clear from the material provided to the Commission by the department that, at numerous times over the past 5 years during Mr AM's detention, the department has given consideration to referring Mr AM's circumstances to the Minister under s 195A. For example, a Case Review dated 15 January 2013 stated:

[Mr AM] is currently being considered for release into the community on a BVE.

It is expected that [Mr AM] will be released on a BVE in the future where he will lodge his protection visa application.

The current placement at YHIDC is appropriate. [H]owever in line with Department Detention Values the client is being considered for the grant of Bridging Visa E.

58. In a further Case Review dated 19 February 2013, the reviewer states:

An email has been sent to S195A requesting [redacted]...that he be considered ASAP.

An email has been sent to the 195a team requesting that they triage the client.

- 59. It also appears that three factors contributed to a significant delay in this referral occurring:
  - (a) Mr AM's categorisation as a 'Category 2 (behavioural detainee)'
  - (b) the failure of Mr AM's PV application at the primary and merits review stages, resulting in him being considered 'finally determined', and so, according to the department, ineligible for consideration under s 195A, and
  - (c) the length of time between Mr AM's judicial review hearing at the FCC and the handing down of its decision.

# 6.1 'Category 2 (behavioural detainee)'

60. Despite apparent inclination within the department to refer Mr AM's case to the Minister under s 195A, his categorisation as a 'Category 2 (behavioural detainee)' appears to have delayed such a referral. For example, a Case Review dated 13 April 2013 stated:

BVE Team advised client is currently not a candidate for BVE processing due to the following: Currently, client is part of the cohort of clients who fall within one of the behavioural categories. BVE team is currently waiting on advice from the Minister's Office.

61. This is expanded upon in a Case Review dated 18 May 2013:

Client is part of a cohort of clients who fall within one of the behavioural categories. Previously excluded from BVE consideration due to this.

Client is currently not a candidate for BVE processing due to falling within a 'behaviour category'. On the 17/05/13 clients case along with other PRE 13 August clients were escalated. On the 8/05/13 s195a team advised that BVE team will be drafting the s195a behavioural submissions with a view to progressing these clients that were previously excluded as behavioural clients to the Minister's Office.

- 62. An undated email from a Senior Case Manager provided to the Commission by the department, indicated that Mr AM was assessed by the department as a 'Category 2 (behavioural detainee)'.
- 63. In its response to my preliminary view, provided on 1 September 2017, the department defined the scope of this Category 2 (behavioural detainee) category into which Mr AM fell. The department stated:

In line with section 195A triage procedures and guidelines in 2013, Mr AM was assessed as a Category 2 (behavioural detainee) as he had been the subject of an Australian Federal Police Investigation. The definition for Category 2 (behavioural detainee) is:

- Detainees who were previously of interest to the AFP or local police, Detention
  Intelligence, Intelligence Analysis Section or National Security and Serious Crimes
  Reporting Team (and are now cleared for BVE consideration). These detainees must
  never have been convicted of an offence (in Australia or overseas).
- Detainees who were involved in a major/serious/critical behavioural incident in
  detention more than three months ago (whether or not they were referred to the
  AFP/local police). The incident must be finalised (and they cannot have had a
  criminal conviction). The date of the detainee's last major/critical incident must be
  at least three months ago.
- 64. Based on the definition above, it is my understanding that Mr AM was categorised as a 'Category 2 (behavioural detainee)' because of his admission that he steered the boat for part of the journey to Christmas Island. This statement attracted the interest of the AFP in 2012 which resulted in the issuance of a CJC in October 2012. The CJC was cancelled two months later for lack of evidence. Despite the cancellation of the CJC in December 2012, it appears that Mr AM's categorisation as a 'Category 2 (behavioural detainee)' persisted and delayed his consideration for referral under s 195A of the Migration Act until August 2016.

- 65. The department's response explains that, as a result of Mr AM's categorisation, he 'was required to be referred on a submission tailored for "behavioural detainees" for the Minister's consideration'.
- As early as 6 August 2013, the department expressed its desire to remove persons in Mr AM's position into less restrictive forms of detention. This is apparent from an email between departmental staff, provided to the Commission by the department, where the officer stated:

As many of you are aware, there has been some delay with referring Category 2 and 3 'behavioural' clients to the Minister for his consideration to grant BVEs under s 195A. We are now in a position to refer these clients and are keen to move quickly with the relevant submissions, given the length of time some have now been in held detention.

- 67. While I acknowledge the department's attempts to have Mr AM's case referred to the Minister, it was not until 2 August 2016 that such a referral was actually made, almost 3 years after the above email of 6 August 2013.
- 68. Recalling the authority of the General Comment on article 9 of the ICCPR above, I accept that, prior to the cancellation of the CJC in December 2012, Mr AM's detention may not have been 'arbitrary'. I do not have the material before me to make findings on this issue. In principle, however, detention for the purpose of investigating a crime, or determining whether an individual poses a threat to national security, might be reasonable, necessary and proportionate in the circumstances. However, Mr AM's CJC was cancelled in December 2012 and there is no suggestion of other security concerns.
- 69. In a Case Review dated 15 January 2013, Mr AM was described as having 'a low security rating' and found to be 'suitable for consideration of a less restrictive placement, if this becomes available'. The only 'incidents of concern' noted in his formal case reviews commencing 7 months into his detention and ending 42 months into his detention are a mobile phone contraband issue and a refusal of food and fluid in his 30 Month Review dated 22 January 2015. There are no documented incidents of violence in detention.
- 70. I am not satisfied that, because Mr AM was once a person 'of interest' to the AFP and therefore a 'Category 2 (behavioural detainee)', this could sufficiently justify a three and a half year delay in referring his matter to the Minister such as to prevent his detention from becoming 'arbitrary' under article 9 of the ICCPR.

# 6.2 Finding 1: Category 2 detainees

71. On the material before me, it appears that, once a person has previously been 'of interest' to the AFP, local police, Detention Intelligence, Intelligence Analysis Section or the National Security and Serious Crimes Reporting Team, they may always be subject to this Category 2 designation. This appears to be regardless of when, and in what circumstances, interest from the authorities ceased.

72. I find that the categorisation of Mr AM as a 'Category 2 (behavioural detainee)', based on a CJC that was cancelled within two months, appears to have delayed the department's consideration of him for referral to the Minister under s 195A for over three years. This rendered Mr AM's detention 'arbitrary', contrary to article 9 of the ICCPR.

# 6.3 'Finally determined'

- 73. In its response to the Commission's preliminary view, the department stated that Mr AM was considered 'finally determined' after the negative outcome of his protection visa application at both the primary (21 August 2013) and merits review stage (24 February 2014). The department stated that, as a result of this determination, 'Mr AM was consequently not eligible to be considered for referral for the Minister's consideration' under s 195A.
- 74. Section 5(9) of the Migration Act defines the term 'finally determined' as follows:

For the purposes of this Act, subject to <u>subsection</u> (9A), an application under this Act is *finally determined* when:

- (a) a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or 7; or
- (b) a decision that has been made in respect of the application was subject to some form of review under Part 5 or 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed; or
- (c) in relation to an application for a protection visa by an excluded fast track review applicant a decision has been made in respect of the application.
- 75. Parts 5 and 7 of the Migration Act provide for review of certain decisions by the Migration and Refugee division of the AAT. It appears that, under the Migration Act, an individual's visa application can be classified as 'finally determined' even if judicial review proceedings have been initiated in either the FCC or Federal Court of Australia.
- 76. The result of being classified as 'finally determined' under the Migration Act appears to be that, from at least 24 February 2014, the department considered Mr AM to be ineligible for placement in less restrictive detention while he awaited the outcome of his judicial review application.
- 77. In a Case Review dated 4 March 2014, it stated that Mr AM is 'currently under consideration for BVE Group 200' and that he 'is currently waiting for consideration for a BVE'.
- 78. However, in a Case Review dated 31 March 2014, it stated that he was 'removed from BVE Group 200'. As discussed above, it appears that this was because he was considered by the department to be 'finally determined' as at 24 February 2014. I note the concerns of a case manager at Wickham Point Immigration Detention Centre, in a Case Review dated 1 June 2015, regarding the length of Mr AM's detention. The case manager stated:

... I am quite concerned about the extended timeframe that this client has been subject to pending a JR outcome.

Could you please advise the best way to expedite an outcome in this situation? I am very worried that we are entering arbitrary detention territory.

79. In another email dated 1 June 2015, a department case manager indicated that they had contacted 'Litigation' within the department for an update on Mr AM's judicial review judgment, and Litigation responded accordingly:

Our solicitors have responded that there is no indication when judgment is likely to be handed down. They noted that the judge who heard Mr [AM]'s matter has a number of outstanding judgments, including once [sic] that has been reserved for more than a year. Unfortunately, that may mean it may be some time before the judgment is delivered.

- 80. These emails suggest that the department knew of the likelihood of continuing delays in the finalisation of Mr AM's judicial review before the FCC.
- While the department has stated that Mr AM's status as 'finally determined' prevented his referral to the Minister under s 195A, I note that neither the 2012 Guidelines nor the 2016 Guidelines indicate that such a status renders an individual ineligible for referral.
- 82. Indeed, both the 2012 and 2016 Guidelines on s 195A state that cases should be actively referred to the Minister 'if the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practical'.
- 83. In my view, removing a person who has ongoing judicial review proceedings in Australia would not be 'reasonably practical' because, in the context of an application for a PV, such removal would render the judicial review process largely nugatory. This view is consistent with what I understand the general practice of the department to be that detainees are not usually removed until all legal appeal avenues have been exhausted or abandoned. Consequently, Mr AM may have met the guidelines for referral to the Minister in March 2014 when he filed his application for judicial review in the FCC.
- 84. I accept that the 20 month delay in the FCC handing down its judicial review decision in Mr AM's matter was beyond the control of the department. However, I am satisfied that, given the department's knowledge that judicial review proceedings can be lengthy, a policy that without an individualised risk assessment prevents people who are 'finally determined' from being referred for consideration under s 195A of the Migration Act, is inconsistent with, or contrary to, article 9 of the ICCPR.

# 6.4 Finding 2: 'finally determined'

85. Based on the material before me, I find that the failure of the department to refer Mr AM to the Minister because of his status as 'finally determined' between 2014 and 2016 resulted in Mr AM's detention becoming 'arbitrary'.

# 7 Department's failure to refer Mr AM's circumstances to the Minister under s 197AB of the Migration Act

86. In assessing the less restrictive options available to the Commonwealth in cases of immigration detention, it is also important to note the 'residence determination' powers. 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).

- 87. Further, the definition of 'immigration detention' includes 'being held by, or on behalf of, an officer in another place approved by the Minister in writing'.
- 88. Section 197AB of the Migration Act permits the Minister, where he thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. This is commonly referred to as 'community detention'. Further, it is open to the Minister to exercise the power conferred by s 197AB subject to additional conditions: see s 197AB(2)(b) of the Migration Act.
- 89. Similar to the guidelines issued under s 195A of the Migration Act, there are guidelines explaining the circumstances in which the Minister might consider exercising his powers under s 197AB of the Migration Act to make a residence determination.
- 90. Mr AM has spent over five years in immigration detention. In that time there have been five different sets of guidelines about s 197AB, made by four successive Ministers, which have applied to his circumstances. On 1 September 2009, the Hon. Chris Evans MP, then Minister for Immigration and Citizenship, made a set of guidelines (the 2009 guidelines). These applied until the Hon. Brendan O'Connor MP, then Minister for Immigration and Citizenship, issued his own set of guidelines on 30 May 2013 (the 2013 guidelines). In 2014, the Hon. Scott Morrison MP, then Minister for Immigration and Border Protection, issued a further set of guidelines (the 2014 Guidelines) and, in 2015, the Hon. Peter Dutton MP issued another set of guidelines (the 2015 Guidelines). On 29 April 2016, the Hon. Peter Dutton MP reissued his guidelines (the 2016 Guidelines).
- 91. I note that, since the commencement of the 2014 Guidelines, under the heading 'Cases generally not to be referred for my consideration under s 197AB', the Ministers' guidelines have included persons who are considered 'finally determined'.

- 92. However, this section is qualified by the statement that the department may refer people to the Minister who are finally determined in 'exceptional circumstances'. I consider that 'exceptional circumstances' exist in this case to permit a referral to the minister under s 197AB. I discuss my finding below.
- 93. I also note that, prior to February 2014, the s 197AB guidelines did not include any requirement that exceptional circumstances exist before finally determined persons might be referred to the Minister.
- 94. It appears that, over the past five years, the department has given some thought to referring Mr AM to the Minister for consideration of community detention. For example, in his first Case Review dated 27 September 2012, the department stated:

No evidence that Mr [AM] has needs that cannot be catered for at Wickham Point Immigration Facility. He has not displayed vulnerabilities that suggest a less restrictive placement or community detention is required.

95. In another Case Review dated 15 January 2013, Mr AM's case manager stated:

All detention alternatives have been considered by myself and previous Case Managers, a referral to community detention has not been initiated ... the client does not meet the criteria to be referred for Community Detention under s197AB. He has a low security rating and would be suitable for consideration of a less restrictive placement, if this becomes available.

- 96. It does not appear that referral under s 197AB of the Migration Act was contemplated again until 2014 when, in a further Case Review dated 9 January 2014, it is stated 'the detainee does not meet guidelines for residence determination under s197AB. CM to reassess the detainee's circumstances regularly to ensure that placement remains appropriate'.
- 97. A Case Review dated 7 March 2016 stated 'DSRO has not become aware of any vulnerability that requires urgent change of placement as his health and welfare can be managed by services at Wickham Point APOD'.
- 98. When the Commission asked the department the reason for Mr AM's detention in an immigration detention centre, the department responded on 27 June 2016 that:
- 99. Mr [AM] arrived on Christmas Island as an Offshore Entry Person and is, therefore, not immigration cleared. Mr [AM]'s continued detention is considered appropriate as he has been found not to engage Australia's protection obligations. The department also advised that:

Mr [AM]'s detention has been reviewed on 41 occasions under case management processes by Case Management and at Detention Review Committee meetings ... Mr [AM] has also had his detention reviewed by a senior officer.

100. The Commission asked the department whether alternative, less restrictive detention options had been considered for Mr AM. The department responded on 27 June 2016 that:

To date, Mr [AM]'s current detention placement is appropriate as he has not demonstrated circumstances to warrant referral for residence determination. The latest case review dated 8 June 2016 recommended no change to Mr [AM]'s detention placement and that his needs are currently being met in the detention environment.

101. On 1 September 2017, the department confirmed that Mr AM had not been the subject of a formal assessment for referral to the Minister under s 197AB of the Migration Act. In the abovementioned case reviews, and in the department's email correspondence with my office, the department has said that Mr AM has not 'displayed vulnerabilities' or 'met the criteria' or 'met the guidelines' for community detention. On the material before me, I do not share this conclusion.

# 7.1 Torture and trauma

- 102. In the 2009 guidelines, it stated that, 'in referring cases to [the Minister] for residence determination, the department is to note that I will give priority to ... people who may have experienced torture or trauma'.
- 103. In Mr AM's 7 Month Case Review, it stated: 'Mr [AM] has not disclosed any history of torture and trauma'. However, in his 13 Month Senior Officer Review dated 22 August 2013, it stated that on 29 July 2013, the International Health and Medical Services provided the department with the following information:

Mr [AM]'s has physical and mental health issues for which he is receiving treatment. Mr [AM] has disclosed a history of torture and trauma and has received specialist counselling. The DRCCS recommends that departmental records be updated to reflect who provided the specialist torture and trauma counselling for Mr [AM].

104. It is unclear from the information before me when the department was first made aware that Mr AM might have had a history of torture and trauma. It is also unclear when he began receiving specialist torture and trauma counselling. If the department knew before 30 May 2013, when the new 2013 guidelines came into effect, it is arguable that he did meet the 2009 guidelines for referral to the Minister as a priority case.

# 7.2 Mental health issues

105. When the 2013 guidelines came into effect, survivors of torture and trauma were removed from the category of priority referrals. However, the then Minister indicated that he would consider exercising his discretion in favour of single adults with 'diagnosed mental illness'. This was retained, although slightly modified, in the 2014 and 2015 Guidelines which stated that the Minister would consider referrals of single adults if they had 'ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention'.

106. The health sections of Mr AM's case reviews are heavily redacted and I have little information available to me about his mental health. I note, however, that in Mr AM's complaint to the Commission dated 22 March 2016, and provided to the department on 2 June 2016, he said:

I am very mentally distressed by my situation. I have lost hope, I feel helpless and suicidal ... I have seen International Health and Medical Services staff about my issues but this hasn't helped much. I have only been prescribed sleeping tablets. I haven't been able to see mental health specialists for ongoing help such as a counsellor, psychologist and/or psychiatrist. Due to this lack of consistent support and the length of my detention, my mental health has been greatly deteriorating.

107. It is also apparent from a partially redacted email dated 13 April 2016 provided to the Commission by the department, that Mr AM's mental health was a live concern among departmental staff. While the email is redacted, it appears to be from a Detainee Status Resolution Officer to another officer of the department. The Resolution Officer stated:

The original CCRS referral for MR [AM] was in December 2015 ... and his decline in Mental Health has exacerbated since this time.

If possible can you escalate this case at your end?

108. Additionally, a guideline assessment decision of 18 May 2016 stated:

Mr [AM] has a history of mental health issues associated with the length of time he has been in held immigration detention and has been diagnosed with an Adjustment disorder. He engages with members of the mental health team for assessment and supportive counselling and is compliant with his current antidepressant medication regime.

109. Based on the documentation before me, it appears that, at some stage over the past 64 months, Mr AM may have become a person with a 'diagnosed mental illness' or a 'mental health illness requiring ongoing medical intervention' appropriate for referral under the 2013 or subsequent guidelines.

# 7.3 Unique or Exceptional Circumstances

- 110. A provision permitting the referral of a detainee to the Minister under s 197AB in 'unique or exceptional circumstances' is found in each set of guidelines applying to Mr AM's circumstances, until the 2016 guidelines. In the 2016 guidelines, the phrase 'unique or extraordinary circumstances' is replaced by the phrase 'compelling and compassionate circumstances'.
- 111. The phrase 'unique or exceptional circumstances' is not defined in the residence determination guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest. 11 In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
  - circumstances that may bring Australia's obligations as a party to the ICCPR into consideration

- the length of time the person has been present in Australia (including time spent in detention), and
- compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person.
- 112. Viewed cumulatively, I consider the following factors relevant to my assessment that Mr AM's case has 'unique or exceptional circumstances':
  - · he has disclosed a history of torture and trauma
  - he has been detained in an immigration detention centre for over 5 years
  - he has indicated that his lengthy detention has caused him to feel helpless and suicidal, and
  - the department has expressed concerns about the deterioration in Mr AM's mental health caused by his prolonged detention.

# 7.4 Finding 3: 197AB

113. I find that the circumstances of Mr AM's case permitted a referral to the Minister for consideration of exercising his power under s 197AB and that the failure of the department to make such a referral resulted in Mr AM's continued detention becoming 'arbitrary', contrary to article 9(1) of the ICCPR.

# 8 Recommendations

- 114. For the reasons above, I have found that the Commonwealth's failure to make timely referrals to the Minister for consideration of alternatives to closed detention under s 195A or 197AB of the Migration Act was inconsistent with Mr AM's rights under article 9 of the ICCPR.
- 115. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with, or contrary to, any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings. <sup>12</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice. <sup>13</sup> The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person. <sup>14</sup>

116. In an effort to ensure that Mr AM, and individuals in similar circumstances, are not held indefinitely in immigration detention without due consideration of their individual circumstances and period of detention, as well as what risk they may pose if placed in a less restrictive environment, I make the following recommendations:

#### **Recommendation 1**

The Minister indicate to his department that categorisation as a 'Category 2 behavioural detainee' should not be a reason for delay in referral under s 195A of the Migration Act — unless an individualised assessment suggests that continuing detention in a closed facility is reasonable, necessary and proportionate.

#### Recommendation 2

The Minister indicate to his department that the definition of a 'Category 2 (behavioural detainee)' be amended to include a timeframe in the first section, such as:

- Detainees who were previously of interest to the AFP or local police, Detention
  Intelligence, Intelligence Analysis Section or National Security and Serious Crimes
  Reporting Team within the past six months (and are now cleared for BVE
  consideration). These detainees must never have been convicted of an offence (in
  Australia or overseas)
- Detainees who were involved in a major/serious/critical behavioural incident in
  detention more than three months ago (whether or not they were referred to
  the AFP/local police). The incident must be finalised (and they cannot have had a
  criminal conviction). The date of the detainee's last major/critical incident must be
  at least three months ago

This would be consistent with the timeframe of 'more than three months ago' in the second section of the existing definition.

#### Recommendation 3

The Minister indicate to his department that he will consider referrals by the department for consideration under s 195A in circumstances where individuals have immigration matters outstanding before the courts, even if they are considered 'finally determined' under the Migration Act.

### **Recommendation 4**

In the event that the Minister declines to intervene under s 195A, the Minister indicate to the department that he will consider a submission about the exercise of his powers in relation to Mr AM and people in comparable situations under s 197AB.

# 9 The department's response to my findings and recommendations

- 117. On 2 February 2018, I provided the department with a notice of my findings and recommendations in respect of Mr AM's complaint.
- 118. On 14 March 2018, the department provided the following response to my findings and recommendations:

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 AM's placement in a detention centre was appropriate, reasonable and justified, in the individual circumstances of his case.

Mr AM's categorisation as a 'behavioural detainee' did not cause a delay to his referral to the Minister.

In 2014, Mr AM had been found not to be owed protection at both primary stage and at merits review. At that time, Mr AM was expected to depart Australia. In line with Government policy at the time, it was considered inappropriate to refer such cases to the Minister under section 195A of the Act. However, Mr AM's case was regularly reviewed and assessed by the Department to ensure his placement in detention remained appropriate.

Detention Review Committees are held monthly to review all cases in held detention to ensure the ongoing lawfulness and reasonableness of the decision to detain a person, by taking into account all the circumstances of the case, including adherence to legal obligations. This periodic review takes into account any changes in the client's circumstances that may affect immigration pathways including returns and removal, and ensures that alternative placement options have been duly considered. Mr AM's case was reviewed by the Detention Review Committee on 54 occasions, and these reviews determined that Mr AM's placement in immigration detention was appropriate.

Mr AM's case was referred for the Minister's consideration under section 195A of the *Migration Act* 1958 (the Act), on three separate occasions: August 2016, February 2017 and August 2017.

On 24 November 2017, the Minister exercised his power under section 195A of the Act and released Mr AM into the community on a Bridging E visa (subclass 050) in association with the ongoing merits review of his Safe Haven Enterprise (subclass 790) visa application.

# Recommendation 1

. . .

The Department notes the recommendation of the AHRC. The Department no longer uses the construct of behavioural detainee categories.

#### Recommendation 2

...

The Department notes the recommendation of the AHRC. The Department no longer uses the construct of behavioural detainee categories.

#### **Recommendation 3**

. . .

The Department notes the recommendation of the AHRC. While Government policy at the time was that those considered 'finally determined' would not be referred to the Minister for consideration, this is no longer the case, and the Department notes that the guidelines for assessment under section 195A of the Act do not preclude the consideration of individuals who have immigration matters outstanding before the courts, even if they are considered 'finally determined' under the Act.

#### **Recommendation 4**

. . .

The Department notes the recommendation of the AHRC. The Minister has issued separate and distinct guidelines outlining the circumstances in which he will consider exercising his powers under section 195A and section 197AB of the Act. Cases are regularly assessed against these guidelines and referred to the Minister for his consideration where appropriate. Referral of a case under section 195A does not preclude a referral or pre-empt a decision under the provisions of the Minister's other ministerial intervention powers.

- 119. I understand that Mr AM is no longer detained in a closed immigration detention centre. On 24 November 2017, the Minister exercised his power under s 195A of the Migration Act and Mr AM was released into the community on a bridging visa.
- 120. I report accordingly to the Attorney-General.

**Emeritus Professor Rosalind Croucher AM** 

**President** 

Australian Human Rights Commission

May 2018

- 1 International Covenant on Civil and Political Rights, 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.
- 3 UN Human Rights Committee, General Comment No. 35 Article 9 (Liberty and security of person), 112<sup>th</sup> Sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, Communication No. 560/1993, 59<sup>th</sup> Sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('A v Australia'); UN Human Rights Committee, Communication No. 900/1999, 67<sup>th</sup> Sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('C v Australia'); UN Human Rights Committee, Communication No 1014/2001, 78<sup>th</sup> Sess, CCPR/C/78/D/1014/2001 (2003) ('Baban v Australia').
- 4 UN Human Rights Committee, General Comment No. 35 Article 9 (Liberty and security of person), 112<sup>th</sup> Sess, UN Doc CCPR/C/GC/35 (2014) [18]; UN Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6].
- 5 Manga v Attorney-General [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee in Communication No. 305/1988, 39<sup>th</sup> Sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('Van Alphen v The Netherlands'); UN Human Rights Committee, Communication No. 560/1993, 59<sup>th</sup> Sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('A v Australia'); UN Human Rights Committee, Communication No. 631/1995, 67<sup>th</sup> 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), 112<sup>th</sup> Sess, UN Doc CCPR/C/GC/35 (2014); UN Human Rights Committee, Communication No. 560/1993, 59<sup>th</sup> Sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('A v Australia') (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, 67<sup>th</sup> Sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('C v Australia').
- 7 UN Human Rights Committee, Communication No. 305/1988, 39<sup>th</sup> Sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('Van Alphen v The Netherlands').
- 8 UN Human Rights Committee, Communication No. 900/1999, 67<sup>th</sup> Sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('C v Australia'); UN Human Rights Committee, Communications Nos. 1255,1256,1259,1260,1266,1268,1270,1288/2004, 90<sup>th</sup> Sess, UN Doc CCPR/C/90/D/1255/2004 (2007) ('Shams & Ors v Australia'); UN Human Rights Committee, Communication No 1014/2001, 78<sup>th</sup> Sess, CCPR/C/78/D/1014/2001 (2003) ('Baban v Australia'); UN Human Rights Committee, Communication No. 1050/2002, 87<sup>th</sup> Sess, CCPR/C/87/D/1050/2002 (2006) ('D and E and their two children v Australia').
- 9 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], footnotes omitted.
- 10 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, Communication No. 305/1988, 39<sup>th</sup> Sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('Van Alphen v The Netherlands'); UN Human Rights Committee, Communication No. 560/1993, 59<sup>th</sup> Sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('A v Australia'); UN Human Rights Committee, Communication No. 900/1999, 67<sup>th</sup> Sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('C v Australia').
- 11 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, Minister's guidelines on ministerial powers (s 345, s 351, s 417 and s 501J) 24 March 2012 (reissued on 10 October 2015), Part 12. The guidelines are incorporated into the department's Procedures Advice Manual. See also Part 4 of the replacement guidelines issued by the Hon Peter Dutton, Minister for Immigration and Border Protection, Minister's guidelines on ministerial powers (s 351, s 417 and s 501J) 11 March 2016, incorporated into the department's Procedures Advice Manual.
- 12 Australian Human Rights Commission Act 1986 (Cth) s 29(2)(a).
- 13 Australian Human Rights Commission Act 1986 (Cth) s 29(2)(b).
- 14 Australian Human Rights Commission Act 1986 (Cth) s 29(2)(c).

# **Further Information**

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