



Australian
Human Rights
Commission

**Nine Vietnamese men
in immigration
detention v
Commonwealth of
Australia (DIBP)**

[2017] AusHRC 118

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

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**Nine Vietnamese men in
immigration detention v
Commonwealth of Australia
(Department of Immigration
and Border Protection)**

[2017] AusHRC 118

Report into arbitrary interference with
privacy and a failure to treat persons
deprived of their liberty with humanity
and with respect for their human
dignity

Australian Human Rights Commission 2017



Australian
Human Rights
Commission

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**Australian
Human Rights
Commission**

May 2017

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into a complaint made by Dr Judyth Watson on behalf of nine Vietnamese men in immigration detention who had sought protection from Australia as refugees. The men have been given the pseudonyms PA, PB, PC, PD, PE, PF, PG, PH and PI in this report.

It was alleged that the Department of Immigration and Border Protection (the department) allowed Vietnamese government officials to interview the men without ensuring that proper processes were in place to minimise the risk of disclosure of facts concerning the men's claims for protection during the course of the interviews. I have found that in eight cases interviews were conducted in a way that amounted to a failure to respect the complainants' humanity and inherent dignity and to protect their privacy, contrary to articles 10 and 17 respectively of the *International Covenant on Civil and Political Rights*.

I found that one of the men, PG, was screened out of the refugee status determination process despite his claim for protection on the basis of religion. In the course of interviewing PG to ascertain his identity, PG was asked questions by Vietnamese officials about the nature of his work, despite the department's awareness that PG had worked for the Catholic church, a fact intimately connected with his claim for protection in Australia.

I also found that PE, PG and PI provided additional information to the department about their substantive claims for protection prior to their interviews with Vietnamese officials, and the department permitted the interviews to proceed without first considering the nature of this additional information.

I further found that the department permitted the Vietnamese officials to question each of PB, PC, PD, PE, PG, PH and PI about whether they travelled to Australia by boat, in circumstances where people in Vietnam were reportedly being prosecuted for the offence in Article 91 of Vietnam's Penal Code of 'fleeing abroad to stay abroad and oppose the people's government'.

In light of my findings, I made a number of recommendations to the department set out in part 7 of this report.

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

The department provided a response to my findings and recommendations on 9 May 2017. This response is set out in part 8 of this report. The department accepted recommendation 1, confirming that it will only invite foreign officials to interview foreign nationals where all standard identification and readmission avenues have been comprehensively investigated by departmental officers.

The department accepted recommendations 2, 3 and 4 which relate to providing a copy of my reasons for decision and recommendations to relevant decision makers so that those reasons can be taken into account in assessing whether or not a protection visa should be granted to a person who was interviewed by Vietnamese officials.

I also recommended that compensation be paid to eight of the complainants. The department accepts that it would be appropriate for compensation to be paid to two of them.

I enclose a copy of my report.

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a long horizontal flourish at the bottom.

Gillian Triggs

President

Australian Human Rights Commission

1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Dr Judyth Watson on behalf of nine Vietnamese men in immigration detention.
2. The nine men arrived in Australia by boat between 28 February 2013 and 22 April 2013 and sought asylum. They were each initially ‘screened out’ of Australia’s refugee status determination process. Between 21 and 23 August 2013, they were interviewed by Vietnamese officials at Yongah Hill Immigration Detention Centre (IDC) which is approximately 90km north east of Perth. Other Vietnamese detainees were also interviewed at Yongah Hill IDC and similar interviews were also conducted by Vietnamese officials with Vietnamese detainees at detention centres in Darwin and Sydney at around the same time. The Department of Immigration and Border Protection (the department) says that the purpose of these interviews was to establish the identity of the complainants in order to facilitate their return to Vietnam. The complainants allege that these interviews were contrary to their human rights.
3. The Commission has previously considered similar complaints by a group of Chinese asylum seekers who were interviewed by Chinese officials while in immigration detention in Australia. The Commission’s report was titled *Complaints by immigration detainees against the Commonwealth of Australia* [2008] AusHRC 40. In that report, the then President of the Commission the Hon John von Doussa QC found that the manner in which the interviews were conducted breached both the right of some of the complainants to be treated with humanity and dignity (article 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR)) and their right to privacy (article 17(1) of the ICCPR).
4. The department says that the interviews with the nine Vietnamese men were carried out in accordance with recommendations made by the Commission in that previous inquiry. Since the interviews took place, each of the men has been ‘screened in’ and has been permitted to make an application for a protection visa.
5. Given that the men have been screened in to the refugee status determination process, I have made a direction under s 14(2) of the AHRC Act prohibiting the disclosure of their identities. The men have been given pseudonyms in this Report.
6. This inquiry was undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

7. On the basis of this inquiry, I make the following findings:
- (a) PG was screened out of the refugee status determination process despite making claims for protection on the basis of his religion, and was subsequently asked questions by Vietnamese officials about the nature of his work, which the department was aware involved working for the Catholic church, and which was intimately connected with his claims for protection in Australia;
 - (b) each of PE, PG and PI provided additional information to the department about their substantive claims for protection prior to their interviews with Vietnamese officials, and the department permitted the interviews to proceed without first considering the nature of this additional information;
 - (c) the department permitted the Vietnamese officials to question each of PB, PC, PD, PE, PG, PH and PI about whether they travelled to Australia by boat, in circumstances where people in Vietnam were reportedly being prosecuted for the offence in Article 91 of Vietnam's Penal Code of 'fleeing abroad to stay abroad and oppose the people's government'.
8. I find that the conduct by the department described above amounted to an arbitrary interference with the privacy of the identified complainants contrary to article 17(1) of the ICCPR and amounted to a failure to treat them with humanity and respect for their dignity contrary to article 10(1) of the ICCPR.
9. I do not have enough information to make any findings of breach in relation to the interview of PA.
10. Having regard to those findings, I make the following recommendations:
- (a) The Commission recommends that, in cases of this kind, interviews involving foreign officials only be conducted when all other means of ascertaining identity have been exhausted and that the interviews be conducted by the department with the assistance of the foreign officials rather than by the foreign officials themselves.
 - (b) The Commission recommends that the department provide a copy of the Commission's findings and recommendations in this inquiry to delegates of the Minister who are considering whether to grant a protection visa to a person in immigration detention who was interviewed by Vietnamese officials at Yongah Hill, Darwin or Sydney in or around late 2013.

- (c) The Commission recommends that the Secretary provide a copy of the Commission's findings and recommendations in this inquiry to the Immigration Assessment Authority when a fast track reviewable decision is referred to the Authority in relation to a person in immigration detention who was interviewed by Vietnamese officials at Yongah Hill, Darwin or Sydney in or around late 2013.
- (d) The Commission recommends that if a person:
 - (i) was in immigration detention and was interviewed by Vietnamese officials at Yongah Hill, Darwin or Sydney in or around late 2013;
 - (ii) made an application for a protection visa that was refused; and
 - (iii) has already had a fast track reviewable decision affirmed by the Immigration Assessment Authority,
 then, if and when that decision is finally determined, the department make a submission to the Minister for the Minister to consider exercising his or her power under section 48B of the *Migration Act 1958* (Cth) to allow the person to make a further application for a protection visa, and include a copy of the Commission's findings and recommendations in this inquiry as part of that submission.
- (e) The Commission recommends that the Commonwealth pay \$5,000 in compensation to each of the following complainants who had their human rights breached as a result of their participation in the interviews with Vietnamese officials: PB, PC, PD, PE, PF, PG, PH and PI.

2 Legal framework

2.1 Functions of the Commission

11. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly, when this inquiry was conducted s 11(1)(f) gave the Commission the following functions:

to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:

- (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
- (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.

12. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
13. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.
14. The rights and freedoms recognised by the ICCPR are 'human rights' within the meaning of the AHRC Act.¹

2.2 Scope of 'act' and 'practice'

15. 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.
16. 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.
17. 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;² that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

2.3 Right of detainees to be treated with humanity and dignity

18. Article 10(1) of the ICCPR provides:

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

19. General Comment 21 on article 10(1) of the ICCPR by the United Nations Human Rights Committee (UNHRC) states:

Article 10, paragraph 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 Covenant. 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.³

20. The above comment supports the conclusions that:
- article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons;
 - the threshold for establishing a breach of article 10(1) is lower than the threshold for establishing ‘cruel, inhuman or degrading treatment’ within the meaning of art 7 of the ICCPR; and
 - the article may be breached if the detainees’ rights, protected by one of the other articles in the ICCPR, are breached unless that breach is necessitated by the deprivation of liberty.
21. The above conclusions about the application of article 10(1) are also supported by the jurisprudence of the UNHRC⁴ which emphasises that there is a difference between the obligation imposed by article 7(1) not to engage in ‘inhuman’ treatment and the obligation imposed by article 10(1) to treat detainees with humanity and respect for their dignity. In *Christopher Hapimana Ben Mark Taunoa v The Attorney General*,⁵ the Supreme Court of New Zealand explained the difference between these two concepts as follows:
- A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment. ... [T]he words ‘with humanity’ are I think properly to be contrasted with the concept of ‘inhuman treatment’ The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts ‘inhuman’ with ‘inhumane’.⁶
22. The decision considered provisions of the New Zealand Bill of Rights which are worded in identical terms to articles 10(1) and 7(1) of the ICCPR.
23. While many of the cases brought under article 10(1) involve physical mistreatment or poor conditions in prison the decisions of the UNHRC in *Angel Estrella v Uruguay*⁷ (*‘Estrella’*) and *Zheludkov v Ukraine*⁸ (*‘Zheludkov’*) demonstrate that article 10(1) can be breached by a breach of the rights of a detainee that do not involve physical mistreatment or poor prison conditions.
24. In *Estrella* the UNHRC held that the conduct the subject of the complaint constituted a breach of both articles 10(1) and 17. In this case the breach involved censorship and restriction of Mr Estrella’s correspondence with his family and friends to such an extent that they considered it to be incompatible with article 17 read in conjunction with article 10(1).

25. In *Zheludkov* the UNHRC held that the State's consistent and unexplained refusal to provide Mr Zheludkov with access to his medical records constituted a breach of article 10(1). The Committee reached this conclusion even though it was not in a position to determine the relevance of the medical records to an assessment of Mr Zheludkov's health or to the medical treatment afforded to him. In a separate concurring opinion Ms Cecilia Medina expressed the view that the actions of the State constituted a breach of article 10(1) regardless of whether the refusal to provide access had any consequences for the medical treatment of Mr Zheludkov. In reaching this conclusion Ms Medina made the following comments about the obligation that arose under article 10(1):

Article 10, paragraph 1, requires States to treat all persons deprived of their liberty 'with humanity and with respect for the inherent dignity of the human person'. This, in my opinion, means that States have the obligation to respect and safeguard all the human rights of individuals, as they reflect the various aspects of human dignity protected by the Covenant, even in the case of persons deprived of their liberty. Thus, the provision implies an obligation of respect that includes all the human rights recognized in the Covenant. This obligation does not extend to affecting any right or rights other than the right to personal liberty when they are the absolutely necessary consequence of the deprivation of that liberty, something which it is for the State to justify.

A person's right to have access to his or her medical records forms part of the right of all individuals to have access to personal information concerning them. The State has not given any reason to justify its refusal to permit such access, and the mere denial of the victim's request for access to his medical records thus constitutes a violation of the State's obligation to respect the right of all persons to be 'treated with humanity and with respect for the inherent dignity of the human person', regardless of whether or not this refusal may have had consequences for the medical treatment of the victim.⁹

26. Both *Zheludkov* and *Estrella* demonstrate that article 10(1) is not confined to cases involving poor physical conditions of detention facilities or physical maltreatment of detainees, but extends to respecting the rights and interests of detainees. The decision in *Zheludkov* even suggests that the mere denial of a right, even if it is not proven to have adverse consequences for the detainee, is sufficient to constitute a breach of article 10(1). I do not express a view about whether the mere breach of a detainee's rights would be sufficient to also constitute a breach of article 10(1) but note that the decision in *Zheludkov* demonstrates the potential breadth of the actions caught by article 10(1).
27. It is not possible to comprehensively identify all of the situations that will constitute a breach of article 10(1). Ultimately, whether there has been a breach of this article will require consideration of the facts of each case. The question to ask is whether the facts demonstrate a failure by the State to treat detainees humanely and with respect for their inherent dignity as a human being.¹⁰ In determining this question regard should be had to the types of conduct that the UNHRC has found to demonstrate such a failure ranging from physical or mental abuse of detainees to a breach of their rights that has not been proven to have adverse consequences for the detainee.

2.4 Right to privacy

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

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

29. The UNHRC in General Comment 16 on article 17(1) states that the ‘concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be ... reasonable in the particular circumstances’.¹¹

30. In relation to the meaning of ‘reasonableness’, the UNHRC said the following in *Toonen v Australia*:¹²

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.¹³

31. An interference with privacy will therefore be arbitrary if it is not reasonable. Reasonableness is assessed by considering whether the interference is necessary and proportional to achieving the purpose of the interference.

32. Manfred Nowak in *UN Covenant on Civil and Political Rights CCPR Commentary*,¹⁴ says in relation to the obligation imposed on State parties by article 17(1) in respect of detainees that:

Special obligations to fulfil the right to privacy by means of positive action and to protect it against interference by private parties arise in relation to persons deprived of personal liberty and other persons in a vulnerable position Typical examples are the duty to ensure to prisoners and detainees a right to correspondence and communication with the outside world and to provide them with a minimum of privacy, intimacy and respect for their honour and reputation against interferences by prison wardens and other inmates alike.¹⁵

33. Further, in its General Comment 16 the UNHRC has expressed the following view about the right recognised by article 17:

The obligations imposed by this article require the State to adopt legislation and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.¹⁶

34. Based on the passage from Nowak and the General Comment a State may breach article 17(1) if it is aware or should be aware that there is a risk of a detainee’s privacy being breached and fails to take adequate steps to prevent this.

35. The UNHRC has not comprehensively defined the word ‘privacy’ in either its General Comment or in case law but it would clearly include the right to have personal information protected from disclosure.¹⁷

3 Background

36. The nine men who are the subject of this complaint arrived in Australia by boat between 28 February 2013 and 22 April 2013 and sought asylum. They were initially screened out of Australia's refugee status determination process. It appears that in most cases, if not in all, this was done on the basis of statements made during their initial arrival interview. The Commission has previously conducted an inquiry into the department's enhanced screening process. The Commission's report in relation to that inquiry is *LA and LB v Commonwealth of Australia* (DIBP) [2015] AusHRC 96.
37. The department made arrangements for the complainants to be interviewed by officials from the Vietnamese Ministry of Public Security Immigration (MPSI). The stated purpose of these interviews was to conduct nationality and identity verification for the purpose of issuing travel documents for Vietnamese nationals who had been found to have no right to remain in Australia.
38. The interviews of the complainants by Vietnamese officials took place between 21 and 23 August 2013. The Vietnamese officials also conducted interviews with other Vietnamese detainees at or around the same time. Not all of those interviewed have made a complaint to the Commission. At the time they were interviewed by Vietnamese officials, each of the complainants had been 'screened out'. Three of the complainants were screened out either the day before the interview (PI) or on the same morning that the interview took place (PG and PH).
39. After the interviews, all of the complainants were screened back in to the refugee status determination process based on additional information provided by them. It appears that in some cases additional information was provided prior to their interview with the Vietnamese officials but may not have been translated and was not taken into account by the department until after the interviews with Vietnamese officials (PE, PG and PI).
40. Below is a table setting out information about when each of the complainants arrived in Australia, when they were screened out, when they were interviewed by Vietnamese officials, when they provided additional information, and when they were screened back in.

Name	Arrived	Screen out	Interview with officials	Additional information	Screen in
PA	28/2/2013	11/4/2013	22/8/2013	4/9/2013; 15/9/2013	19/9/2013
PB	2/4/2013	15/5/2013	21/8/2013	16/9/2013	24/9/2013
PC	8/4/2013	9/7/2013; 12/8/2013	22/8/2013	1/8/2013; 1/10/2013	4/10/2013
PD	10/4/2013	15/5/2013	22/8/2013	29/7/2013 5/9/2013 11/9/2013	27/9/2013
PE	14/4/2013	7/8/2013	22/8/2013	20/8/2013	4/9/2013
PF	14/4/2013	15/5/2013	22/8/2013	9/9/2013	27/9/2013
PG	22/4/2013	23/8/2013	23/8/2013	20/8/2013	4/9/2013
PH	22/4/2013	23/8/2013	23/8/2013	4/9/2013	27/9/2013
PI	19/5/2013	9/7/2013 21/8/2013	22/8/2013	13/8/2013	19/9/2013

41. Since being screened back in and being permitted to make an application for a temporary protection visa (TPV) or a safe haven enterprise visa (SHEV), five complainants have made an application for one of these visas. As at 15 February 2017, four complainants had not made an application for a TPV or a SHEV. Of the five who have applied for visas, one was granted a TPV on 20 November 2016, three have had their applications for a TPV or SHEV refused and are seeking review of the refusal decisions, and one made an application for a SHEV on 2 August 2016 which had not been finalised as at 15 February 2017.

4 Previous inquiry and recommendations

42. The Commission has previously conducted an inquiry into interviews with Chinese asylum seekers in immigration detention in Australia that were conducted by officials from the People's Republic of China (PRC). The Commission's report in relation to that inquiry is *Complaints by immigration detainees against the Commonwealth of Australia* [2008] AusHRC 40. In that report, the then President of the Commission the Hon John von Doussa QC found that the manner in which the interviews were conducted breached both the right of some of the complainants to be treated with humanity and dignity (article 10(1) of the ICCPR) and their right to privacy (article 17(1) of the ICCPR).
43. The breach of article 10(1) of the ICCPR was found in relation to a number of complainants who had made applications for protection visas prior to the interviews. The President found that the department had failed to take adequate steps to prevent or at least minimise the risk of the complainants disclosing or being asked questions about their protection visa applications. This amounted to a failure to treat them with humanity and respect for their inherent dignity as human beings, contrary to article 10(1) of the ICCPR, because the department knew there was a risk of such a disclosure and should have known that if such information was disclosed the complainants may be at risk of persecution if they were returned to the PRC.
44. The President's reasoning was consistent with an advisory opinion published by the United Nations High Commissioner for Refugees (UNHCR) on 31 March 2005. This advisory opinion set out a general rule of confidentiality and specific circumstances in which information about an asylum seeker could be shared with a country of origin:
- [T]he State that receives and assesses an asylum request must refrain from sharing any information with the authorities of the country of origin and indeed from informing the authorities in the country of origin that a national has presented an asylum claim. This applies regardless of whether the country of origin is considered by the authorities of asylum as a "safe country of origin", or whether the asylum claim is considered to be based on economic motives. ...
- Regarding persons found not to be in need of international protection (that is, rejected cases after exhaustion of available legal remedies), the limited sharing of personal data with the authorities of the country of origin is legitimate in order to facilitate return, even if this is without the consent of the individuals concerned. Such cases usually arise when nationality is in question and/or the individual has no national travel or identification documents. However, disclosure should go no further than is lawful and necessary to secure readmission, and there should be no disclosure that could endanger the individual or any other person, not least disclosure of the fact that the individual has applied for asylum. Moreover, in the first instance everything should be done to secure the voluntary nature of return.¹⁸
45. The UNHCR also noted that sharing of the personal information of asylum seekers with officials from their country of origin may create additional risks including giving rise to *sur place* claims for protection and leading to risks for family members remaining in their country of origin:

[S]haring with the country of origin, information about the asylum seeker, including the fact itself that the person applied for asylum, may constitute an aggravation of the person's position vis-à-vis the Government alleged to be responsible for his persecution. In a situation where the initial elements of the claim presented by the asylum-seeker would not lead to inclusion, sharing of confidential information with the country of origin, could well lead to the asylum-seeker becoming a refugee *sur place*.

... [T]his practice may endanger any relatives or associates of the asylum-seeker remaining in the country of origin and may lead to a risk for retaliatory or punitive measures by the national authorities against them.¹⁹

46. The UNHCR has reinforced the messages from its Advisory Opinion in a *Guidance Note on Extradition and International Refugee Protection*.²⁰
47. The President also found that the conduct of the interviews breached the rights of some of the complainants under article 17(1) of the ICCPR not to have their privacy arbitrarily interfered with. The breach arose because these complainants divulged personal information about themselves during the interviews, such as information about their protection visa applications, that was unrelated to the purpose for which the interviews were being conducted.
48. The President made a number of recommendations for the conduct of future interviews with immigration detainees. At the outset, he noted that there is a risk that such interviews will cause unnecessary distress and agitation to detainees and may result in arbitrary breaches of detainees' privacy, so they should only be conducted when all other means of ascertaining identity have been exhausted. Further, the department should consider conducting the interviews itself with the assistance of overseas officials, rather than arranging for the overseas officials to conduct them.
49. The President recommended that, if the department is to arrange for overseas officials to conduct such interviews, then it should consider a number of matters which would help address any risk posed by the process. These matters included the following:
 - (a) The department should have regard to the UNHCR Representation in Japan's *Advisory Opinion on the rules of confidentiality regarding asylum information* and ensure it acts in accordance with this opinion.
 - (b) The overseas officials should give the department a list of the possible questions they may ask during the interviews in advance of the interviews and the department should review the information they have about the detainees to consider whether the likely responses to the questions (given the information the department has on the detainees) would have unduly adverse consequences for the detainees.
 - (c) The department should inform the detainees who will be interviewed of the purpose of the interviews and the identity of the interviewers.

- (d) There should be clear written guidelines about the manner in which the interviews are to be conducted, the types of questions that can be asked and what is to happen to detainees following their interviews ... prepared by the department and given to the overseas officials sufficiently in advance of the interviews so that the department can discuss any issues with the overseas officials prior to them being conducted.
- (e) At least one departmental official should be present throughout the interviews and that official must be able to understand what is being discussed and be properly briefed as to what questions are and are not permissible. The guidelines for the interviews should clearly provide the departmental official with the right to direct the overseas official not to proceed with an impermissible question and to terminate an interview if necessary.
- (f) The detainees should be permitted to have support people present during the interviews.
- (g) The department's standard practice for interviewing detainees which requires detainees' consent to the recording of interviews to be obtained, dual tape recordings to be made and detainees being given a copy of the recording should be followed.
- (h) If a detainee's English is not sufficiently proficient any explanation provided to them about the interviews should be translated.

5 Consideration

5.1 Arrangements for the interviews with Vietnamese officials

50. The department submits that in arranging the interviews that were conducted by Vietnamese officials, the department adhered to the recommendations previously made by the Commission. The application of these recommendations to the circumstances of these interviews are considered in more detail below.

(a) Questions to be asked

51. The department said that prior to arrival in Australia, the Vietnamese officials provided the department with a list of questions they would like to ask clients in order to establish identity, to which the department agreed.

52. The complainants alleged that they were required to sign a document at the conclusion of their interview with Vietnamese officials and were not provided with a copy of this document. The department says that the complainants were asked, but were not required, to sign the document and that this is demonstrated by the fact that three of them refused to sign. The department does not dispute that those who signed the document were not provided with copies of it.
53. During the course of the Commission's inquiry, the Commission asked for a copy of the document that detainees said that they were required to sign. The department initially said: 'Detainees were asked by the delegation to sign a document however the department does not hold a copy of this document and cannot comment on its contents'. This answer was repeated in the department's information response for each complainant. It was not correct. It was only after the Commission pressed for answers about whether the department was aware of the contents of the document and, if not, for the reasons why the department did not make inquiries about the content of the document and why it facilitated the provision of the document to detainees for signing, that a copy of the document was produced to the Commission.
54. The department provided the Commission with an English translation of a form titled 'Record of Client's Statement' which was provided to the interviewed detainees and which they were asked to sign at the conclusion of the interview. The department also provided the Commission with a form that was filled out by a departmental officer present at the interview which summarised the questions in the Record of Client's Statement.
55. The department said that there was a departmental officer present in the room for each interview who was briefed on the purpose of the interview and their role during the interviews. The officer was fluent in Vietnamese and was in a position to ensure that only questions required to determine the detainee's identity were asked and that the interviews were conducted in a manner which maintained the dignity of the detainee. The department said that the officer had the appropriate authority to stop the interview if questions beyond identity verification were asked.
56. The form filled out by the departmental officer who was present at the interview generally mirrored the form that the detainee was asked to sign, but contained less detail. The departmental form listed eight questions and provided a space for the officer to indicate whether the question was asked and to provide any additional comments. There was also a space at the end to indicate whether any additional questions were asked.

57. The questions on the departmental form were summarised in the following way:

1. Personal particulars
2. Permanent address prior to departure from Vietnam
3. Date departed Vietnam
4. Date arrived in Australia
5. Criminal history
6. Relatives in Vietnam
7. Residential details upon return to Vietnam
8. Relatives who will return to Vietnam with client

Were any additional questions asked?

58. There are some significant differences between this summary and the Record of Client's Statement used by the Vietnamese officials that the people being interviewed were asked to sign. In particular:

- Question 3 asked not only for the date that the person departed Vietnam, but also the name of the border checkpoint where the person departed Vietnam, the person's purpose for leaving Vietnam and details of the person's passport.
- Question 4 asked not only for the date that the person arrived in Australia, but also the route taken to reach Australia and details of the passport used for travel.
- There is an additional question 9 on the Record of Client's Statement titled 'Other information relating to client's illegal entry to Australia'.
- The Record of Client's Statement contains a number of declarations at the end including:

Mr/Ms has no questions regarding the attitude or content of the interview questions by the Vietnamese officials.

It does not appear from the form that the person signing the document had the option of not making a declaration in these terms.

59. In the context of interviewing people who had claimed asylum in Australia, asking them why they left their country of origin is inappropriate. Also, as will be described in more detail below, asking them about their mode of travel between Australia and Vietnam may also indicate whether or not they were asylum seekers. It is likely that people travelling from Vietnam to Australia by boat are doing so for the purpose of seeking asylum in Australia. As can be seen from question 9, not reproduced in the department's summary, the premise of the Record of Client's Statement that detainees were asked to sign is that their entry to Australia was illegal.

(b) Information provided to complainants

60. The department says that the complainants were informed of the purpose of the interviews and the identity of the interviewers in oral briefings prior to the interviews.
61. In the original complaint made to the Commission, it was alleged that two of the complainants were told that they were to see a doctor rather than Vietnamese immigration officials, one being woken up to attend the clinic.
62. The department said that all detainees to be interviewed were initially advised of the interviews by Serco Australia Pty Ltd (Serco), the department's contracted detention services provider, who delivered interview slips to detainees on the morning of the interviews. The department said that once detainees had gathered in the interview area, case management provided information on the purpose of interviews being conducted by the delegation. The department has provided the Commission with a copy of the briefing document used to inform detainees of the purpose of the interview. This document includes the following points:
- The immigration department needs more information from you about your circumstances. This includes needing more detail about your identity.
 - Anyone who comes to Australia and is not an Australian citizen must prove their identity – who they are.
 - Today, you will meet with an official from the Vietnamese immigration department, who will ask questions to confirm your identity and nationality.
 - Because this official is from the Government of Vietnam, they are only speaking with people who are from Vietnam.
 - An Australian immigration officer will also be in the room during the interview.
 - The interview purpose is only to confirm your nationality and identity.
 - The Vietnamese immigration official has the biographical and identity information you have already provided to the Australian immigration department.
 - Please cooperate by answering questions truthfully.
 - After your interview, you can talk to a case manager if you have any questions. You will be able to return to your room. You may have to wait until everyone in your group has been interviewed.
 - In the meantime if you have any questions about the interview, a case manager is available to talk with you.

63. A section headed 'Additional Q & A (only if asked)' included the following information:

What if I do not want to participate in the interview?

Participating in the interview will help progress your immigration status, but it is your choice to participate or not.

64. On the basis of the information provided by the department, I find that the complainants were informed of the purpose of the interviews and the identity of the interviewers in oral briefings prior to the interviews.

(c) Written guidelines for the conduct of the interviews

65. The department said that it provided the MPSI with briefings in the lead up to the delegation visit in a series of emails and meetings through Post Hanoi. In addition, it said that the departmental national office representative travelling with the delegation reinforced these messages in a briefing the day prior to the commencement of the interviews.

66. The Commission asked the department to produce a copy of the briefing document used by the departmental national office representative to brief the delegation prior to the commencement of the interviews. The department produced a document titled 'Briefing for delegation 19 August 2013'. The document included a number of suggested introductory statements, including:

- The delegation's visit is highly valued by the Australian government as a key step forward to stop arrivals by [boat] and reduce people smuggling ventures.
- Outcomes of the delegation are very important to the Australian government towards facilitating returns.
- Reiterate the purpose of the visit is to send a strong message that the Australian and Vietnamese government are working to combat people smuggling; and that if you arrive by boat you will be returned.

67. On one view, the last statement may suggest that anyone claiming asylum in Australia would not be successful. However, I consider that this is not in fact an accurate description of the refugee status determination process as it existed at the time.

68. Under a heading 'Interview process', the briefing document provided:

- Talk through the guidelines for interview in general terms
- Reiterate the purpose of the interviews is identity/nationality verification for the purpose of issuing a travel document
- Provide an overview of what will happen the next day:
 - Assure safety concerns by talking about Serco presence
 - Run through the daily schedule quickly (pickups, breaks, recorders, roles)
 - Run through how the clients will be managed (brought up in groups of 30, advised of purpose, interviewed)
- Reinforce that clients may not present on the second/subsequent days

69. The department also provided a document which set out the roles and responsibilities of participants involved in what it described as 'an identity verification exercise'. This document was separately described by the department as 'guidance provided at site level in relation to the delegation and interview process'. It is not clear whether these are the 'guidelines' that are referred to in the briefing document extracted above. However, I infer that the contents of this document were communicated to the Vietnamese delegation either in the initial email communication with Post Hanoi and/or in the briefings of officers in advance of the interviews. The responsibilities of Vietnamese delegation officials were described in the following way:

Vietnamese delegation officials – limited to asking questions related to and aimed at determining identity and / or nationality for example, requesting information on addresses, parental and family history, education, employment, region, civil status and other identifiers. However the following guidelines should be observed whilst asking questions:

- Provide departmental officials with a copy of likely questions if prepared / available prior to commencement of the interview process.
- Consular and other foreign government representatives must:
 - accurately identify themselves to the person at the beginning of the visit
 - explain the purpose of their visit
- **All questions must be restricted to those necessary to establish client identity, nationality or right of entry to Vietnam.**
- **Questions asked on other matters, for example the reasons for travelling to Australia, must not be asked.**
- Questions should focus on the interviewee or their family and questions cannot be asked about other clients including Vietnamese in detention.
- Be mindful that:
 - the department cannot enforce attendance or responses to questions if a client refuses to cooperate. Similarly, clients may choose to stop an interview or refuse to answer questions at any time.
 - it is possible that clients may provide misleading information to prevent identification and possible removal.

[emphasis added]

70. On the basis of the information provided by the department, I find that the department had prepared written guidelines about the manner in which the interviews were to be conducted and the types of questions that could be asked and that these guidelines were given to the Vietnamese officials sufficiently in advance of the interviews so that the department could discuss any issues with the Vietnamese officials prior to them being conducted.

(d) Role of departmental official

71. The department said that there was a departmental officer present during each interview, that the officer was fluent in Vietnamese and monitored the interview to ensure that only questions pertinent to nationality verification were asked, and the officer completed an affirmation at the end of each interview that questions were limited to those in support of establishing nationality.

72. The document which set out the roles and responsibilities of participants involved in the 'identity verification exercise' described the responsibilities of departmental officers present during the interview in the following way:

DIAC officer – will perform an observer role during the interview with the following responsibilities:

- Introduce all members in the interview room and reinforces to client purpose and role of members in the interview.
- Confirm with the client if he/she understands the purpose of the interview.
- Monitors to ensure that the delegation's questions comply with the guidelines provided, particularly:
 - interviews are conducted in a manner which maintains the dignity of the client
 - monitors all questions to ensure they do not go beyond the scope of determining or verifying the client's identity and / or nationality.
- If the DIAC officer deems a question inappropriate they may stop the line of questioning or may terminate the interview. Ensure that the client is not left alone with the delegation officials at any time.
- Ensure that interviews are carried out in a timely manner.
- Ensure any additional information relating to a client's claims for protection are captured and promptly passed on to the UMA Screening Operations team for consideration.
- Provides exception reporting for each interview.

73. On the basis of the information provided by the department, I find that the guidelines for the interviews provided the departmental official with the right to direct the overseas official not to proceed with an impermissible question and to terminate an interview if necessary. Having said that, the instructions also anticipated that the questioning of the clients may well elicit 'additional information relating to a client's claims for protection'. This acknowledgment is relevant to my assessment about whether there was an interference with the privacy of the complainants, as discussed in more detail below.

(e) Support people

74. The communication guide prepared by the department to assist officers in communicating with detainees about the interviews provided that detainees were not permitted to bring a friend or relative to the interview.
75. In response to my preliminary view, the department provided the following explanation for preventing friends or relatives from attending interviews:

This was to mitigate the risk that the support person would become a refugee *sur place*. The Department was concerned that the Vietnamese nationals might choose a support person who had been screened in to the refugee assessment process or have outstanding claims.

76. However, as noted in paragraph 45 above, arguably the *sur place* risks applied equally to the people being interviewed directly by Vietnamese officials. Concerns about *sur place* risks could have been better dealt with by departmental officers being responsible for the conduct of the interviews.
77. It is not clear whether any of the complainants asked for a support person to be present during the interview. As recommended by President von Doussa in the Commission's previous report, if a request for a support person was made then the person should have been permitted to be accompanied by a support person.

(f) Recording of interviews

78. The Commission asked for audio recordings of the interviews and written transcripts of the interviews if available. The department provided the Commission with a copy of the two page interview template filled out by the departmental officer during the interview.
79. In response to my preliminary view in this matter, the department confirmed that the interviews were not audio recorded.
80. I consider that, as recommended by President von Doussa in the Commission's previous report, the department should have sought the detainees' consent to the recording of interviews and the detainees should have been provided with a copy of the recording of the interview. In response to my preliminary view in this matter, the department confirmed that the audio recording of interviews is supported by the department and will be considered on a case by case basis prior to undertaking future operations.

(g) Translation of information about the interviews

81. The department has confirmed that the complainants and other Vietnamese detainees at Yongah Hill IDC were briefed by an officer of the department with the assistance of an accredited interpreter. The department also notes that when similar interviews were conducted in New South Wales and the Northern Territory, briefings were provided by departmental officers who were fluent in Vietnamese.

5.2 Conduct of the interviews

(a) General observations

82. As noted above, it appears that the interviews were not recorded. I do not have transcripts of the interviews. The only records of what occurred during the interviews that I have are the contemporaneous notes taken by the departmental officers and, in the case of PB, a survey form completed and signed by him describing what occurred during his interview. It appears that the survey form was completed by PB sometime between his interview on 21 August 2013 and 25 October 2013.
83. Based on these records, I make the following findings about the conduct of the interviews.
84. All of the detainees had been 'screened out' of Australia's refugee status determination process prior to the interviews. However, some detainees were screened out only shortly before the interview took place. PI was screened out on 21 August 2013 before being interviewed at 10.00am on 22 August 2013. PG and PH were screened out on 23 August 2013 and were interviewed the same day, at 10.50am and 11.05am respectively. The department says that PG and PH were screened out prior to the interview which means the decision was taken at most only a few hours before the interviews took place. It would be of concern if decisions to screen out detainees were rushed in order that they could be made available to be interviewed by Vietnamese officials while those officials were visiting Yongah Hill IDC. I deal below with an issue of concern that arises in particular in relation to PG and PI (and also PE) based on the timing of the decisions to screen them out prior to the consideration of additional submissions made by them. I note that ultimately all of the detainees were screened back in to the refugee status determination process.
85. In response to my preliminary view, the department denied that any assessments to 'screen out' detainees were rushed. It said that the assessments 'were completed by trained officers, in a methodical manner having regard to relevant facts'. The department also noted that 'some interviews' were cancelled or postponed so that additional information could be considered in a screening process. However, it appears that this was not done in the cases of PE, PG and PI. As described in more detail in section 6.2 below, the department permitted them to be interviewed by Vietnamese officials while some of their substantive claims for protection had yet to be considered.
86. All of the interviews lasted for approximately 10 minutes, other than the interview with PE which lasted for 17 minutes.

87. The records taken by the departmental officers confirmed that the majority of the complainants were asked the eight questions listed on the departmental pro-forma described in paragraph 57 above. In some cases an 'N' was placed in the column headed 'Was it asked?' next to the question, however, it appears that this notation was also used on some occasions where the question was asked but not answered. In the space next to the question 'Were any additional questions asked?', most records indicate that the complainants were asked about their education and their job.
88. There is evidence suggesting that some of the detainees were distressed at the prospect of being interviewed by Vietnamese officials:
- Notes taken by the departmental officer present during the interview with PF say that 'His body kept on shaking during the interview'. PF sought to explain this to those interviewing him on the basis that he 'may have had a cold as he had an early walk and shower'.
 - Notes taken by the departmental officer present during the interview with PG say that he was concerned about giving details of his residential address in Vietnam, that he was 'very worried and anxious after the interview', that he refused to sign the Record of Client's Statement and that he asked to see his case manager.
 - Notes taken by the departmental officer present during the interview with PH say that he was concerned about giving details of his residential address in Vietnam and refused to answer this question.
 - Three of the complainants (PC, PG and PH) refused to sign the Record of Client's Statement.
89. There appears to have been some confusion about the purpose of the interview and the Record of Client's Statement that the complainants were asked to sign. On 23 August 2013, the day after he was interviewed, PF wrote a letter to Serco. It appears from the letter that he did not understand what he was asked to sign during the interview with the Vietnamese officials. His letter says:
- I heard that when I sign the paper to meet the Vietnamese officer, it means that I have to return to my country. I got this information on the internet, is it true?
- If it is true, it was unfortunate for me. I thought that I signed the paper so that my profile could be reviewed as DIAC told me before I met the officer. But actually it was not so, I was really sad when I heard about that. I regretted and felt restless for many nights.

90. The complainants allege that they were told that if they refused to sign papers recording the interviews, 'the process would slow down with negative impacts on their files, and thus make the process hard for them'. There is some support for this allegation in the documents produced by the department. A communication guide was prepared for speaking one-on-one with Vietnamese 'unlawful maritime arrivals' who chose not to participate in an identity verification interview. 'Non-participation' was defined to include 'not answering all the questions and leaving the interview before it is complete'. The guide instructed departmental officers to say:

Because you chose not to fully participate in the interview:

- You have not fulfilled your obligation to cooperate with the immigration process and provide evidence of who you are.
- You have negatively impacted on your immigration outcome and the possibility of you being released from immigration detention.

...

- Your interview with the Vietnamese immigration official will be rescheduled.
- You can choose not to answer any questions that do not relate to your identity.

91. This communication guide appears to be inconsistent with the suggestion in other departmental documents that clients were to be given a choice about whether or not to participate in the interviews (see paragraph 63 above).

92. The complainants also allege that many of them were asked by the officials why they had left Vietnam. As noted in paragraph 59 above, in the context of interviewing people who had claimed asylum in Australia, asking them why they left their country of origin is inappropriate. I consider evidence in support of this claim in more detail in section 6.3 below.

(b) Allegations of what happened after the interviews were conducted

93. The complainants alleged that since the interviews the families in Vietnam of ten men who participated in a survey of their experiences with the interviews (and others not in the survey) were visited and questioned by security police. They said that this was very frightening for the families and for the men in detention.

94. In his report about Chinese detainees being interviewed by Chinese officials, President von Doussa considered a similar allegation. In that inquiry, he accepted the complainants' evidence that some of them were told that their families in the PRC had been disturbed and interrogated by Chinese local police following their interviews and that they were all fearful and concerned about their families in the PRC because of this. However, he noted that this evidence was hearsay and considered that it was not sufficient to base a finding that their family members were in fact disturbed or interrogated by Chinese local police. As a result, he made no findings about whether their family members were in fact disturbed or interrogated by Chinese local police as a result of the information disclosed by the complainants during the interviews. I consider that the same circumstances apply in this case and I do not make any findings about whether or not the families of the complainants were visited and questioned by security police as a result of information disclosed by them in their interviews.²¹

6 Assessment

6.1 Questioning about basis for protection claims – PG

95. I find that the department permitted PG to be interviewed by Vietnamese officials despite PG making claims for protection based on his religion (some of which it appears had not been translated at the time he was 'screened out' of the refugee status determination process). In addition, based on a review of the notes taken by the departmental official who was present during the interview, I find that PG was asked questions by Vietnamese officials about the nature of his work, which as the department was aware involved working for the Catholic church, and which was intimately connected with his claims for protection in Australia. I find that this conduct was contrary both to his right to privacy in article 17 of the ICCPR and his right to be treated with humanity in article 10 of the ICCPR.
96. PG arrived in Australia on 22 April 2013 by boat and was initially detained at Northern IDC in Darwin. He was taken to Manus Island on 11 May 2013 before being returned to Australia on 25 July 2013 and placed first in Curtin IDC in the Kimberley region of Western Australia and then in Yongah Hill IDC.
97. In his induction interview on 3 August 2013, PG claimed that he had been harassed by the Vietnamese Government because of his work with the Catholic church. He expanded on these concerns in a written statement dated 20 August 2013, in which he said:

I am Catholic, a leader in a youth catholic group and also participated in all the catholic activities, but I was always oppressed by the community authorities. They made it difficult for us in all the Catholic activities and stopped us from going to Mass. Many times the government forced me to join the Union, meaning Vietnam's Communist Youth Union. I refused to join this Union as this job is not allowed by Catholics.

They saw that I attended religious activities in the parish. These activities improved and it created greater unity of people. They found a way to pull me into authority activities for the ward or district. However, I objected many times. They then caused many difficulties for me and other brothers in the parish. Their obvious purpose is to limit my attendance in religious activities. ...

As a young person living in this society, it is very hard for me to find a job and to be hired or I am even prohibited to work as I am Catholic. ...

I broke the law because I crossed the border to Australia. ...

I knew I came to Australia by an illegal way but my life in Vietnam was oppressed and exploited and I had no way to live. If I have to return to Vietnam I will be arrested, beaten and it will affect my life. I hope the Australian government approves for me to be a refugee in Australia.

98. Contemporaneous country information supported PG's claim that Catholics in Vietnam were at risk of persecution. For example, Amnesty International reported that in September 2008 there had been violent attacks on Catholic protesters in Ha Noi.²² Reports of this incident were the subject of comment by the United Nations Human Rights Council in its 2009 Universal Periodic Review of Vietnam.²³

99. Similarly, Human Rights Watch reported that in July, August and September 2011, 15 religious activists, primarily Catholic Redemptorists were arrested in Vietnam:

"These latest arrests demonstrate the Vietnam government's hostility toward people who seek to practice their faith freely, outside government constraints," said Phil Robertson, deputy Asia director at Human Rights Watch. "The authorities' actions against these peaceful religious advocates are a telling indicator of Vietnam's deepening abuses of human rights."

...

The arrests of the influential Catholic bloggers Le Van Son and Ta Phong Tan capped a police campaign of harassment, short-term detention, and interrogations against both bloggers related to their writings.

...

Pastoral leaders at both churches report they suffer from regular police surveillance and harassment.²⁴

100. On 9 January 2013, shortly before PG came to Australia, 14 of these activists were reportedly convicted and 13 were sentenced to terms of imprisonment between three and 13 years. The US State Department reported:

On 9 January 2013, a Nghe An Province court convicted 13 Roman Catholic Redemptorist bloggers for "attempting to overthrow the state" (Article 79). The court sentenced Ho Duc Hoa, Dang Xuan Dieu, and Ly Van Son to 13 years' imprisonment each for their links to the banned prodemocracy group Viet Tan. The other 10 received sentences from three to six years' imprisonment.²⁵

101. Further details of the circumstances of these convictions were provided by Human Rights Watch:²⁶

Many of the 14 are affiliated with the Redemptorist Thai Ha church in Hanoi and Ky Dong church in Ho Chi Minh City, known for strongly backing bloggers and other peaceful religious and rights activists. Over the last two years, both churches have regularly held prayer vigils expressing support for those they consider prisoners of conscience and detainees otherwise held for their political or religious belief.

102. It appears that PG's statement dated 20 August 2013 was initially provided by him in Vietnamese and required translation. It appears that it may not have been translated and reviewed by the department until 28 August 2013, after his interview with Vietnamese officials, which is the date that the department says PG provided it with additional information in relation to his protection claims.
103. Despite having an untranslated letter from PG setting out in detail his claims for protection, the department screened PG out of the refugee status determination process on 23 August 2013. As noted in the Commission's report in relation to the enhanced screening process, the purpose of enhanced screening was supposed to be to obtain information about a person's reasons for coming to Australia, and filter out those people who did not raise a claim that could reasonably engage Australia's protection obligations.²⁷ In fact, Mr PG had made claims for protection which had not been assessed.
104. It appears likely that PG was screened out on 23 August 2013, despite his submissions not having been translated, because this was the day that Vietnamese officials were present at Yongah Hill IDC to conduct interviews with detainees. PG was interviewed at 10.50am, so he could only have been screened out at most a few hours prior to this interview.
105. During the course of that interview, records taken by the departmental officer present show that PG was asked about his job which, as PG then revealed, was with the church, and which was the basis for his claim for protection. As described above, the departmental officer present at the interview described PG as 'very worried and anxious after the interview' and that he asked to see his case manager. He refused to sign the Record of Client's Statement.
106. In response to my preliminary view, the department said that during the interview with Vietnamese officials 'PG volunteered that his occupation [was] working in a church' and denied that this amounted to a breach of articles 17 or 10 of the ICCPR. I do not consider that it is accurate to describe PG as 'volunteering' this information to Vietnamese officials. PG had told the department prior to the interview with Vietnamese officials that he had been harassed by the Vietnamese Government because of his work with the Catholic church. The department knew that PG would be asked questions about his work during the course of the interview with Vietnamese officials. When he was asked these questions, he answered them truthfully. That is not the same as volunteering information to the Vietnamese officials.
107. The department says that PG was screened back in to the refugee status determination process on 4 September 2013 on the basis of his written statement.

108. I find that the privacy of PG was interfered with as a result of the following acts which caused or contributed to the disclosure of personal information in relation to his claims for protection:
- the questioning by the Vietnamese officials about his work with the Catholic church;
 - the department screening PG out of the refugee status determination process and permitting him to be interviewed by Vietnamese officials despite him making claims for protection based on his religion; and
 - the department screening PG out of the refugee status determination process and permitting him to be interviewed by Vietnamese officials despite him making a further written submission which had yet to be translated.
109. It appears that the decision to screen PG out on 23 August 2013 was at least in part because of the timing of the visit by Vietnamese officials. The interview was not cancelled or postponed as the department has said occurred in some other cases. This was not reasonable or necessary in the circumstances given PG's claims for protection. As a result, I find that this interference with PG's privacy was arbitrary, contrary to article 17 of the ICCPR.
110. The obligation arising under article 10 of the ICCPR applies in respect of PG because he was in immigration detention and was deprived of his liberty. I find that the manner in which his interview with Vietnamese officials was organised and conducted constituted a failure to treat him with humanity and respect for his dignity, contrary to article 10.
111. In particular, the department:
- placed PG in a situation where there was a risk that he would be asked questions by Vietnamese officials about his claims for protection
 - should have been aware of the risk to PG, based on the statements made by him in his induction interview on 3 August 2013
 - should have been aware of country information that supported his claims for protection on the basis of his religion
 - should have taken steps to translate the further claims in his written statement dated 20 August 2013 before screening him out of the refugee status determination process and permitting him to be interviewed by Vietnamese officials
 - should have been aware that if the risk eventuated it may cause PG the following harm:
 - it may place him at risk of persecution if he was returned to Vietnam
 - it may cause him to be anxious and distressed as a result of a fear of such persecution.

112. I find that permitting PG to be interviewed by Vietnamese officials, given these risks, showed a disregard for his rights and interests that amounted to a failure to treat him with humanity and dignity.

6.2 Interviews while substantive claims for protection yet to be considered – PE, PG and PI

113. In the case of three of the complainants (PE, PG and PI), it appears from the material provided by the department that although each of them was ‘screened out’ at the time of their interviews with the Vietnamese officials, they were later ‘screened in’ on the basis of additional material that they had already provided prior to the interviews with the Vietnamese officials. That is, although the complainants had provided submissions which were later relied upon to screen them in, the department permitted them to be interviewed by Vietnamese officials on the (incorrect) basis that they had not raised a claim that could reasonably engage Australia’s protection obligations.

114. I note that following the interviews with Vietnamese officials Mr Tri Vo, the President of the Vietnamese Community in Australia, wrote to the then Minister for Immigration, Multicultural Affairs and Citizenship, the Hon Tony Burke MP, expressing his concerns about the nature of these interviews. Mr Burke wrote a letter to Mr Tri Vo in response, saying:

I want to reassure you that at no time are Vietnamese officials given access to asylum seekers from Vietnam while it is being determined whether or not they are refugees. This would be in breach of our international obligations and a matter that we would not allow to take place.

115. The circumstances of PG are described above.
116. In the case of PE, he arrived in Australia on 14 April 2013 by boat and was initially detained at Northern IDC. He was taken to Manus Island on 30 April 2013 before being returned to Australia on 25 July 2013 and placed first in Curtin IDC and then in Yongah Hill IDC.
117. PE participated in an entry interview on 24 April 2013 in which he indicated that he was Catholic. He was screened out of the refugee status determination process on 7 August 2013. He provided the department with a statement dated 20 August 2013 which set out in more detail his claims for protection on the basis of his religious beliefs. Among other things, this statement said:

I witnessed a lot of intentional oppressive actions by the Ha Noi authorities on our Catholic religion and others. ... The Ha Noi authority does not oppress on only our Catholic religion but also to other religions such as Buddhism, Christians and Protestants. Dealing with these cases, I had an idea to set up the so called Youth Platoon Organization to act as a group helping alone, poor or handicapped people and visiting or encouraging families under oppression or coercion, etc. ... Members in the operation team of this Organization have been living unsafe lives. They have often been threatened. ... They sent threats to me that if I joined ... days of praise or such activities, I would be arrested.

118. In support of this submission, he also provided a letter from his parish priest also dated 20 August 2013.
119. It is possible that this statement was initially provided in Vietnamese and required translation. However, despite having a (possibly untranslated) letter from PE setting out in detail his claims for protection, the department permitted PE to be interviewed by Vietnamese officials two days later at 11.55am on 22 August 2013.
120. The department later received a letter dated 1 October 2013 from three Vietnamese clergymen who were visiting Australia and who supported PE's claims for protection. The department has also provided the Commission with another undated statement from PE in which he discusses his fear of persecution on the basis of his religion. On 4 October 2013 PE was screened back in to the refugee status determination process.
121. In the case of PI, he arrived in Australia on 19 May 2013 by boat and was initially detained at Northern IDC. He was transferred to Yongah Hill IDC on 27 July 2013.
122. PI participated in an entry interview on 6 June 2013 in which he indicated that he was Catholic. He was screened out of the refugee status determination process on 9 July 2013 and notified of this outcome on 9 August 2013. PI provided further information in support of his claims on 13 August 2013. The department noted that this information had to be translated before being considered. On 21 August 2013, PI was screened out for a second time.
123. It is not clear whether the additional information provided on 13 August 2013 was considered prior to him being screened out for the second time. This information included allegations that he was asked to pay extortionate amounts of tax from people who claimed to be from the tax office. He claimed that he was coerced into making these payments and that officials removed his shop sign and confiscated his tools. He said that:
- [!]f I am returned back to Vietnam, people in the government agencies will do things that are harmful to my family and I don't know what will happen to my family.
124. PI was interviewed by Vietnamese officials at 10.00am on 22 August 2013, the day after he was screened out for the second time.
125. After being interviewed, on 19 September 2013, PI was screened back in. In its response to the Commission's requests for information, the department has not suggested that the decision to screen PI back in was based on any information provided by him after the interview with Vietnamese officials. It appears that the only additional information provided by PI was that provided on 13 August 2013.
126. As noted above, in response to my preliminary view in this matter the department said that 'some interviews' were cancelled or postponed so that additional information could be considered in a screening process. However, that this was not done in the cases of PE, PG and PI.

127. I find that the privacy of each of PE, PG and PI was interfered with as a result of the following acts which risked the disclosure of personal information in relation to their claims for protection:
- the department permitting PE, PG and PI to be interviewed by Vietnamese officials despite having provided the department with (possibly untranslated) information which supported their claims for protection and which was later used as a basis for screening them back in to the refugee status determination process.
128. It appears that the decision to permit PE, PG and PI to be interviewed prior to the translation or consideration of their additional claims was due to the timing of the visit by Vietnamese officials. This was not reasonable or necessary in the circumstances given the real potential for the additional submissions to reveal reasons why they should not be interviewed. As a result, I find that this interference with the privacy of PE, PG and PI was arbitrary, contrary to article 17 of the ICCPR.
129. The obligation arising under article 10 of the ICCPR applies in respect of PE, PG and PI because they were in immigration detention and were deprived of their liberty. I find that the manner in which their interviews with Vietnamese officials was organised and conducted constituted a failure to treat them with humanity and respect for his dignity, contrary to article 10.
130. In particular, the department:
- placed PE, PG and PI in a situation where there was a risk that they would be asked questions by Vietnamese officials about their claims for protection
 - should have recognised that the written statements that they provided to the department prior to their interviews with Vietnamese officials could have been relevant to their claims for protection and should have been translated and taken into account prior to those interviews
 - should have been aware that if the risk eventuated it may cause PE, PG and PI the following harm:
 - it may place them at risk of persecution if he was returned to Vietnam
 - it may cause them to be anxious and distressed as a result of a fear of such persecution.
131. I find that permitting PE, PG and PI to be interviewed, given these risks, showed a disregard for their rights and interests that amounted to a failure to treat them with humanity and dignity.

6.3 Questioning about travel to Australia by boat – PB, PC, PD, PF, PG, PH and PI

132. I find that seven of the complainants (PB, PC, PD, PF, PG, PH and PI) were asked questions by Vietnamese officials about how they travelled to Australia.
133. The pro forma records of the interviews filled out by departmental officers show that at least five of the complainants (PC, PD, PF, PG and PH) were asked how they travelled to Australia. In particular, they were asked whether they travelled by boat. The records of interview of PB and PI have been redacted in parts. However, it appears from the context of these records and from a comparison with other similar records that they were also asked whether they travelled to Australia by boat:
- In the case of PB, additional information recorded on the pro-forma for his interview next to the question ‘Were any additional questions asked?’ contains two dot points. The first word in the first dot point is ‘travelled’. The balance of the information has been redacted. It appears from the handwriting used on the forms that the same officer filled out PB’s form at 11.30am on 21 August 2013 and PF’s form at 10.50am on 22 August 2013. On PF’s form, the officer recorded three dot points next to the question ‘Were any additional questions asked?’. The first was ‘Travelled by boat or plane? By boat.’ The second was ‘Where? Not sure. Started from the south.’ I infer that PB was asked about whether he arrived in Australia by boat.
 - In the case of PI, additional information was recorded on the pro-forma for his interview next to question 4 which asked for his date of arrival in Australia. The information other than the date has been redacted. Questions 3 and 4 are the places on the pro forma for most of the other complainants where an officer recorded that they travelled to Australia by boat. It appears from the handwriting used on the forms that the same officer filled out PI’s form at 10.00am on 22 August 2013, PD’s form at 10.45am on 22 August 2013 and PC’s form at 12.10pm on 22 August 2013. The officer recorded next to question 4 that PD had travelled to Australia by boat and that PC had travelled to Australia by boat and airplane. Further, as described in paragraph 58 above, the more detailed Record of Client’s Statement used by the Vietnamese officials indicates that question 4 also included questions about the route taken by a person to reach Australia. I infer that PI was asked about whether he arrived in Australia by boat.
134. In response to my preliminary view, the department said that asking a person about their mode of travel to Australia or borders they crossed ‘are legitimate lines of questioning to establish their identity, nationality and right of entry to Vietnam’. This submission picks up the language used in the guidelines provided to Vietnamese officials, that all questions ‘must be restricted to those necessary to establish client identity, nationality or right of entry to Vietnam’ (see paragraph 69 above).

135. The department said that questions about mode of travel are common questions asked by foreign officials required to establish a person's identity for the purposes of issuing a travel document. It said that the standard biographical questions that detainees were asked (in this case, questions about their name, sex, ethnicity, nationality, date of birth, place of birth, address in Vietnam, date of departure from Vietnam and date of arrival in Australia, among others) were 'not sufficient'.
136. While it may be common to ask people arriving at a border about their mode of travel (and purpose for entry), the context in which such questions are asked is important in assessing whether the questions amount to an arbitrary interference with their privacy.
137. The Vietnamese officials who were permitted to question Vietnamese detainees were not asking questions at the border of Vietnam about how people arrived in Vietnam. They were asking questions of people in immigration detention in Australia about how they came to arrive in Australia.
138. It is reasonable to infer that people who travelled from Vietnam to Australia by boat are likely to have sought asylum in Australia. I find that at least one reason for Vietnamese officials asking questions about the way that the complainants had travelled to Australia was to determine whether they had sought asylum in Australia.
139. There is conflicting information about whether the detainees were directly asked their purpose for coming to Australia. The guidance provided by the department to Vietnamese officials was that detainees must not be asked about their reasons for travelling to Australia (see paragraph 69 above). The statement that detainees were asked to sign contained a space to fill in their purpose for departing Vietnam (see paragraph 58 above). As I have not been provided with copies of the statements signed by those detainees who agreed to sign one, I have not been able to reach a concluded view on whether detainees, as well as being asked how they arrived in Australia, were also asked directly about their reasons for leaving Vietnam.
140. PA was interviewed on 22 August 2013. He made a submission to the department on 4 September 2013 saying: 'if I have to return to Vietnam, I will be accused of following Article 92 of the penal code of the Socialist Republic of Vietnam, people who flee from Vietnam will be imprisoned from three to seven years'. He made a further submission on 15 September 2013. Among other things, this second submission said:
- [A]t present I feel anxiety and fear, because on 17/08/2013 I was interviewed by the Vietnamese Police (A18). Now my name is revealed, so the police make difficulties for my family. My parents were interviewed many times and threatened, and my mother was ill because of fear. For me, if I have to return to my country, I will be arrested and imprisoned because of opposing against the state and crossing the border.
141. PA was screened back in to the refugee status determination process on 19 September 2013.

142. The submissions by PA are supported by independent country information. Human Rights Watch has reported on the use by Vietnam of 'vague national security laws to stifle dissent and arrest critics'.²⁸ HRW reported that in November 2015, the Public Security Minister, General Tran Dai Quang, reported to the National Assembly that from June 2012 until November 2015, 'the police have received, arrested and dealt with 1,410 cases involving 2,680 people who violated national security'. One of the offences for which people were reportedly prosecuted was 'fleeing abroad to stay abroad to oppose the people's government' (Article 91 of the Penal Code, maximum penalty of imprisonment for life).
143. I find that the privacy of seven complainants was arbitrarily interfered with as a result of Vietnamese officials asking them questions about how they travelled to Australia. These were requests for personal information that was not necessary to ascertain their identity. The answers to those questions were likely to put them at risk of being identified as asylum seekers and/or as being people who had left Vietnam without authorisation, potentially contrary to Vietnamese law.
144. Asking those questions was not reasonable in the circumstances. The department was aware that these questions were to be asked of detainees because it had a copy of the Record of Client's Statement used by the Vietnamese officials that the people being interviewed were asked to sign. I find that the department took steps to protect the privacy of the complainants, including by ensuring that a departmental officer was present during the interviews who spoke Vietnamese and who was instructed to monitor all questions to ensure that they did not go beyond the scope of determining or verifying the client's identity and/or nationality. However, it does not appear that any steps were taken by the departmental officer to prevent questions being asked about how the complainants left Vietnam or how they came to Australia. I find that the steps taken by the department to protect the privacy of the complainants were inadequate in the circumstances.
145. As a result, I find that the manner in which the interviews with PB, PC, PD, PF, PG, PH and PI were conducted was inconsistent with or contrary to their rights under article 17(1) of the ICCPR.
146. The obligation under article 10(1) of the ICCPR applies in respect of all of the complainants because, as a result of being in immigration detention, they were deprived of their liberty.
147. I find that the failure of the department to take adequate steps to prevent the seven complainants identified above from being asked questions about how they came to Australia also amounted to a failure to treat them with humanity and respect for their dignity. This is because:
- the department placed them in a situation where this risk arose
 - the department knew about the risk, in particular because it had a copy of the questions that the Vietnamese officials proposed to ask in the pro forma that interviewees were asked to sign

- the department should have been aware that if the risk eventuated it may cause them the following harm:
 - it may place them at risk of persecution if they were returned to Vietnam
 - it may cause them to be anxious and distressed as a result of a fear of such persecution.

148. I find that knowing the risks faced by these complainants and failing to take adequate steps to minimise those risks showed a disregard for their rights and interests and amounted to a failure to treat them with humanity and dignity.

7 Recommendations

149. 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.²⁹ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice, or for the taking of action to remedy or reduce loss or damage suffered by a person as a result of the act or practice.³⁰

7.1 Previous recommendations by the Ombudsman

150. Some of the present complainants had also made a complaint to the Commonwealth Ombudsman. The Ombudsman noted that s 336F of the *Migration Act 1958* (Cth) (Migration Act) allows the release of certain information to foreign officials in cases where the consideration of a person's claims has been finalised. However, in the Ombudsman's view, in some of the cases there were questions as to whether the cases should have been considered to be finalised and therefore whether the detainees should have been referred for interview.

151. The Ombudsman made the following recommendations:

- a) The department review all of the cases of those interviewed by the Vietnamese officials to establish if s 336F of the Migration Act applied to them at the time of the interview. For any cases where s 336F is found not to have been applied, that fact should be annotated on their immigration records and this should be taken into account during the processing of any protection claims.
- b) Any future interviews should be conducted by departmental staff with the assistance of the foreign officials rather than by the foreign officials themselves.

- c) Any future interviews should be recorded with the recordings to be retained for an appropriate time period.
 - d) Any future communication guides or group statements for interviews such as these should explicitly advise that participation is voluntary.
152. In relation to recommendation (a), the department has advised the Commission that ‘this recommendation was accepted and all these Vietnamese nationals have an appropriate record in the departmental systems’.
153. I have found that the department permitted PE, PG and PI to be interviewed by Vietnamese officials despite having provided the department with (possibly untranslated) information which supported their claims for protection and which was later used as a basis for screening them back in to the refugee status determination process. For the avoidance of doubt, the Commission sought confirmation from the department that a note has been added to the files of at least PE, PG and PI confirming that the requirements of s 336F of the Migration Act were not satisfied at the time they were interviewed by Vietnamese officials.
154. Recommendations (b) and (c) above are consistent with recommendations previously made by President von Doussa (see paragraphs 48 and 49(g) above). As noted in paragraph 80 above, the department has accepted that audio recording of interviews of this nature is appropriate.
155. At the time that President von Doussa made these recommendations, the department agreed with the content of recommendation (b) above. In the department’s response to the Commission’s findings and recommendations, it said:
- The department acknowledges and accepts the President’s recommendations to: ... only conduct such interviews in the future when all other means of ascertaining identity have been exhausted and such interviews to be conducted by the department with the assistance of overseas officials, rather than by the overseas officials themselves.
156. This is an important point, and one that appears to have been overlooked in the course of arranging the interviews that are the subject of this inquiry. The Commission considers that it is important to reaffirm the position taken by the department following the Commission’s previous inquiry.

Recommendation 1

The Commission recommends that, in cases of this kind, interviews involving foreign officials only be conducted when all other means of ascertaining identity have been exhausted and that the interviews be conducted by the department with the assistance of the foreign officials rather than by the foreign officials themselves.

7.2 Referral of Commission’s findings to relevant decision makers

157. The complainants have asked for recommendations that the Commission’s findings in this inquiry be referred to relevant decision makers who are considering whether a protection visa (including a Temporary Protection Visa or a Safe Haven Enterprise Visa) should be granted to a person in immigration detention who was interviewed by Vietnamese officials at Yongah Hill, Darwin or Sydney in or around late 2013.
158. It appears that of the nine complainants to this inquiry, five have made an application for either a TPV or a SHEV. As at 15 February 2017, four complainants had not made an application for a TPV or a SHEV. Of the five who have applied for visas, one was granted a TPV on 20 November 2016, three have had their applications for a TPV or SHEV refused and are seeking review of the refusal decisions, and one made an application for a SHEV on 2 August 2016 which had not been finalised as at 15 February 2017.
159. The Commission does not have precise details of how many other detainees were interviewed by Vietnamese officials or the status of any of their applications for protection.
160. There are two occasions on which substantive decisions may be made about whether to grant a protection visa to a person who arrived in Australia as an unauthorised maritime arrival between 13 August 2012 and 1 January 2014 and who has not been taken to a regional processing country. The first occasion is a decision by a departmental officer acting as a delegate of the Minister in assessing whether a visa should be granted. If the officer refuses to grant a protection visa, that refusal decision is referred to the Immigration Assessment Authority (IAA) as a ‘fast track reviewable decision’. When such a decision is referred to the IAA, the Secretary of the department must give the IAA any material that is in the Secretary’s possession or control and is considered by the Secretary (at the time the decision is referred to the IAA) to be relevant to the review.³¹ The IAA has the power to either affirm the fast track reviewable decision or remit the decision for reconsideration.³²
161. The Commission considers that its findings in relation to this inquiry should be provided to both sets of decision makers so that they are aware of the issues that have been raised and can take them into account in assessing whether the grant of a protection visa is appropriate or whether a fast track reviewable decision should be remitted for reconsideration.

Recommendation 2

The Commission recommends that the department provide a copy of the Commission’s findings and recommendations in this inquiry to delegates of the Minister who are considering whether to grant a protection visa to a person in immigration detention who was interviewed by Vietnamese officials at Yongah Hill, Darwin or Sydney in or around late 2013.

Recommendation 3

The Commission recommends that the Secretary provide a copy of the Commission's findings and recommendations in this inquiry to the Immigration Assessment Authority when a fast track reviewable decision is referred to the Authority in relation to a person in immigration detention who was interviewed by Vietnamese officials at Yongah Hill, Darwin or Sydney in or around late 2013.

162. Given the passage of time since the interviews with Vietnamese officials were conducted, it may be that some detainees have already had a fast track reviewable decision affirmed by the IAA. In cases where relevant decision makers have not had regard to the fact that the detainees were interviewed by Vietnamese officials while in detention, this fact should be taken into account if the application for a protection visa is finally determined and a subsequent application for a protection visa is made.
163. Section 48B of the Migration Act provides that if the Minister thinks that it is in the public interest to do so, the Minister may allow a person who was refused a protection visa to make another application for a protection visa.

Recommendation 4

The Commission recommends that if a person:

- (a) was in immigration detention and was interviewed by Vietnamese officials at Yongah Hill, Darwin or Sydney in or around late 2013;
- (b) made an application for a protection visa that was refused; and
- (c) has already had a fast track reviewable decision affirmed by the Immigration Assessment Authority,

then, if and when that decision is finally determined, the department make a submission to the Minister for the Minister to consider exercising his or her power under section 48B of the *Migration Act 1958* (Cth) to allow the person to make a further application for a protection visa, and include a copy of the Commission's findings and recommendations in this inquiry as part of that submission.

7.3 Compensation

164. The complainants have also asked for compensation. They suggest that compensation could take the form of a grant of protection or the payment of monetary compensation.
165. I do not have the power to grant protection visas to the complainants. However, I do have the power to make recommendations for the payment of monetary compensation.³³

166. The complainants refer to the Commission's Report No 40 in which the department agreed to pay \$5,000 in compensation to those complainants from the PRC whose human rights had been breached as a result of interviews with officials from the PRC while they were in immigration detention.

167. In reaching the figure of \$5,000 in respect of the interviews, President von Doussa said:

In the Commission Report, *Report of Complaint by Mr Huong Nguyen and Mr Austin Okoye Against the Commonwealth of Australia and GSL (Australia) Pty Ltd*, I concluded that, so far as possible by a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.

Compensation for the complainants' distress and fear would, in tort law or unlawful discrimination law, be characterised as 'non-economic loss'. There is no obvious monetary equivalent for such loss and courts therefore strive to achieve fair rather than full or perfect compensation.

In unlawful discrimination and sexual harassment cases, which involve a form of a breach of human rights, the courts whilst cautioning against too excessive an award for non-economic loss have also cautioned against awarding too low an amount. The courts have also emphasised that ultimately the amount awarded depends on the facts of each case and is a matter of judgment for the judicial officer hearing the matter. ...

In a range of unlawful discrimination cases and sexual harassment cases the amounts awarded for non-economic loss for hurt, humiliation and distress where there is no finding that the applicant suffered from a psychological or medical illness as a result of the unlawful conduct has ranged from \$500 to \$20,000. Whilst I am determining the amount of compensation based on the facts of this complaint I do that bearing in mind the quite varied amounts that Australian courts have awarded for actions involving a breach of human rights. ...

Whilst the harm suffered by each of the complainants arising from the interviews and the separation detention may have varied from person to person I find that the differences would not be so significant as to warrant an individual assessment of the harm. Further, as I said above when awarding compensation for non-economic loss courts seek to achieve fairness rather than full and perfect compensation. Accordingly, I have calculated compensation on an equality basis and awarded each of the complainants the same amount in respect of the human rights breaches arising from the interviews and those arising from the separation detention.

168. There have been two decisions by the Administrative Appeals Tribunal in which compensation was awarded as a result of a breach of privacy contrary to the *Privacy Act 1988* (Cth). In each case, the Tribunal made an award of \$8,000 in damages for non-economic loss.³⁴

169. I consider that the factors described by President von Doussa above also apply in this case. I am satisfied that the conduct of the department described in this Report was contrary to the human rights of PB, PC, PD, PE, PF, PG, PH and PI set out in articles 10(1) and 17(1) of the ICCPR. I am satisfied that each of these complainants experienced feelings of distress and anxiety as a result of being subjected to interviews with Vietnamese officials. I am therefore satisfied that it is appropriate that compensation be paid to them.

170. In reaching an appropriate figure, I have taken into account that:

- the conduct of the department had the tendency to cause the complainants to be anxious and distressed
- the anxiety and distress experienced by the complainants would have diminished over time but would have persisted for a period that would not have been transitory or insignificant
- none of the complainants suffered any physical injury
- there is no evidence that the complainants suffered any psychological injury as a result of the interviews
- all of the complainants were subsequently screened back in to the protection process and permitted to make an application for a protection visa.

171. In all of the circumstances, and taking into account the similar circumstances in the Commission's Report No 40, I consider that it would be appropriate for the Commonwealth to pay each of the complainants identified above compensation in the sum of \$5,000.

Recommendation 5

The Commission recommends that the Commonwealth pay \$5,000 in compensation to each of the following complainants who had their human rights breached as a result of their participation in the interviews with Vietnamese officials: PB, PC, PD, PE, PF, PG, PH and PI.

172. As I said in a report last year titled *Ms AR on behalf of Ms AS, Master AT and Miss AU v Commonwealth of Australia (DIBP)* [2016] AusHRC 110 at [196]-[204] the Parliament has determined that the Commission is to have the power to make recommendations for compensation when there has been a breach of human rights. The loss or damage need only be a result of the act or practice that was inconsistent with or contrary to any human right. The power to make such recommendations is not contingent on another breach of domestic law being available. Indeed, the Commission's inquiry function is typically used in situations where there is no other domestic remedy available.

173. The Scheme for Compensation for Detriment caused by Defective Public Administration (CDDA) is an administrative scheme that was established by the Australian Government in 1995 and is currently described in Resource Management Guide No. 409 published by the Department of Finance. It provides a means of compensating people who have suffered because of defective government administration. Importantly, the scheme is intended to compensate those to whom there is no legal obligation to pay compensation. Decisions to compensate under the scheme are approved on the basis that there is a moral rather than a legal obligation to pay compensation.³⁵

174. The CDDA scheme permits payments to be made where an official has caused detriment to a person because of:³⁶
- a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the person’s circumstances; or
 - an unreasonable failure to institute appropriate administrative procedures to cover the person’s circumstances.
175. Here, there was a lapse in complying with administrative procedures previously articulated by the department following the Commission’s Report No 40. That is, the department had said that it would ‘only conduct such interviews in the future when all other means of ascertaining identity have been exhausted and such interviews to be conducted by the department with the assistance of overseas officials, rather than by the overseas officials themselves’.
176. For the reasons set out in this report, there was also a failure to institute appropriate administrative procedures to prevent a breach of articles 10(1) and 17(1) of the ICCPR in relation to the interviews of eight of the nine complainants.
177. The complainants seek a recommendation that compensation also be paid to other people in immigration detention who were interviewed by Vietnamese officials but who have not made a complaint to the Commission. I am unable to make such a recommendation as I have not been provided with details of their situation. If other people in a similar situation were to make applications to the department for payment under the CDDA scheme, I expect that the department would consider those applications taking into account my findings and recommendations in this inquiry.

8 The department’s response

178. On 9 May 2017 the department provided the following response to my recommendations:

...

Response to recommendation 1

The Department agrees with the Commission’s findings on recommendation one. The Department only invites foreign officials to interview foreign nationals where all standard identification and readmission avenues have been comprehensively investigated by departmental officers.

...

Response to recommendation 2

The Department will provide a copy of the Commission's findings and recommendations to the departmental decision maker for complainant PH and will provide a copy to the decision makers for complainants PD, PE, PF and PG when a decision maker is assigned as they are yet to lodge their application for a Temporary Protection (subclass 785) visa (TPV) or Safe Haven Enterprise (subclass 790) visa (SHEV). This recommendation (and recommendations 3 and 4) are not applicable to complainant PA, who has been granted a TPV.

The Department will also make a copy of the Commission's findings and recommendations available to all of its decision makers to take into consideration, where relevant.

...

Response to recommendation 3

The Department will provide a copy of the Commission's findings and recommendations to the Immigration Assessment Authority (IAA) and the Migration and Refugee Division (MRD), of the Administrative Appeals Tribunal (AAT). Complainant PB is currently seeking review of the refusal of their TPV applications.

...

Response to recommendation 4

People who have had a protection visa application refused are consequently barred from making a further valid application under section 48A [of the] *Migration Act 1958* (the Act). If the Minister for Immigration and Border Protection (the Minister) considers it in the public interest, he can intervene and exercise his non-compellable and non-delegable power under section 48B of the Act to allow a further protection visa application.

The Department will provide a copy of the Commission's findings and recommendations to its Ministerial Intervention Units who receive requests for ministerial intervention under section 48B of the Act. The findings and recommendations will be taken into consideration for those people who were interviewed by the 2013 Vietnamese delegation in assessing if they meet the guidelines for referral to the Minister should they make a request under section 48B of the Act.

Complainants PC and PI will be referred to the Minister under section 48B of the Act as their applications for a TPV were refused by the Department and affirmed by the AAT.

...

Response to recommendation 5

Complainants PE and PG may be eligible for compensation.

Upon review of the findings, the Department is of the view that complainants PE and PG should not have been interviewed by the Vietnamese delegation as they had provided additional claims to the Department (untranslated) that were not taken into consideration prior to their interviews. Both PE and PG were subsequently screened in to the protection process on the basis of these claims. It appears that these interviews should not have proceeded until the additional claims had been considered and the Department will review its practices for future delegations as a result.

The Department does not agree with the recommendation that compensation should be paid to all the complainants.

Contrary to the Commission's recommendation, the Department does not agree that the Scheme for Compensation for Detriment caused by Defective Administration (CDDA scheme) is the appropriate mechanism for payment of compensation. The CDDA scheme is an administrative, discretionary compensation scheme that can apply in circumstances where there is no legal liability to pay compensation. In these cases, the Commission noted that none of the complainants suffered a physical injury nor was there any evidence of psychological injury as a result of the interviews that could give rise to legal liability for compensation. Accordingly, the Commission found that the CDDA scheme could be used as a mechanism to pay compensation. However the CDDA scheme requires that there is a quantifiable loss in order for compensation to be paid. Loss can be economic or non-economic. Non-economic loss is in relation to personal injury. In these cases, as there is no evidence of economic loss or personal injury, the Department considers that the CDDA scheme is not the appropriate mechanism for paying compensation.

If compensation was to be paid, it would be under the Act of Grace mechanism which is administered by the Department of Finance. The Act of Grace mechanism is another discretionary compensation mechanism that can be used in circumstances where there is no other available avenue of redress. Payments can be authorised by the delegate in the Department of Finance where they consider it appropriate to do so because of special circumstances. This mechanism was used to pay compensation in response to the recommendations in the 2008 AHRC report discussed at paragraph 8.

Under the Act of Grace Scheme, the complainants could apply to the Department of Finance to have their claims assessed. The Department would provide the Department of Finance with a submission relating to the claims for compensation and our recommendations. The final decision to pay the compensation will be at the discretion of the delegate in the Department of Finance.

The Department does not agree, as stated in our previous section 27 response on the preliminary findings, that asking questions about where a person is employed, even when that place of employment is a church, goes beyond the purpose of establishing identity. As noted by the AHRC, the interviews were voluntary and the purpose of the interview (to establish identity) was explained to each of the complainants. Complainant PG was not asked questions about his religion nor did he have to respond to any or all of the questions. As such, the Department does not accept the AHRC's finding that the Department arbitrarily interfered with his privacy and maintains that the Department did not fail to treat him with humanity and respect for his dignity under articles 17(1) and 10(1) of the ICCPR.

The Department does not agree, as stated in our previous section 27 response to the preliminary findings, that asking questions in relation to the mode of transport used to travel to Australia goes beyond the purposes of establishing identity. These are legitimate lines of questioning to establish the complainant's identity and right of entry to Vietnam. The Department also does not agree that asking this question, where the answer would be by boat, identifies the person as an asylum seeker. In screening these complainants out of the protection process, the Department has found that they did not raise claims that *prima facie* engage Australia's protection obligations. As such, the Department does not accept the AHRC's finding that the Department arbitrarily interfered with their privacy and that the Department did not fail to treat them with humanity and respect for their dignity under articles 17(1) and 10(1) of the ICCPR.

In relation to complainant PI, all additional claims provided to the Department (on 13 August 2013 and translated on 19 August 2013) were assessed and a screen out decision was made prior to his interview (both occurred on 23 August 2013). He raised subsequent claims after his interview (on 13 September 2013) that resulted [in] him being screened in to the protection process. As such, the Department does not accept the AHRC's finding that the Department arbitrarily interfered with his privacy and maintains that the Department did not fail to treat him with humanity and respect for his dignity under articles 17(1) and 10(1) of the ICCPR.

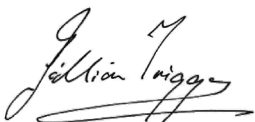
Additional AHRC recommendations

The Commission in its findings and recommendations has also sought confirmation in relation to the Department's implementation of the Commonwealth Ombudsman's recommendations to the Department in 2014 following an investigation on the conduct of the interviews for seven of the nine complainants.

The Ombudsman made a recommendation to establish whether section 336F(1) of the Act applied to the detainees at the time of the interview and, where it did not, this be taken into account in processing PV claims. The Commission notes that the Department accepted and implemented this recommendation but further seeks confirmation that the Department has included a note on the files of complainants PE, PG and PI confirming that the requirements of section 336F of the Act were not satisfied at the time they were interviewed by the Vietnamese officials.

As the Department is only agreeing that complainants PE and PG were interviewed when they should not have been, a client of interest note will be added to their ICSE record for the decision makers in their protection visa applications to take into consideration in the assessment of their claims. No note will be added for complainant PI as section 336F of the Act was satisfied at the time of his interview.

179. I report accordingly to the Attorney-General.



Gillian Triggs

President

Australian Human Rights Commission

May 2017

Endnotes

- 1 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act. The CRC is an international instrument that has been declared under s 47 for the purposes of the AHRC Act.
- 2 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 3 UNHRC, *General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)* [3].
- 4 *Walker and Richards v Jamaica*, Communication No 529/1993, UN Doc CCPR/C/60/D/639/1995; *Kennedy v Trinidad and Tobago*, Communication No 845/1998, UN Doc CCPR/C/74/D/845/1998; *R.S. v Trinidad and Tobago*, Communication No 684/1996, UN Doc CCPR/C/74/D/684/1996.
- 5 [2007] NZSC 70.
- 6 [2007] NZSC 70 [79].
- 7 Communication No. 74/1980, UN Doc CCPR/C/18/D/74/1980.
- 8 Communication No 726/1996, UN Doc CCPR/C/76/D/726/1996.
- 9 Communication No 726/1996, UN Doc CCPR/C/76/D/726/1996. Mr Rivas Posada, with whom Messrs Bhagwati and Ando agreed, dissented in the case and found that mere obstruction of access to medical records per se did not breach article 10(1).
- 10 See discussion the meaning of the word 'dignity' in a different context in *A, R (on the application of) v East Sussex County Council* [2003] EWHC 167 [86]-[89].
- 11 UNHRC, *General Comment No. 16: Article 17 (Right to privacy)* [4].
- 12 Communication No. 488/1992 UN Doc CCPR/C/50/D/488/1992.
- 13 Communication No. 488/1992 UN Doc CCPR/C/50/D/488/1992 [8.3]. While this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.
- 14 (NP Engel, 2nd ed, 2005).
- 15 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P Engel, 2nd ed, 2005) 380 [7].
- 16 UNHRC General Comment 16 [1].
- 17 *IP v Finland*, Communication No 450/1991, UN Doc CCPR/C/48/D/450/1991. This involved a complaint about disclosure of personal information. While the UNHRC ultimately held that the disclosure did not breach article 17(1) it did not suggest that a disclosure of personal information would not fall within the terms of this article.
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- 29 AHRC Act s 29(2)(a).
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- 31 Migration Act s 473CB(c).
- 32 Migration Act s 473CC.
- 33 AHRC Act s 29(2)(c)(i).
- 34 *Rummery v Federal Privacy Commissioner* (2004) 85 ALD 368; *EQ v Office of the Australian Information Commissioner* (Freedom of Information) [2016] AATA 785.
- 35 See, for example, the previous description of the CDDA scheme by the Department of Finance and Deregulation in Finance Circular No. 2009/09, *Discretionary Compensation and Waiver of Debt Mechanisms*, 7, Attachment A [3] at <https://www.finance.gov.au/archive/archive-of-publications/finance-circulars/2009/09.html>.
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Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: www.humanrights.gov.au

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