Australian Human Rights Commission

QA v Commonwealth (Department of Home Affairs)

[2021] AusHRC 140

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Report into arbitrary detention and the best interests of children

Australian Human Rights Commission 2021

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Australian Human Rights Commission

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

Dear Attorney

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) into complaints by Mr QA on his own behalf and on behalf of his sons Master QB and Master QC, alleging a breach of their human rights by the Department of Home Affairs (Department). The complaints concern two matters.

First, Mr QA states that on 15 April 2015, Master QB was sexually assaulted by another minor detained in the same immigration detention facility. Mr QA alleges that the Department failed to take all appropriate measures to protect his son from sexual abuse. This allegation raised issues under articles 3, 19 and 37(c) of the *Convention on the Rights of the Child* (CRC).

I have found that the actions taken by the Department and its service providers in terms of investigation, reporting, referral, and medical treatment were appropriate. I found that these responses by the Department and its service providers to the alleged sexual assault were not inconsistent with or contrary to Master QB's human rights.

However, as noted in paragraph 115, I am concerned that Master QB was not referred to IHMS by Serco following the alleged sexual assault. I have made a recommendation about this issue which has been accepted in principle by the Department.

Secondly, Mr QA and his sons were detained for long periods of time. His sons were detained in closed immigration detention facilities for two years and eight months before being released into community detention. Mr QA was detained in closed immigration detention facilities for more than 7 years before being granted a Temporary Protection Visa. The family complains that their detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and articles 3 and 37(b) of the CRC.

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I have found that the Department's delay in referring Mr QA and his sons to the Minister for consideration of a community detention placement resulted in their detention being 'arbitrary', contrary to article 9(1) of the ICCPR and, in the case of the children, articles 3 and 37(b) of the CRC. As the Department appears to acknowledge in a response set out in paragraph 136, the guidelines made by the Minister in relation to the exercise of community detention powers meant that Mr QA and his sons should have been treated as a priority. A referral to the Minister should have been made as soon as reasonably practicable after the family was detained.

I made three recommendations in relation to the Ministerial Intervention guidelines. Recommendation two was aimed at ensuring that detainees are assessed at regular intervals to determine whether they satisfy the Minister's guidelines for a residence determination (community detention) or the grant of a visa. This recommendation was not accepted by the Department.

Recommendations three and four proposed amendments to the guidelines to clarify the circumstances in which referrals are made to the Minister, and to seek to avoid protracted periods where no consideration is given to alternatives to detention. These recommendations were also not accepted by the Department.

On 29 September 2020, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 24 November 2020. That response can be found in Part 6 of this report.

I enclose a copy of my report.

Yours sincerely,

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

February 2021

1 Introduction to this inquiry

1. This is a report setting out the findings and recommendations of the Australian Human Rights Commission following an inquiry into complaints by Mr QA on his own behalf and on behalf of his sons Master QB and Master QC against the Commonwealth of Australia – Department of Home Affairs (Department) alleging a breach of their human rights. In September 2020, when I provided a notice of my findings and recommendations to the Department, Master QB was 14 years old and Master QC was 13 years old.

2. Among other things, the complainants allege that they have been arbitrarily detained contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).[1] The right to liberty and freedom from arbitrary detention is not protected in the Australian Constitution. The High Court has upheld the legality of indefinite detention under the Migration Act.[2] As a result, there are limited avenues for an individual to challenge their detention.

3. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights. In the context of this case, one of the key acts was a failure by the Department to refer the family's case to the Minister for consideration of the exercise of a ministerial discretion to release the family from closed detention.

4. In order to avoid detention being 'arbitrary' under international human rights law, detention must be justified as reasonable, necessary and proportionate to a legitimate purpose, on the basis of the individual's particular circumstances. Furthermore, there is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than detention to achieve the ends of the immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'. Lawful detention can still be arbitrary if it is unjust, unreasonable or disproportionate to a legitimate aim.

5. In this case, Mr QA and his sons travelled to Australia by boat, seeking asylum, arriving on 14 December 2012. They were detained on arrival under the *Migration Act 1958* (Cth) (Migration Act).

6. The complaints before me concern two distinct matters.

7. First, Mr QA states that on 15 April 2015, Master QB was sexually assaulted by another minor detained in the same immigration detention facility. Mr QA alleges that the Department failed to take all appropriate measures to protect his son from sexual abuse. This allegation raises issues under articles 3, 19 and 37(c) of the *Convention on the Rights of the Child* (CRC).

8. Secondly, Mr QA and his sons were detained for long periods of time. His sons were detained in closed immigration detention facilities for two years and eight months before being released into community detention. Mr QA was detained in closed immigration detention facilities for more than seven years before being granted a Temporary Protection Visa (TPV). The family complains that their detention was arbitrary, contrary to article 9 of the ICCPR and articles 3 and 37(b) of the CRC.

9. A number of other allegations by Mr QA about his separation from his sons, and an alleged failure to provide appropriate medical care while in detention, were not pressed.

10. In relation to the alleged sexual assault incident, on the basis of information available to me during this inquiry, it does not appear that the Department was on notice of a particular risk to Master QB over and above the general risks involved in being detained in a large immigration detention facility. I am satisfied that the alleged sexual assault is not attributable to a failing on the part of the Department or its service providers in providing for the welfare of detainees at the Wickham Point immigration detention facility at the relevant time.

11. I find that the actions taken by the Department and its service providers in terms of investigation, reporting, referral, and medical treatment were appropriate. I find that these responses by the Department and its service providers to the alleged sexual assault were not inconsistent with or contrary to Master QB's human rights.

12. While I have not made any findings against the Department or individuals in relation to the alleged sexual assault, I note with concern that the reason that Master QB was still in closed immigration detention at the Wickham Point immigration detention facility in April 2015 was because there had been a delay of more than two years in making a submission to the Minister for him to consider a community detention placement for this family and because, when a referral was made in February 2015, the Minister had declined to consider exercising his powers to place the family into community detention.

13. As the Commission has noted in previous inquiries, immigration detention can be a dangerous place for children. This inquiry again highlights the importance of ensuring that if children are detained in immigration detention facilities, this is done only as a last resort and for the shortest appropriate period of time. This is not merely a verbal formulation. It is a matter that has real consequences for children.

14. In relation to the second set of allegations, I find that Mr QA and his sons were arbitrarily detained, contrary to article 9 of the ICCPR and, in the case of the children, articles 3 and 37(b) of the CRC. According to the guidelines made by the Minister in relation to the exercise of community detention powers, Mr QA and his sons should have been treated as a priority. A referral to the Minister should have been made as soon as reasonably practicable after the family was detained. Acting

in accordance with those requirements would have been consistent with their human rights. Instead, it took more than two years for the Department to send a submission to the Minister for him to consider a community detention placement. The best interests of the children were not taken into account as a primary consideration, nor was their closed detention limited to the shortest appropriate period of time. No sufficient justification has been given for the delay in referring the family's case for Ministerial consideration. The delay resulted in prolonged and arbitrary detention of the whole family. While the family's detention continued to be lawful under the Migration Act, the lawfulness of their detention under Australian law did not prevent their detention in closed immigration facilities from being arbitrary, contrary to Australia's international law obligations.

15. After his sons were released into community detention, Mr QA continued to be detained. Mr QA spent more than seven years in immigration detention in total while his claim for protection was assessed. Ultimately, that assessment was determined in his favour and he was granted a TPV. No administrative process directed to the assessment of refugee status should take that long, nor should Mr QA have been kept in closed detention facilities for the entirety of that period.

16. I find that it was open to the Department under the community detention guidelines to have made a referral to the Minister for him to consider a residence determination in favour of Mr QA in his own right. I find that the failure by the Department to make such a referral during the almost four and a half years after his sons had been released into community detention resulted in Mr QA's continued detention being arbitrary, contrary to article 9 of the ICCPR. While some character issues were raised in relation to Mr QA's case, it is clear from the outcome of the contested hearing on character issues conducted by the Administrative Appeals Tribunal that these were not issues that should have prevented Mr QA being released into the community.

17. In section 5 of this report, I set out a number of recommendations that are aimed at preventing a repetition of the acts found to be contrary to the complainants' human rights.

18. Given that all family members have been granted temporary protection and given the nature of the alleged sexual assault on Master QB, I have made a direction under s 14(2) of the AHRC Act prohibiting the disclosure of the identities of each of the family members in relation to this inquiry.

19. At the request of the Department, I also made a direction under s 14(3) of the AHRC Act in relation to certain documents provided by the Department to the Commission. This direction prohibits the publication of those documents except to the complainants for the purposes of making submissions about the relevance of those documents to their complaints, or in any report produced by the Commission as a result of this inquiry.

2 Legal framework

2.1 Functions of the Commission

20. The relevant functions and powers of the Commission are contained in the AHRC Act. The relevant provisions of the AHRC Act have been amended since the complaint was made.[3] Those amendments do not affect the present complaints.[4] The references to the legislation in this document are, unless otherwise appears, to the legislation in force at the time the acts and practices were done and the complaints were made.

21. Section 11(1) of the AHRC Act identifies the functions of the Commission. That section has been amended since the complaints were made. At all relevant times, 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.

22. Section 20(1)(b) of the AHRC Act at all relevant times required 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, and s 20(1)(c) required the Commission to perform those functions when it appeared desirable to do so.

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

24. The rights and freedoms recognised by the ICCPR and the CRC are 'human rights' within the meaning of the AHRC Act.[5]

2.2 Scope of 'act' and 'practice'

25. 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.

26. 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.

27. 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;[6] that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

2.3 Protection from sexual abuse

28. The Commonwealth has an obligation to protect children in immigration detention from sexual abuse. Article 19(1) of the CRC provides that:

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

29. In considering the nature of the measures required to be taken, article 19(2) of the CRC relevantly provides that:

> Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment ... .

30. More generally, the Commonwealth has a duty to ensure that children have 'such protection and care as is necessary' for their wellbeing.[7] This requires the Commonwealth to ensure:

> that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.[8]

31. A number of competent authorities have established standards for the care and protection of children. In particular, the United Nations has adopted Rules for the Protection of Juveniles Deprived of their Liberty.[9] These rules relevantly provide:

> 28. The detention of juveniles should only take place under conditions that take full account of their particular needs ... and which ensure their protection from harmful influences and risk situations. ...
>
> 87. In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles, in particular, as follows: ...

(d) All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation, and should take immediate action to secure medical attention whenever required.

32. Domestically, a number of authoritative bodies have established best practice principles for creating child-safe environments and organisations. These bodies include the Community and Disability Services Ministers' Conference,[10] the Australian Children's Commissioners and Guardians,[11] and the Royal Commission into Institutional Responses to Child Sexual Abuse.[12]

33. More recently, the National Children's Commissioner has published the National Principles for Child Safe Organisations, which have been endorsed by members of the Council of Australian Governments, including the Prime Minister and State and Territory First Ministers.[13] The development of these principles was part of the Government's response to the Royal Commission into Institutional Responses to Child Sexual Abuse. They form part of the Third Action Plan 2015–2018 of the National Framework for Protecting Australia's Children 2009–2020.

34. Finally, article 37(c) of the CRC relevantly provides that:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

2.4 Arbitrary detention

35. Article 9(1) of the ICCPR provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

36. Article 37(b) of the CRC provides:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

37. Similarly, section 4AA of the Migration Act confirms that children should only be detained as a measure of last resort.

38. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:

(a) 'detention' includes immigration detention;[14]

(b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system;[15]

(c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;[16] and

(d) detention should not continue beyond the period for which a State party can provide appropriate justification.[17]

39. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee found detention for a period of 2 months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.[18] Similarly, the Human Rights Committee considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was 'considerably in excess of what is necessary'.[19]

40. The Human Rights Committee has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.[20]

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

> Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[21]

42. It will be necessary to consider whether the detention of the family in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention.

2.5 Best interests of children

43. Article 3 of the CRC provides that in all actions concerning children the best interests of the child must be a primary consideration.

44. The United Nations Children's Fund (UNICEF) Implementation Handbook for the Convention on the Rights of the Child provides the following guidance on article 3:

> The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests ... .
>
> The child's interests, however, must be the subject of active consideration; it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.[22]

45. Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.

46. In *Wan v Minister for Immigration & Multicultural Affairs*, the Full Court of the Federal Court considered the way in which a decision maker should assess the requirements of article 3 of the CRC when determining whether to make a decision that would lead to a child's parents being removed from Australia.[23]

47. The Court said that the starting point is to identify what the best interests of the child indicate that the decision maker should decide.[24] It is legally open to a decision maker to make a decision that does not accord with the best interests of the child. However, in order to do so there are two requirements:

- the decision maker must not treat any other factor as inherently more significant than the best interests of the child; and
- the strength of other relevant considerations must outweigh the consideration of the best interests of the child, understood as a primary consideration.[25]

3 Background

3.1 Alleged sexual assault of a minor

48. The impetus for Mr QA making a complaint to the Commission was an alleged sexual assault on his son Master QB. The alleged assault took place on 15 April 2015, shortly before Master QB's ninth birthday, while Mr QA and his sons were detained at Wickham Point Immigration Detention Centre in Darwin. The alleged perpetrator was another detainee, then aged 17 years of age.

49. There were significant disturbances at Wickham Point on 15 April 2015. The Department's contracted detention service provider was Serco Australia Pty Ltd (Serco). According to a Serco report, detainees in the Sand compound, where Mr QA and his sons were detained, became disruptive after two family groups were taken to another compound in preparation to remove them to Nauru. Some detainees allegedly 'kicked open gates and climbed internal fences in order to gain access to movement areas in order to find the families'. The Northern Territory Police were called to restore order. Incidents on this day and similar incidents on the following day resulted in 19 people being forcibly removed from the facility by Serco's Emergency Response Team before dawn on 18 April 2015. The background to the extraction of these people from Wickham Point is described in more detail in the Commission's report into *Use of force in immigration detention*.[26]

50. Mr QA reported the alleged sexual assault on his son to a Serco Client Service Officer at approximately 8.00pm on 15 April 2015. The incident report by the Serco officer stated:

> [Mr QA] appeared very distressed and stated when he entered his room he saw detainee [redacted] sexually assaulting his son [QB]. I spoke with [QB] about the seriousness of the incident and [QB] assured me that he was telling the truth. I asked [QB] did the offender touch him in any way and [QB] informed me that the alleged offender encouraged him to pull his pants down. Then [QB] stated that [redacted] was trying to put his penis inside his bottom. [QB] then stated that he did not like it and that is when [Mr QA] the father of the alleged victim came to the cabana area to get me.

51. At 9.15pm on 15 April 2015, the Serco Operations Manager notified the Northern Territory Police by telephone of the incident.

52. At 10.30am on 16 April 2015, the day after the alleged sexual assault, Mr QA approached a mental health nurse from International Health and Medical Services (IHMS), the Department's contracted medical provider, in a distressed state and asked for the nurse to come to the family's room to see Master QB. They described the incident from the previous day and said that they were very concerned that no authorities had arranged to speak with them. The nurse immediately escalated the issue to the Mental Health Team Leader for appropriate action and noted that a mandatory report would be made. A mandatory report was sent to the Northern Territory Department of Children and Families (DCF) later that day.

53. On 17 April 2015, Master QB attended a consultation at the Darwin Sexual Assault Service at Royal Darwin Hospital. The clinic carried out a physical assessment and took urine and blood samples to test for sexually transmitted infections. The results of these tests were negative.

54. On 29 April 2015, Master QB had a telehealth appointment with an IHMS psychiatrist who diagnosed him with Acute Stress Disorder. The psychiatrist recommended that he undergo a specialist physical examination and be referred for sexual abuse counselling. He was referred to the Melaleuca Refugee Centre (MRC) for specialised counselling and attended a specialist counselling appointment there on 18 May 2015. He attended a total of nine counselling sessions at MRC between 18 May 2015 and 4 August 2015. On 12 August 2015 he was transferred to community detention in New South Wales along with his brother.

55. Master QB attended two further follow up sessions with IHMS mental health nurses on 24 May 2015 and 16 June 2015. On the second occasion, he was administered with mental health screening tools K10 and HoNOSCA. The HoNOSCA tool used was a client-rated version (that is, a self-assessment) rather than a clinician-rated version. His HoNOSCA score was 13 which, while not in the severe range, was significantly higher than his score of 2 when the HoNOSCA was previously administered to him in November 2014. The use of HoNOSCA on children in immigration detention is described in the Commission's *Forgotten Children* report.[27]

56. According to the Department, the alleged offender was charged by Northern Territory Police with four counts of 'sexual intercourse with a child under 16 years' and other related offences and attended court in relation to the alleged offences.[28] The Department says that the alleged offender was ultimately found not guilty of these offences.

57. Mr QA blamed the Commonwealth for the alleged sexual assault on his son. In his original complaint to the Commission, he said: 'I think the main culprit of this crime is the Minister of Immigration and the Immigration Department of Australia'. He said that this incident was 'not the first time that these sexual harassments happened for children who are in immigration detention and it wouldn't be the last time'.

3.2 Detention and consideration of alternatives to detention

(a) Arrival and detention

58. Mr QA was born in Baghdad, Iraq. He first arrived in Australia on 11 October 1999 and sought asylum. At that time, he was 41 years old. He was initially detained at Curtin Immigration Reception Processing Centre in the Kimberley region of Western Australia. On 24 May 2000 he was granted a TPV and on 16 May 2003 he was granted a further TPV.

59. The Department says that in 2003, Mr QA was sentenced to 12 months imprisonment, with a non-parole period of nine months, for three counts of the offence of 'have false instrument with intent to use' in relation to his possession of three counterfeit credit cards. Mr QA appealed his conviction and was released on bail but failed to attend court in relation to the appeal. He was subsequently convicted of a number of other offences related to a separate incident. The† offences included common assault, destroying or damaging property, driving while intoxicated and with an expired licence, and theft. He was not sentenced for these convictions at the time.

60. Sometime between 2003 and 2005, while on bail, Mr QA departed Australia, apparently on a passport belonging to someone else. He had outstanding warrants for his arrest, valid until 2023, should he return to New South Wales.

61. On 16 March 2005, Mr QA's application for a permanent Protection Visa was refused.

62. On 14 December 2012, Mr QA arrived in Australia again, accompanied by his sons Master QB and Master QC. They arrived at Christmas Island and sought asylum.

63. The date of Mr QA's second arrival in Australia was prior to the announcement on 19 July 2013 by the then Prime Minister Kevin Rudd that people who arrived in Australia by boat after that date would be subject to offshore processing and had no prospect of being resettled in Australia.[29]

64. Mr QA and his sons were found to have claims that *prima facie* engaged Australia's protection obligations and were 'screened in' to the refugee assessment process. However, they were not entitled to apply for a protection visa until the Minister 'lifted the bar' under s 46A of the Migration Act. As with almost all asylum seekers who arrived in Australia during this period of time, they faced protracted delays in the processing of their claims for protection. The Commission has discussed these delays in more detail in its report, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'*.[30] The delays included a 'pause' on processing of asylum claims following the reintroduction of third country processing in 2012, and a further delay following the 2013 Federal election, pending the implementation of a range of policy and legislative changes such as the reintroduction of temporary protection visas. Processing was not recommenced in any substantial way until May 2015. Mr QA was not invited to make an application for a protection visa until June 2016. Despite no progress being made on their claims for protection, Mr QA and his young sons continued to be held in immigration detention.

65. For a period of two and a half years, Mr QA and his sons were transferred between a number of immigration detention facilities on Christmas Island and the mainland of Australia, including Phosphate Hill, Construction Camp, Leonora, Bladin and Wickham Point. These facilities were formally classified as 'Alternative Places of Detention' (APODs) but, in practice, were closed immigration detention facilities.[31]

66. Wickham Point was previously classified as an Immigration Detention Centre (IDC) but on 11 July 2013 it was reclassified as an APOD. The reclassification meant that it was not inconsistent with Government policy for children to be detained there. Mr QA and his sons spent 12 months detained at Wickham Point (from January to September 2014 and from February to June 2015). The Commission conducted an inspection of Wickham Point in October 2015 along with two experienced paediatricians, Professor Elizabeth Elliott AM and Dr Hasantha Gunasekera. The report produced by these paediatricians recommended that Wickham Point should not be considered an alternative place of detention for children because the environment, educational opportunities, play and recreational and health services were inadequate for children.[32]

67. On 23 June 2015, Master QB and Master QC were transferred to what the Department described as a 'less restrictive APOD', while Mr QA remained at Wickham Point.

(b) Delay in considering alternatives to detention

68. According to case reviews produced by the Department, Mr QA and his two sons were first referred internally within the Department for consideration of community detention on 14 January 2013, approximately a month after they had arrived in Australia and while they were detained on Christmas Island.

69. Mr QA and his sons were transferred from Christmas Island to the mainland of Australia on 22 February 2013 and were initially detained at the Leonora immigration detention facility in Western Australia. In a case review on 9 April 2013, their case manager confirmed that the family had been referred for community detention. The case manager said that this was consistent with an announcement by the then Minister for Immigration that he would consider community detention for asylum seekers who had arrived in Australia after 13 August 2012. The case manager said that it was also in line with the Department's Procedural Advice Manual (PAM3) which relevantly provided:

> The placement of a Minor in an immigration detention facility is to be used only as a last resort, for the shortest practicable time, and the least restrictive form appropriate to the minor's circumstances.

70. The case manager appeared to have some confidence that community detention would be approved. In the case review, transfer to community detention was referred to as 'pending'.

71. In a further case review on 11 June 2013, the family's case manager said:

> The Minister has announced that the government will begin granting IMA [Irregular Maritime Arrival] families, including those with children under 18 years, bridging visas to enable them to be managed in the community while their immigration status is resolved.

However, the family was not granted a bridging visa. The case review noted that 'security, identity, health & character checks have not been finalised' for Mr QA.

72. On 10 July 2013, a second referral was made within the Department for the preparation of a submission to the Minister, for the Minister to consider making a residence determination in favour of Mr QA and his sons under s 197AB of the Migration Act. A residence determination is often referred to as a 'community detention placement'. In a case review later that month, the family's case manager described three 'barriers to case resolution': Mr QA had outstanding warrants with NSW Police, he had previously been granted a TPV 'but returned to his home Country', and he claimed to have been offered asylum in the United States but refused this offer because he wanted to settle in Australia. Case managers had been in contact with the Complex Case Assessment Team on a number of occasions.

73. On 26 August 2013, Mr QA's risk rating was increased to 'high risk' as a result of his criminal history. A week and a half later, on 6 September 2013, a submission recommending transfer to Immigration Residential Housing in Sydney was 'declined', according to a Departmental case review. It does not appear that this submission was made to the Minister. Rather, it appears that the relevant section of the Department decided not to proceed with a submission to the Minister.

74. The following day, 7 September 2013, there was a Federal election and a change of government.

75. On 11 October 2013, the family's case manager sent an email to the Complex Case Resolution Section (CCRS), asking for an update on the request for a community detention placement. On 25 October 2013, CCRS advised the case manager that they were 'in the process of formulating a possible submission to the Minister'.

76. On 25 May 2014, a case review recorded advice from CCRS that the submission on community detention was 'in the final drafting phase and going to EL1 for clearance before submitting'. CCRS had also indicated to the family's case manager that a community detention placement was 'unlikely'.

77. In a case review on 7 August 2014, the family's case manager noted that 'a new case officer from CCRS is re-drafting a new submission for Community Detention to submit to the Minister for consideration'.

78. In a Senior Officer Review on 12 September 2014, the Ministerial Intervention request in relation to community detention was described as 'ongoing'. The officer noted that '[t]here has been a delay in progressing the MI request due to the criminal history and substantial behavioural incidents of [Mr QA]'. An internal departmental email from around this period suggests that the 'substantial behavioural incidents' was a reference to three allegations: that in July 2013 Mr QA exposed himself to a female detainee; that in May 2014 he entered the room

of a female detainee and attempted to overpower and sexually assault her; and that in June 2014 he forced a 14 year old boy into his room, locked the door and attempted to kiss him. Mr QA denies these allegations and has given a different account of them. These incidents were investigated by police and no charges were laid.

79. In a case review on 31 October 2014, the family's case manager noted that 'the family have been referred for a residence determination under s 197AB of the Migration Act, with a submission being prepared by CCRS, however [it] is on hold pending outcome of Department of Children and Families investigation'. This inquiry was completed on 11 November 2014 with the outcome 'no abuse or neglect found'. Subsequent case reviews in December 2014 and January 2015 indicated that the submission was 'currently being drafted'.

80. It was not until 5 February 2015, more than two years after Mr QA and his sons had been placed in immigration detention, that the Department first sent a submission to the Minister for consideration of community detention under s 197AB of the Migration Act.

The submission described Mr QA's previous convictions and the alleged behavioural incidents set out in paragraph 78 above. The submission included the following statement:

> As the [QA] family composition includes minor children under the age of 10 years, who have been in held immigration detention for more than two years, their case is being referred to you under section 197AB of the Act for your consideration of placing the family into community detention.

81. No explanation was provided for the lengthy delay in making this submission.

82. In the submission to the Minister, the Department referred to article 3 of the CRC and identified the best interests of Mr QA's children as a 'key factor' in any assessment about community detention. It said:

> The composition of the [QA] family suggests that their most appropriate placement is in community detention. … The Department considers that separating the family may not be in the best interests of the children under the *Convention on the Rights of the Child*.
>
> The Department notes that it is a priority for the Government to release children from held immigration detention. Further, the Department may be subject to public scrutiny and criticism from external review bodies, such as the Australian Human Rights Commission and the Commonwealth Ombudsman, regarding the continued placement of the … children in held immigration detention.
>
> Conversely, considering [Mr QA's] criminal history, the Department could be subject to criticism if he is released into the community.

83. On 16 February 2015, the then Minister for Immigration and Border Protection, the Hon Peter Dutton MP, indicated that he was not inclined to consider intervening under s 197AB to place Mr QA and his sons into community detention. Instead, the Minister commented that '[Mr QA] should be moved to NSW to face criminal charges. Please provide further advice about possible foster care arrangements for the two boys in this case'.

84. A subsequent case review indicated that 'CCRS are currently liaising with relevant business areas to determine the feasibility of implementing the Minister's proposed approach for managing this family'.

(c) Release from detention

85. After the alleged sexual assault on Master QB on 15 April 2015, IHMS reported that it had concerns for his safety, physical and mental health. On 13 May 2015, IHMS reported that:

> [QB] remains vulnerable both physically and mentally. Ongoing residence in the compound is significantly distressing for [QB] due to widespread knowledge of the previous [sexual assault] incident.
>
> Recommendation: Escalated to DIBP Case Management/NTHLO that [QB] and his younger brother be removed from the centre ASAP due to risks associated with ongoing DCF involvement.

86. On 16 June 2015, the Department received a letter from DCF setting out the results of its child protection investigation in relation to Master QB and Master QC following the mandatory notification it had received from the Department on 16 April 2015. DCF said:

> During the course of the investigation DCF identified concerns in relation to the care provided by the children's father, [Mr QA]. As a result of these concerns, the investigation substantiated neglect as a result of inadequate supervision, physical harm and risk of sexual exploitation of [QB] and [QC] with the person believed responsible, [Mr QA]. Additionally, emotional harm of [QB] has been substantiated with [Mr QA] identified as the person believed responsible.
>
> As a result of the information gathered during the investigation DCF have determined the above named children are not currently safe in their father [Mr QA's] care.

87. DCF recommended that Master QB and Master QC be released into community detention in New South Wales without their father, with weekly supervised contact between them to be arranged.

88. On 23 June 2015, the Department made a decision to move Master QB and Master QC from Wickham Point to a less restrictive APOD, without their father. Save the Children were appointed as their full time carers.

89. While Mr QA and his sons were located in Darwin, the Department arranged for supervised visits twice weekly: on Wednesday afternoons and on Saturdays for two to three hours at a time.

90. On 29 July 2015, a second submission was sent to the Minister, recommending that Master QB and Master QC be placed into community detention in New South Wales. The Minister made a decision to that effect on 6 August 2015. On 12 August 2015, QB and QC were placed into community detention.

91. At the time that Master QB and Master QC were transferred into community detention, they had been in closed immigration detention for two years and eight months, which was approximately a third of their lives. They were 9 and 8 years old respectively.

92. On 13 August 2015, Mr QA was transferred to New South Wales and was taken into criminal custody on arrival. On 14 August 2015, Mr QA was arrested by New South Wales Police in relation to the two outstanding warrants. On 18 August 2015, the sentence of 12 months imprisonment in relation to his first conviction from 2003 was varied to commence from 15 August 2014 and conclude on 14 August 2015.

    This was later described by the Administrative Appeals Tribunal as being equivalent to sentencing Mr QA to 'time served' in immigration detention and treating immigration detention as though it were custodial detention.[33] Mr QA was released from criminal custody on 21 August 2015 and transferred to Villawood Immigration Detention Centre.

93. On 27 August 2015, Mr QA was sentenced in Fairfield Local Court in relation to his other convictions from 2003. He was sentenced to enter into a good behaviour bond for 12 months, his driver licence was disqualified for 18 months and he was required to pay a $400 fine.

94. Following his transfer to VIDC and the conclusion of his outstanding criminal proceedings, weekly visits with Master QB and Master QC were scheduled for Tuesday afternoons and Saturdays.

95. In September 2015, the New South Wales Department of Family and Community Services (FACS) was allocated the child protection matter in relation to Master QB and Master QC. They conducted an interview with the children to assess the concerns identified by DCF. The FACS report noted that the interview related to 'concerns of sexualised behaviours and psychological abuse towards the children from father'. FACS reported that '[d]uring the assessment the children did not disclose any harm historically or recently'. FACS assessed the current risk to the children while in community detention as low. However, it noted that if the children were placed back into the care of their father in a detention centre then there would be a high risk of harm, 'given their ages and exposure to concerns

within their environment'. FACS noted that '[t]he information previously disclosed by the children whilst in the detention centre is concerning and would require further consideration prior to being placed back into this environment'.

96. On 2 December 2015, FACS wrote to the Department saying that it would close the current child protection matter 'as the safety and risk concerns reported have not been identified'. In a subsequent email from an officer of FACS to the Department, following a request for information from the Commission, FACS noted that if Mr QA resumed care of his children this would require a further assessment by FACS as a result of the findings of DCF.

97. On 14 June 2016, the Department notified Mr QA that the Minister had lifted the bar under s 46A of the Migration Act and it invited him to make an application for a TPV or a Safe Haven Enterprise Visa on behalf of himself and his sons. This was the first time since his detention, three and a half years previously, that Mr QA was permitted to make an application for a protection visa. This was despite the fact that the purported reason for his detention was the assessment of the claims for protection made by him and his sons.[34]

98. On 13 October 2016, Mr QA lodged an application for a TPV and listed his sons as dependants. His application was initially refused by the Department on 22 March 2017, but this decision was set aside by the Immigration Assessment Authority (IAA) on 10 May 2017 and remitted to the Department with an instruction that Mr QA and his sons were persons in respect of whom Australia has protection obligations. On 28 June 2017, the Department assessed Mr QA against the Ministerial guidelines in relation to community detention and decided that there were no 'exceptional circumstances' that justified his case being referred to the Minister for consideration of community detention. In December 2017, Master QB and Master QC were granted TPVs.

99. On 31 August 2018, more than a year after the remittal from the IAA, a delegate of the Minister refused Mr QA's application for a protection visa under s 501 of the Migration Act on the ground that he did not pass the character test. On 23 November 2018, this decision was set aside by the Administrative Appeals Tribunal (AAT) and remitted to the Department with a direction that the discretion under s 501 be exercised in Mr QA's favour.[35] On 13 June 2019, after more than six months without a decision on his protection visa application, Mr QA commenced proceedings in the Federal Court seeking an order that a decision be made without further delay.[36] On 12 July 2019, before Mr QA's application could be heard, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs made a decision under s 501A(2) of the Migration Act, setting aside the decision of the AAT. On 26 November 2019, the Federal Court set aside the Minister's decision.[37] On 9 January 2020, Mr QA was granted a TPV and released from VIDC into the community. He is now living in the community with his sons.

4 Consideration

4.1 Sexual assault allegations

100. The first issue I consider is whether the Commonwealth took all appropriate measures to protect Master QB from sexual abuse.

101. It is well established that immigration detention can be a dangerous place for children. Data provided by the Department to the Commission in the course of the *Forgotten Children* inquiry showed that, from January 2013 to March 2014, there were 233 reported assaults involving children in immigration detention, or approximately 15 per month. In the same period, there were 33 reported incidents of sexual assault in immigration detention, or approximately two per month, the majority of which involved children.[38]

102. The Commission has conducted other inquiries into specific allegations of sexual abuse of children in immigration detention. For example, in *Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth (Department of Immigration and Border Protection)* [2016] AusHRC 110, the former President of the Commission, Professor Gillian Triggs, found that, while in immigration detention on Christmas Island, Ms AR made an urgent request for medical assistance in relation to a possible sexual assault on her four year old daughter, Miss AU, which was not acted upon for three days after the alleged incident took place. Professor Triggs found that this delay was contrary to Miss AU's rights under article 19 of the CRC.

103. Mr QA says that while the family were in immigration detention, his sons were 'at daily risk of assault' and that the Department knew of this risk because of previous incidents in immigration detention. Mr QA says that the Department 'was, in some respect, responsible for the sexual abuse' of Master QB.

104. During the course of the present inquiry, the Commission asked the Department to describe the measures that are taken to ensure the safety of minors in immigration detention, including the protection of minors from sexual abuse.

105. The Department said that staff and contracted service providers who work in child-related roles undergo pre-employment screening to ensure that they are suitable to work with children. Such staff and contracted service providers must have a valid 'working with children check' for the relevant jurisdictions prior to commencing work with children in immigration detention and immigration programs. The Department said that staff and contracted service providers received child safeguarding and wellbeing training.

106. The Department noted that its officers and contracted service providers are required to report all incidents involving children in immigration detention to the relevant business areas and, where appropriate, to the relevant State and Territory child welfare authority (SCWA).

107. Serco staff undertake training in relation to reporting requirements during their initial training and refresher training. Serco's Incident Reporting policy that was current at the time of the incident involving Master QB, provided that all instances of suspected abuse or neglect of a minor are to be reported to the relevant SCWA, whether or not the jurisdiction has a mandatory reporting requirement. Serco's Working with Families and Minors policy included details of how to identify signs of abuse and neglect, and responsibilities for reporting.

108. IHMS had a specific policy dealing with Child Protection and Mandatory Reporting. This policy included details of the legal requirements in each Australian jurisdiction. The policy described how to identify and respond to signs of child abuse. It noted that IHMS clinical staff are mandatory reporters under relevant legislation and set out their responsibilities. Among other things, the policy provided that reports should be made without delay (before the end of the shift).

109. In accordance with relevant policies, the alleged sexual assault on Master QB was reported to Northern Territory Police by Serco in the evening of 15 April 2015, approximately an hour after Serco had been informed of the incident by Mr QA. DCF was notified the following day, following the requirement for mandatory reporting being identified by a mental health nurse in IHMS.

110. I am satisfied that reporting to police and DCF was done promptly and appropriately, in accordance with relevant policies.

111. Serco maintains closed circuit television (CCTV) coverage of general areas of facilities including some open recreational areas, but not individual bedrooms, for privacy reasons. In previous inquiries, the Department said that Serco staff actively engage with detainees on a daily basis and report any anomalies to management. Serco employs Intelligence Officers who gather information and Serco administers a complaints management system for detainees.

112. The Department said that in facilities that house family groups, Serco allocates Personal Officers to those groups to act as the first point of contact for the family. Detainees are also allocated a case manager from the Department with whom they can raise or discuss issues of concern.

113. On the basis of information available to me during this inquiry, it does not appear that the Department was on notice of a particular risk to Master QB over and above the general risks involved in being detained in a large immigration detention facility. I am satisfied that the alleged sexual assault is not attributable to a failing on the part of the Department or its service providers in providing for the welfare of detainees at the Wickham Point facility at the relevant time.

114. Following the reporting of the incident to DCF, Master QB was promptly referred to a specialised sexual assault service for a physical examination. He was also provided with an appointment with a psychiatrist and referred to an external provider for specialist sexual abuse counselling. IHMS also continued to provide him with mental health support. I am satisfied that this follow up medical support was appropriate.

115. However, I am concerned that Master QB was not referred to IHMS by Serco following the alleged sexual assault. It appears that the first contact with IHMS in relation to this incident occurred because of an approach made by Mr QA to IHMS in the morning following the incident. Nevertheless, it is clear that Mr QA knew where to go in order to obtain medical help and that it was available when it was sought. I find that the lack of a referral from Serco to IHMS, although regrettable, did not amount to a breach of Master QB's human rights. I make a recommendation in relation to this issue in section 5 below.

116. I find that the actions taken by the Department and its service providers in terms of investigation, reporting, referral and medical treatment were appropriate. I find that these responses by the Department and its service providers to the alleged sexual assault were not inconsistent with or contrary to Master QB's human rights.

117. While I have not made findings against individuals in relation to the alleged sexual assault, I note with concern that the reason that Master QB was still in closed immigration detention at Wickham Point in April 2015 was because there had been a delay of more than two years in making a submission to the Minister for him to consider a community detention placement for this family and because, when a referral was made in February 2015, the Minister had declined to consider exercising his powers to place the family into community detention. I deal with these issues below in the context of the arbitrary detention claim by Mr QA.

4.2 Alternatives to detention

118. The second issue I consider is whether the family was detained arbitrarily. In assessing this issue, there are two relevant acts of the Commonwealth.

119. The first act is the substantial delay of more than two years before the first referral was made by the Department to the Minister for the Minister to consider a community detention placement for the family. For the reasons set out below, my preliminary view is that this act was inconsistent with or contrary to the rights of each of the family members under article 9 of the ICCPR and the rights of Master QB and Master QC under articles 3 and 37(b) of the CRC.

120. The second act is the failure by the Department to refer Mr QA to the Minister for consideration of a community detention placement following the release of his sons from the Wickham Point detention facility into a less restrictive alternative place of detention and ultimately into community detention. Mr QA spent more than seven years in immigration detention while his claim for protection was assessed. Ultimately, that assessment was determined in his favour and he was granted a TPV. No administrative process directed to the assessment of refugee status should take that long, nor should Mr QA have been kept in closed detention facilities for the entirety of that period. While some character issues were raised in relation to Mr QA's case, it is clear from the outcome of the contested hearing on character issues conducted by the AAT that these were not issues that should have prevented Mr QA being released into the community.

121. For the reasons set out below, my preliminary view is that the acts and omissions that resulted in this extraordinarily long period of administrative detention were inconsistent with or contrary to the rights of Mr QA under article 9 of the ICCPR.

(a) Relevant guidelines

122. Mr QA claims that it was open to the Minister for Immigration to permit him and his sons to live in the community subject to a 'residence determination'. This is often referred to as community detention. Section 197AB of the Migration Act permits the Minister, where the Minister considers that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community.

123. When Mr QA arrived in Australia on 14 December 2012, the relevant guidelines dealing with residence determinations were guidelines issued by the Hon Chris Evans MP on 1 September 2009 when he was Minister for Immigration and Citizenship. As discussed in more detail below, the guidelines were updated a number of times during the course of the family's detention. However, one aspect of the guidelines remained constant: families with children were to be accorded priority and referred to the Minister as soon as practicable for consideration of alternatives to closed detention.

124. The first set of guidelines provided that the Department was to conduct reviews of detention placement and make referrals to the Minister for the consideration of community detention. Priority was to be given to children and their accompanying family members.[39] Priority cases were to be assessed and a submission with a residence determination recommendation were to be provided to the Minister 'as soon as reasonably practicable'.[40] The guidelines were clear when it came to children. They provided that minors should be identified for a residence determination 'as soon as they are detained'.[41] The Department was required

to notify the Minister's office that a minor was in detention and that a residence determination submission was being prepared.[42] The submission covering the development of the accommodation and care plan was to be completed 'as soon as practicable'.[43] Residence determination plans were to have high regard to keeping families together and the provision of appropriate community support.[44]

125. In the case of this family, there was an internal referral within the Department for consideration of community detention on 14 January 2013, approximately a month after they had arrived in Australia. The Department noted that, even though this family was liable for potential offshore processing because they arrived in Australia after 13 August 2012, the then Minister for Immigration had announced that he would consider community detention for asylum seekers in this cohort. Despite the requirements in the guidelines and the public position of the Minister, the Department did not make a referral to the Minister for him to consider community detention for this family at this time.

126. On 30 May 2013, the Hon Brendan O'Connor MP, then Minister for Immigration and Citizenship, published new residence determination guidelines.[45] The 2013 guidelines reiterated that families with children should be referred to the Minister for consideration of community detention. Relevantly, they provided:

> **8 Cases to be referred for my consideration**
>
> In accordance with the principle in section 4AA of the Act that a minor shall only be detained as a measure of last resort, where detention of a child is required under the Act, it should, when and wherever possible, take place in the community under a residence determination rather than under traditional detention arrangements. …
>
> It is also my expectation that the principle of family unity be maintained (including accompanying guardians or carers for a minor) unless there are significant circumstances that would warrant a residence determination being made which would split a family unit.

127. On 10 July 2013, a second referral was made within the Department for the preparation of a submission to the Minister. However, despite the clear terms of the guidelines, the Department did not make a referral to the Minister for him to consider community detention for this family at this time. Similarly, consideration of transfer to less restrictive immigration residential housing was considered within the Department in September 2013 but not referred to the Minister for his consideration.

128. The 2013 guidelines were issued prior to then Prime Minister Rudd's announcement on 19 July 2013 that asylum seekers arriving after that date would be subject to offshore processing and would not be resettled in Australia.

129. Following a change of government in September 2013, replacement guidelines were issued by the Hon Scott Morrison MP, then Minister for Immigration and Border Protection, on 18 February 2014. The 2014 guidelines relevantly provided:[46]

> **8 Cases to be referred for my consideration**
>
> In accordance with the principle in section 4AA of the Act that a minor shall only be detained as a measure of last resort, where detention of a child is required under the Act, it should, when and wherever possible, take place in the community under a Residence Determination rather than under traditional detention arrangements.
>
> It is my expectation that the principle of family unity be maintained (including accompanying guardians or carers for a minor) unless there are significant circumstances that would warrant a Residence Determination being made which would split a family unit.
>
> For these reasons, priority cases that are to be referred to me are detainees who arrived in Australia before 19 July 2013 and to whom the following circumstances apply:
>
> - unaccompanied minors; or
> - minor children aged 10 years and under and their accompanying family members.

130. Mr QA and his sons arrived in Australia before 19 July 2013. His sons were both under 10 years old. Despite the family continuing to satisfy the criteria of a 'priority case', the Department did not make a referral to the Minister for him to consider community detention for this family for almost a year after these new guidelines were made.

131. In addition to the power to make a residence determination under s 197AB, the Minister also has a discretionary non-compellable power under s 195A to grant a visa to a person in detention, again subject to any conditions necessary to take into account their specific circumstances.

(b) Assessment

132. The starting point for assessment in this case is the principle that detention of children should be used only as a measure of last resort and for the shortest appropriate period of time. This is a requirement not only of international law pursuant to article 37(b) of the CRC, but also a requirement of domestic law pursuant to s 4AA of the Migration Act.

133. Section 4AA(2) of the Migration Act provides that the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination. The clear objective of s 4AA is to move children and their families out of held detention and into community detention or onto a visa as soon as possible.

134. It is in the best interests of children who are in a closed detention environment for them to be removed from such an environment as quickly as possible. If there are countervailing reasons for keeping families in closed detention, these need to be clearly articulated and balanced against the best interests of the children. In any such exercise, the best interests of children need to be the subject of active consideration and given weight as a primary consideration.

135. These legal obligations were also reflected in guidelines promulgated by various Ministers for Immigration over the period of the family's detention. Each of those guidelines identified families with young children as a priority case for referral to the Minister as soon as practicable in order to ensure that any detention of children was for the shortest appropriate period of time.

136. In response to my preliminary view in this matter, the Department said:

> The Department acknowledges that the Ministerial guidelines in operation at the time indicated priority was to be given to cases involving minor children and their accompanying family members, and submissions should be provided to the Minister as soon as reasonably practicable. It was also the Minister's expectation that the principle of family unity be maintained unless significant circumstances warranted a residence determination being made which would split a family unit.

137. However, the Department also appeared to suggest that it had a discretion as to whether or not it would decide to assess a person to see if they met the guidelines issued by the Minister. In the same submission, the Department said:

> Ministerial intervention policy does not provide for automatic assessment against the Minister's intervention guidelines or the referral of cases to the Minister under the Minister Intervention powers for persons in detention. Rather, only cases that are assessed as meeting the Ministerial guidelines are referred for the Minister's consideration. The Department refers cases to the Minister where it is assessed that the case meets the Ministerial intervention guidelines.
>
> It is not a legal requirement that a detention case be considered against the guidelines, or be referred to the Minister.

138. The submission that the Department could, at its discretion, decide not to assess detainees against the guidelines is a surprising one. While the Minister's intervention powers are non-compellable, the guidelines issued by the Minister to the Department are clear in their terms. Each of the relevant guidelines referred to above contained words to the following effect: 'the purpose of these guidelines is to … inform officers of the Department … when to refer a case to me for the consideration of exercising' the relevant powers.

139. In any event, the Department did assess this family against the guidelines but then decided not to make a referral to the Minister, despite the family meeting the criteria for referral. As noted above, the first internal referral for assessment against the community detention guidelines was made on 14 January 2013, approximately a month after the family had arrived in Australia on 14 December 2012.

140. However, the first submission to the Minister in relation to this family was not made until 5 February 2015, more than two years after the family first arrived in Australia. In response to that first submission, the Minister indicated that he would not consider exercising his powers under s 197AB. At the same time, the Minister asked for advice about possible foster care arrangements for Master QB and Master QC. The boys were removed from Wickham Point on 23 July 2015 and placed in a less restrictive APOD. On 29 July 2015, the Department made a second submission to the Minister, with a recommendation of community detention limited to Master QB and Master QC. On 6 August 2015 the Minister made a residence determination in accordance with the Department's recommendation. The two boys were moved into community detention in New South Wales on 12 August 2015.

141. The Commission asked the Department why it took two years for a submission to be provided to the Minister. The Department's full response was as follows:

> Following referral of Mr QA's case in January 2013, the Department took time during the first half of 2013 to gather all relevant information, given the circumstances of the case. This work involved liaising with various internal and external stakeholders in order to obtain information to prepare comprehensive advice for the Minister. In addition, a number of incidents relating to Mr QA occurred during this period, resulting in investigations by government agencies in the Northern Territory, which impacted on progress of the submission to the Minister.
>
> In addition, multiple departmental staffing changes and competing priorities in 2013 and 2014 impacted on the progression of the case. The submission was then put on hold on 10 September 2014 while a child welfare assessment by the Northern Territory Department of Children and Families (NT DCF) was being conducted. The submission was progressed following the outcome of the welfare assessment.

142. I consider that the response provided by the Department does not provide an adequate explanation for the two-year delay in circumstances where consideration needed to be given to the placement of a family with young children.

143. The initial part of the response merely indicates that it was necessary to gather information in order to prepare a submission. This is true of any submission process. It does not explain why a case that fell within Ministerial guidelines as a 'priority' case was delayed for so long.

144. Similarly, the identification of staffing changes and 'competing priorities' may be a description of what occurred but does not provide any justification for delay when considering the placement of a family with young children.

145. The only reason for delay put forward by the Department that had any degree of specificity involved a consideration by 'government agencies in the Northern Territory' of incidents relating to Mr QA. As noted above, the Northern Territory police investigated two alleged incidents by Mr QA in May and June 2014 but did not lay any charges. The first investigation was finalised in three days. The second investigation was finalised in nine days. By the time of the first of these incidents,

at the end of May 2014, the family had already been detained for 18 months. As a result, this does not provide an explanation for why a referral to the Minister had not been made earlier.

146. The only other Northern Territory agency identified in the material provided by the Department to the Commission that considered incidents involving Mr QA was DCF. The 2014 inquiry by DCF appears to have been commenced following a referral from the Department on 1 September 2014, after the family had been detained for more than 20 months. The Department says that the referral to the Minister was put on hold on 10 September 2014 while the child welfare assessment was conducted. The assessment by DCF was completed on 11 November 2014. DCF advised that, after interviewing Mr QA and his children, they would be finalising their investigation with the outcome 'no abuse or neglect found' and 'will be recommending for case closure with no further intervention from DCF'. At most, the pause in preparing a submission to the Minister as a result of the investigations by DCF could only account for two months of the overall delay.

147. A further inquiry by DCF was conducted after IHMS reported the alleged sexual assault on Master QB. This report was made on 16 April 2015 and the inquiry was concluded on 16 June 2015. However, this second inquiry occurred after the family's case had been referred to the Minister in February 2015 for consideration of a community detention placement and so cannot be a reason for the delay in making that referral.

148. The Department appears to accept that the failure to refer the family's case to the Minister was inconsistent with the obligation in the guidelines to prioritise cases involving young children and to refer those cases to the Minister as soon as reasonably practicable. However, the Department says that the two-year delay was justified because of other conduct by Mr QA. For the reasons set out above, I am not satisfied that the obligation to refer cases involving young children was qualified in the way suggested by the Department, or that the delay is adequately explained by investigations in relation to the conduct by Mr QA.

149. While the failure to comply with the guidelines for referral is a significant issue, the question in this inquiry is whether the delay in referral and the consequential closed detention was inconsistent with the family's human rights. Based on the reasons given by the Department for the delay, I am satisfied that the best interests of the children were not taken into account as a primary consideration when considering the question of referral. Instead, the focus was substantially, if not exclusively, on the conduct of Mr QA. I am also satisfied that the delay in referral resulted in the family's detention being arbitrary. The reasons given for the delay did not justify its length. Further, and importantly, the detention of the children was not limited to the 'shortest appropriate period of time'.

150. I find that the failure by the Department to refer the family to the Minister pursuant to the community detention guidelines for more than two years resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. I find that in assessing whether to make a referral to the Minister there was a failure to take into account the best interests of Master QB and Master QC as a primary consideration, contrary to article 3 of the CRC. In this case, the breach of human rights was also reflected in the breach of the guidelines. Given the clear statements in the community detention guidelines that families with children were a priority case for referral, this should have been done promptly after the family was first detained.

(c) Continued detention of Mr QA

151. After the release of his sons into community detention, Mr QA continued to be detained for almost four and a half years. When he was finally granted a TPV and released from immigration detention in January 2020, he had been administratively detained for more than seven years.

152. The continued detention of Mr QA following the release of his children into community detention raises issues under article 9 of the ICCPR. Mr QA no longer presses his complaint about the separation of his family for this period.

153. During most of the period of Mr QA's continued detention, there were two sets of guidelines made by the Minister, the Hon Peter Dutton MP, dealing with the exercise of powers under s 197AB. The first of those guidelines was made on 29 March 2015 and the second was made on 10 October 2017.

154. Each of these guidelines provided that the Minister generally would not expect referral of cases 'where it is believed that a person presents character issues that indicate that they may fail the character test' under s 501 of the Migration Act. However, this general position was qualified such that cases could still be referred if there were 'exceptional reasons'. Similarly, the guidelines provided that cases should be referred to the Minister where there were 'unique or exceptional circumstances'.

155. The phrase 'unique or exceptional circumstances' was not defined in the guidelines, but it was defined in similar guidelines relating to the Minister's power to grant visas in the public interest. In one set of those guidelines, reissued on 10 October 2015 while Mr QA was in detention, factors that were relevant to an assessment of unique or exceptional circumstances included:

- circumstances that may bring Australia's obligations as a party to the ICCPR into consideration; and
- the length of time the person has been present in Australia (including time spent in detention).[47]

156. Mr QA had already been detained for two years and eight months by the time his sons were released into community detention. The length of time that Mr QA had already spent in detention, and the potential for his detention to be arbitrary, contrary to Australia's obligations under article 9 of the ICCPR, are matters that should have been identified as 'exceptional' and weighed heavily in favour of a decision by the Department to prepare a submission to the Minister for him to consider a community detention placement.

157. The length of time in detention was particularly important in Mr QA's case because, through no fault of his own, for the first three and a half years of his detention he was not permitted to make an application for a protection visa. There were no further steps he could take to bring his closed detention to an end and no steps were being taken by the Commonwealth to progress an assessment of his protection claims.

158. As noted above, the United Nations Human Rights Committee has summarised the position at international law in relation to article 9 of the ICCPR.

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

159. By the date of the first community detention submission on 16 February 2015 at the latest, it was clear that there were no health or security issues that would prevent a community detention placement. An identity officer was satisfied that Mr QA was the same person who had travelled to Australia in 1999 and been granted a TPV. The only substantial concern expressed by the Department related to Mr QA's character.

160. In March 2017, in response to questions asked by the Commission, the Department said that Mr QA had not been referred internally for a community detention assessment since the Minister declined to make a residence determination in his favour in February 2015, more than two years earlier.

161. The Department pointed to the fact that at the time of the February 2015 assessment, Mr QA was the subject of two outstanding arrest warrants relating to convictions in New South Wales in 2003. As noted above, these warrants were executed in August 2015 when Mr QA was transferred to New South Wales. The court treated his previous 12 month sentence as having been served by time already spent in immigration detention. In relation to the matters for which he had been convicted but not yet sentenced, the court imposed a good behaviour bond for 12 months, a licence disqualification for 18 months and a fine of $400, but did not consider that the offences warranted any period of custodial detention. It is difficult to suggest that the conduct giving rise to these offences, engaged in more than a decade earlier, meant that further administrative detention was required when a court responsible for sentencing Mr QA determined that no further period of custodial detention was necessary.

162. On 30 May 2017, a little over 20 months after his sons had been released into community detention, Mr QA was referred internally within the Department for consideration of a community detention placement in his own right. This referral was shortly after the IAA had determined that Australia had protection obligations to him. On 28 June 2017, he was assessed by the Department as not meeting the Ministerial guidelines and, as a result, no submission to the Minister was prepared inviting the Minister to consider exercising his power under s 197AB.

163. In response to my preliminary view in this matter, the Department gave the following description of the assessment made in June 2017:

> There was no evidence of health issues requiring ongoing medical intervention. His case fell within the types of cases which the Minister had indicated should not be referred due to his criminal history, character concerns, identity issues and there being a real chance that he may not abide by the residence determination conditions or cause harm to the Australian community.

164. The materiality of the concerns raised about Mr QA's identity and criminal history has been considered above.

165. In October 2017, the Department told the Commission that Mr QA had 'ongoing character concerns' and that consideration was being given to refusing his application for a protection visa under s 501 of the Migration Act. The Department said that, as a result of these character concerns, Mr QA would not be referred for consideration of community detention under s 197AB or a visa under s 195A until his character consideration under s 501 had been finalised or there was a significant change in circumstances. It took another 10 months for a decision to be made to refuse Mr QA a protection visa on character grounds.

166. The primary 'character concern' identified by the Department was that, in 2003, Mr QA had been convicted of an offence and sentenced to a period of 12 months imprisonment. As a result, he had a 'substantial criminal record' as defined in s 501(7)(c) of the Migration Act and did not pass the character test as a result of s 501(6)(a). However, the question of whether a person should be refused a visa under s 501 as a result of not passing the character test involves the exercise of a discretion that must take into account all of the relevant circumstances. This question was considered by the AAT in 2018. The Tribunal was constituted by Deputy President Rayment QC. As to the Department's reliance on the conviction from 2003, the Deputy President said:

> The main problem about deciding that the acts of 2003 mean that the Australian community is at risk of harm from him, is that the offending is now some fifteen years ago, and his present circumstances are very different. He was then alone here. As will appear, he now has five sons here [including three sons to his former wife], and has every incentive not to reoffend. All five sons and he himself are owed protection obligations and further offending may quickly lead to action again being taken against him by the respondent. He has been in detention for six years, and knows that he would face the same prospect again.[48]

167. Various other matters of conduct including some unproven allegations of conduct while in immigration detention were referred to by the Department as discretionary matters that supported a decision not to grant a protection visa on character grounds. The delegate of the Minster acknowledged in its reasons that 'all such incidents are deemed closed with none of the allegations escalating to formal criminal charges'. When the matter came before the AAT, Mr QA denied the allegations and he was not cross-examined to suggest that any of the allegations had substance.[49] No evidence was led from officers of Serco as to their own inquiries into the allegations.[50] The Deputy President was not inclined to give them any weight.[51] Ultimately, the AAT set aside the decision by a delegate of the Minister to refuse Mr QA a visa on character grounds and remitted the matter to the Department with a direction that the discretion under s 501(1) of the Migration Act be exercised in Mr QA's favour. The Minister did not seek judicial review of the reasons of the AAT.

168. Following a contested hearing dealing specifically with whether Mr QA should be refused a visa on character grounds, the Department was given the opportunity to put any allegations of bad character to Mr QA or to file evidence that suggested that the allegations had substance, and did not do so. Having taken into account all of the material filed by the Department and Mr QA and detailed submissions from each of them, an experienced and independent decision maker determined that a visa should not be refused on character grounds. I am of the view that I should give this conclusion significant weight, given the nature and focus of that proceeding.

169. In my view, the analysis by the Deputy President can be applied equally to the question of whether character considerations should have prevented a referral to the Minister for him to consider exercising his discretion under s 197AB to make a residence determination in favour of Mr QA. While, strictly speaking, Mr QA's conviction and sentence in 2003 meant that he had a 'substantial criminal record' for the purposes of the character test, the question of whether a community detention referral should have been made required a broader perspective to be taken.

170. The Department should have taken into account whether there were any unique or exceptional circumstances that warranted a referral being made. This should have included consideration of the protracted length of Mr QA's detention and Australia's obligations under article 9 of the ICCPR to ensure that no one is subjected to arbitrary detention.

171. It was open to the Department under the community detention guidelines to make a referral to the Minister for him to consider a residence determination in favour of Mr QA in his own right. I find that the failure by the Department to make such a referral during the almost four and a half years after his sons had been released into community detention resulted in Mr QA's continued detention being arbitrary, contrary to article 9 of the ICCPR.

172. I find that the failure to make a referral was unreasonable and disproportionate to the aim of protecting the community from the risk of harm, particularly given the gravity of the failure in terms of its impact on the liberty of Mr QA.

5 Recommendations

173. 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.[52] The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.[53] The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.[54]

5.1 Prompt medical assessment for alleged sexual assault victims

174. As noted in paragraph 115 above, I am concerned that Master QB was not immediately referred to IHMS by Serco following the alleged sexual assault on him. Instead, it appears that the first contact with IHMS in relation to this incident occurred because of an approach made by Mr QA to IHMS in the morning following the incident. Once Mr QA reported the incident to IHMS, I consider that the follow-up action taken by IHMS was appropriate.

175. However, I consider that there should have been an immediate proactive referral to IHMS when this incident was first reported to Serco.

176. The United Nations has adopted Rules for the Protection of Juveniles Deprived of their Liberty.[55] These rules relevantly provide:

> 87. In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles, in particular, as follows: ...
>
> (d) All personnel should ensure the full protection of the physical and mental health of juveniles, including protection from physical, sexual and emotional abuse and exploitation, and should take immediate action to secure medical attention whenever required.

177. Similarly, the Royal Commission into Institutional Responses to Child Sexual Abuse made detailed recommendations about how to implement Child Safe Standards in institutions. Standard 6 deals with processes for responding to allegations of child sexual abuse. It is in the following form:

> **Standard 6: Processes to respond to complaints of child sexual abuse are child focused**
>
> a. The institution has a child-focused complaint handling system that is understood by children, staff, volunteers and families.
>
> b. The institution has an effective complaint handling policy and procedure which clearly outline roles and responsibilities, approaches to dealing with different types of complaints and obligations to act and report.
>
> c. Complaints are taken seriously, responded to promptly and thoroughly, and reporting, privacy and employment law obligations are met.[56]

178. These standards are now reflected in the *National Principles for Child Safe Organisations*, developed by the National Children's Commissioner in conjunction with Community Services Ministers across Commonwealth, State and Territory governments.[57]

179. The Department should ensure that Serco has policies and procedures in place to effectively respond to allegations of child sexual abuse in the way set out in the *National Principles for Child Safe Organisations*.

Recommendation 1

The Department should ensure that Serco has implemented the *National Principles for Child Safe Organisations*. In particular, the Department should ensure that Serco has implemented the requirement in Principle 6.3 to ensure that complaints are taken seriously, and responded to promptly and thoroughly.

5.2 Discretionary application of guidelines

180. I am concerned by the suggestion by the Department in response to my preliminary view that assessing detainees against the Minister's intervention guidelines is optional (see paragraphs 137–138 above).

Recommendation 2

To the extent necessary, the Department amend its internal policies to ensure that all people in closed immigration detention are assessed at regular intervals to determine whether they satisfy the Minister's guidelines for a residence determination under s 197AB or the grant of a visa under s 195A.

5.3 Clarifying priority cases for referral

181. Although the residence determination guidelines provided that minors should be identified for a residence determination 'as soon as they are detained', it took more than two years for a referral to be made to the Minister. It appears that this was as a result of concerns held by the Department about Mr QA.

182. There is arguably a tension in the community detention guidelines between the priority cases for referral in section 8 (titled: 'cases to be referred for my consideration under section 197AB') and other cases in section 10 (titled: 'cases *generally* not to be referred for my consideration under section 197AB'). However, two textual features suggest that if a case falls within one of the priority categories in section 8, then it should be referred to the Minister even if it also falls within one of the categories in section 10:

- first, the use of the word 'generally' in the heading to section 10
- secondly, the text of section 10 which provides: 'I would not expect the Department to refer to me for consideration of Residence Determination under section 197AB of the Act a specified person or persons in any of the following circumstances, *unless there are exceptional reasons or I have requested it*'.

  (emphasis added)

183. It is tolerably clear that by identifying priority cases for referral, the Minister has, through the guidelines, requested that those kinds of cases be referred even if they also fall within one of the categories in section 10.

184. In order to avoid the issues that arose in the present case, the Commission recommends that the guidelines be amended to make clear the relationship between section 8 and section 10.

Recommendation 3

The Department raise with the Minister an amendment to the residence determination guidelines to confirm that priority cases identified in section 8 are to be referred to the Minister for consideration, even if one or more of the circumstances in section 10 of those guidelines apply.

5.4 Updating the guidelines

185. In this case, a man has been detained administratively for more than seven years on the basis of unreviewable assessments of his character. The character assessments were primarily based on his criminal convictions for conduct engaged in more than a decade earlier. As a result of those convictions, this man was sentenced to two periods of detention of 12 months. As far as the criminal justice system was concerned, there was no requirement for his ongoing detention. However, he has been administratively detained at the discretion of the Minister for Home Affairs for far longer than his criminal offences warranted.

186. Mr QA was detained while his application for protection was processed. At the end of a period of more than seven years, he has been found to be a refugee and has been granted a TPV. It is extraordinary that the process of assessing his protection claims took this long and that he was administratively detained for the entirety of that period.

187. There is a need for a change both in the process of referring detainees to the Minister for consideration of alternatives to detention, and in the consideration by the Minister of the exercise of those powers, so that historical conduct does not pose an absolute barrier to any consideration of release from closed detention and so that the increasing burden of protracted detention is appropriately weighed against any risk to the community.

188. The Minister's community detention guidelines were last revised on 10 October 2017. The Minister's s 195A guidelines which deal with the power to grant a visa to a person in immigration detention were last revised in November 2016.

189. I have previously made recommendations for these guidelines to be revised to more appropriately balance questions of risk to the community and the impact of prolonged detention on people in immigration detention.[58] I reiterate those recommendations and ask that the Department raise with the Minister amendments to the guidelines having regard to this case and similar cases.

Recommendation 4

The Department raise with the Minister the following amendments to the s 197AB and s 195A guidelines:

(a) That people in closed immigration detention are eligible for referral under s 197AB and s 195A where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period (whether by explicitly including these considerations within the definitions of 'unique and exceptional circumstances' and 'compelling or compassionate circumstances' or otherwise).

(b) That people in closed immigration detention are eligible for referral under s 197AB and s 195A whether or not they have had a visa cancelled or an application for a visa refused under s 501 of the Migration Act, or it appears they may fail the character test in s 501.

(c) Where the Minister has previously decided not to consider exercising the powers under either s 197AB or s 195A in relation to a person, or has considered exercising those powers and declined to do so, the Department may nevertheless re-refer that person to the Minister if the person has remained in closed detention for a further protracted period.

(d) In the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility (whether for reasons relevant to the 'character test' in the Migration Act or otherwise), the Department include in any submission to the Minister under s 197AB or s 195A:

    (i) a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment

    (ii) an assessment of whether any identified risk could be satisfactorily mitigated if the person were allowed to reside in the community (for instance by the imposition of residence requirements, reporting obligations, sureties or other conditions), including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment.

6 The Department's response to my findings and recommendations

190. On 29 September 2020, I provided the Department with a notice of my findings and recommendations.

191. On 24 November 2020, the Department provided the following response to my findings and recommendations:

> **Sexual assault allegations**
>
> The Department values your assessment that the alleged sexual assault was not attributable to a failing on the part of the Department or its service providers in providing for the welfare of detainees at the Wickham Point facility at the relevant time.
>
> The Department accepts your finding that the actions taken by the Department and its service providers in terms of investigation, reporting, referral and medical treatment were appropriate. The Department also accepts your finding that the responses by the Department and its service providers to the alleged sexual assault were not inconsistent with or contrary to Master QB's human rights.
>
> **Child safeguarding**
>
> The Department agrees in principle with recommendation one, and ensures that the Facilities and Detainee Service Provider (FDSP), Serco, implements the *National Principles for Child Safe Organisations*, particularly the requirement in Principle 6.3 that all complaints are taken seriously, reviewed thoroughly and responded to promptly.
>
> Serco adheres to the Department's *Child Safeguarding Framework* (the framework). The framework articulates the strong commitment of the Department to the safeguarding and wellbeing of children. Serco also follow a Complaints Management policy and procedure manual as well as the Department's 'Assurance Checklist for Child Safe Standard 2: Children participate in decisions affecting them and are taken seriously'.
>
> The framework states that '*The Department makes children and their families aware of mechanisms to report complaints, concerns or incidents of child abuse, and departmental business areas and contracted service providers use the triple track approach to child-related incidents.*
>
> a. *The Department has complaints handling processes and reporting systems that prioritise child-related complaints.*
> b. *Allegations, concerns and complaints handling policies and procedures clearly outline roles and responsibilities, approaches to dealing with different types of concerns, incidents and complaints, and obligations to act and report.*
> c. *Departmental officers and contracted service providers take concerns, incidents and complaints seriously, and respond to them promptly and thoroughly, using the triple track approach where applicable, and meet reporting, privacy and employment law obligations.'*

Ministerial Intervention guidelines

The Department disagrees with recommendations two, three and four. Ministerial Intervention policy does not provide for automatic assessment, or assessment at certain intervals, against the Minister's Intervention guidelines or referral of cases under Ministerial Intervention powers for detainees.

The Minister issues the guidelines to the Department at his discretion. The Minister's personal intervention powers under the *Migration Act 1958* (the Act), allow him to grant a visa to a person, if he thinks it is in the public interest to do so. What is in the public interest is a matter for the Minister to determine. The Minister's Intervention powers are non-delegable and non-compellable, meaning that only a portfolio Minister can exercise these powers and the Ministers are under no obligation to consider exercising or to exercise these powers in any case.

The Department has a framework in place of regular reviews, escalations and referral points to ensure that people are detained in the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. The Department also maintains that review mechanisms regularly consider the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa.

The Department conducts formal monthly reviews of efforts to resolve the status of persons held in immigration detention. Status Resolution Officers identify cases where the Minister is the only person with the power to grant the non-citizen a visa or to make a residence determination in order to allow an unlawful non-citizen to reside in community detention.

Where a case is determined to potentially meet the Ministerial Intervention guidelines, the case is referred to the Minister for consideration under section 195A of the Act, to grant a visa to a person in immigration detention, or under section 197AB of the Act, allowing a detainee to reside in the community. Only cases which meet the Minister's guidelines are referred for consideration.

As outlined in the Department's response to the Commission's preliminary view on 17 July 2020, the Department acknowledges the Ministerial guidelines in operation at the time indicated priority was to be given to cases involving minor children and their accompanying family members, and submissions should be provided to the Minister as soon as reasonably practicable. It was also the Minister's expectation that the principle of family unity be maintained unless significant circumstances warranted a residence determination being made which would split a family unit. In considering Mr QA's case, there were significant indicators that his case did not meet the Ministerial Intervention guidelines for referral to a Minister, with the exception of the presence of the children.

The Ministerial guidelines in place at the time outlined the types of cases which the Minister indicated should generally not be brought to the Minister's attention under section 197AB of the Act, unless there were exceptional reasons or the Minister had requested it. These included:

- Where it is believed that a person presents character issues that indicate that they may fail the character test under section 501 of the Act;
- Where a person has been charged with an offence but is awaiting the outcome of the charges;

- Where a person knowingly fails to provide information or provides misleading information about their identity (such as age, nationality, citizenship or ethnicity); and
- Where there a real chance the person may not comply with the conditions specified in the determination (such as not residing at the specified address) or cause harm to the Australian community.

The Department maintains that Mr QA's family placements in detention were appropriate, reasonable and justified given the family's circumstances.

192. I report accordingly to the Attorney-General.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

February 2021

Endnotes

1 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), [1980] ATS 23 (entered into force for Australia 13 November 1980).
2 *Al-Kateb v Godwin* (2004) 219 CLR 562.
3 By the Human Rights Legislation Amendment Act 2017 (Cth), (commenced 13 April 2017).
4 Human Rights Legislation Amendment Act 2017 (Cth) Sch 2 It 58.
5 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.
6 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
7 CRC, article 3(2).
8 CRC, article 3(3).
9 The Rules for Protection of Juveniles were adopted by the UN General Assembly in resolution 45/113 of 14 December 1990: UN Doc A/RES/45/113.
10 Community and Disability Services Ministers' Conference, Creating Safe Environments For Children – Organisations, Employees and Volunteers, National Framework (July 2005). At <https://www.dcp.wa.gov.au/Resources/Documents/Policies%20and%20Frameworks/CreatingSafeEnvironmentsforChildren%20NationalFramework.pdf>.
11 Australian Children's Commissioners and Guardians, *Principles for Child Safety in Organisations* (2013). At <https://www.ccyp.wa.gov.au/media/1640/accg-principles-for-child-safety-in-organisations-october-2013.pdf>.
12 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (30 June 2014), Chapter 5, 'What we are learning about responding to child sexual abuse', p 167. At <http://www.childabuseroyalcommission.gov.au/getattachment/7014dd2f-3832-465e-9345-6e3f94dd40eb/Volume-1>.
13 Australian Human Rights Commission, *National Principles for Child Safe Organisations* (2019), at <https://childsafe.humanrights.gov.au/national-principles>.
14 UNHRC, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).
15 UNHRC, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
16 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UNHRC in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
17 *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
18 United Nations Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).
19 United Nations Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
20 United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Shams & Ors v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007); *Baban v Australia*, Communication No. 1014/2001, CCPR/C/78/D/1014/2001 (2003); *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006).
21 United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].
22 United Nations Children's Fund, Implementation Handbook for the Convention on the Rights of the Child (2008), pp 38-39.
23 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133.
24 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 at [26].
25 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 at [32].
26 Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130, pp 92-118, at <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention>.
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28 See also, Australian Broadcasting Corporation, 'Child sexually assaulted by 16-year-old asylum seeker at Darwin immigration detention centre, NT Police say' 22 April 2015, at <https://www.abc.net.au/news/2015-04-22/alleged-assault-by-16yo-asylum-seeker-darwin/6413356>.
29 The Hon Kevin Rudd MP, Prime Minister, 'Transcript of broadcast on the Regional Resettlement Arrangement between Australia and PNG' Media Release, 19 July 2013. At <http://pandora.nla.gov.au/pan/79983/20130830-1433/www.pm.gov.au/press-office/transcript-broadcast-regional-resettlement-arrangement-between-australia-and-png.html>.
30 Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'* (2019), p 39, at <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>.
31 Australian Human Rights Commission, *Immigration detention and human rights*, 6 December 2016, at <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/immigration-detention-and-human-rights#5>.

32 Professor Elizabeth Elliott AM and Dr Hasantha Gunasekera, *The health and well-being of children in immigration detention*, Report to the Australian Human Rights Commission, Monitoring Visit to Wickham Point Detention Centre, Darwin, NT, October 16th – 18th 2015, at <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/health-and-well-being-children-immigration>.
33 *SYLN and Minister for Home Affairs (Migration)* [2018] AATA 4408 at [39].
34 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [26].
35 *SYLN and Minister for Home Affairs (Migration)* [2018] AATA 4408.
36 *SYLN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1986 at [4].
37 *SYLN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1986.
38 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014), p 62. At <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children>.
39 The Hon Chris Evans MP, Minister for Immigration and Citizenship, *Minister's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 1 September 2009, at [4.1.4]. The guidelines are incorporated into the Department's Procedures Advice Manual.
40 The Hon Chris Evans MP, Minister for Immigration and Citizenship, *Minister's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 1 September 2009, at [4.1.5].
41 The Hon Chris Evans MP, Minister for Immigration and Citizenship, *Minister's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 1 September 2009, at [6.1.2].
42 The Hon Chris Evans MP, Minister for Immigration and Citizenship, *Minister's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 1 September 2009, at [6.1.2].
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44 The Hon Chris Evans MP, Minister for Immigration and Citizenship, *Minister's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 1 September 2009, at [6.1.3].
45 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *Minister's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 30 May 2013. The guidelines are incorporated into the Department's Procedures Advice Manual.
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47 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s 345, s 351, s 417 and s 501J),* 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the Department's Procedures Advice Manual.
48 *SYLN and Minister for Home Affairs (Migration)* [2018] AATA 4408 at [16].
49 *SYLN and Minister for Home Affairs (Migration)* [2018] AATA 4408 at [43].
50 *SYLN and Minister for Home Affairs (Migration)* [2018] AATA 4408 at [48].
51 *SYLN and Minister for Home Affairs (Migration)* [2018] AATA 4408 at [43].
52 AHRC Act, s 29(2)(a).
53 AHRC Act, s 29(2)(b).
54 AHRC Act, s 29(2)(c).
55 The Rules for Protection of Juveniles were adopted by the UN General Assembly in resolution 45/113 of 14 December 1990: UN Doc A/RES/45/113.
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