



Australian
Human Rights
Commission

FA, FB, FC and FD v Commonwealth of Australia (DIBP)

[2014] AusHRC 83

© Australian Human Rights Commission 2014.



ISSN 1837-1183

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication. All material presented in this publication is licenced under a Creative Commons Attribution 3.0 Australia licence, with the exception of the Australian Human Rights Commission Logo.

To view a copy of this licence, visit <http://creativecommons.org/licences/by/3.0/au>.

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

Design and layout Dancinggirl Designs

Printing Masterprint Pty Limited

Electronic format

This publication can be found in electronic format on the website of the Australian Human Rights Commission:
www.humanrights.gov.au/publications/index.html.

Contact details

For further information about the Australian Human Rights Commission, please visit www.humanrights.gov.au or email communications@humanrights.gov.au. You can also write to:

Communications Team
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

**FA, FB, FC and FD v
Commonwealth of Australia
(Department of Immigration
and Border Protection)**

Report into arbitrary detention and the
failure to consider less restrictive forms
of detention

[2014] AusHRC 83

Australian Human Rights Commission 2014



**Australian
Human Rights
Commission**

Contents

1	Introduction to this inquiry	2
2	Legal framework	3
2.1	Functions of the Commission	3
2.2	Scope of 'act' and 'practice'	3
2.3	Arbitrary detention	3
3	General background	5
3.1	Detention of complainants	5
3.2	Residence determinations	6
4	Consideration of the circumstances of each of the complainants	7
4.1	Mr FA	7
4.2	Mr FB	9
4.3	Mr FC	10
4.4	Mr FD	12
5	Opportunity to respond to the Commission's preliminary view	14
6	Recommendations	15
6.1	Power to make recommendations	15
6.2	Recommendation of referrals for community detention	15
6.3	Consideration of compensation	16
6.4	Recommendation that compensation be paid	17
6.5	Apology	18
7	The Department's response to my findings and recommendations	19



**Australian
Human Rights
Commission**

July 2014

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

Dear Attorney

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaints made by Mr FA, Mr FB, Mr FC and Mr FD against the Commonwealth of Australia – Department of Immigration and Border Protection (the Department).

I have found that the Department's failure to detain Mr FA, Mr FB, Mr FC and Mr FD in the least restrictive manner possible was inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant of Civil and Political Rights*.

As such, I recommended that the Department submit to the Minister that a residence determination be made in favour of Mr FA and Mr FC with such requirements (including reporting requirements) as may be necessary. The Department has confirmed that, as per this recommendation, it is working on a residence determination submission for Mr FA for the Minister's consideration. It has also confirmed that Mr FC was granted a bridging visa on 27 May 2014 and is now residing in the community.

I also recommended that the Commonwealth pay compensation to each of the complainants and that the Department provide a formal written apology to each complainant for the breach of their human rights. These recommendations were not accepted.

In response to my notice, the Department wrote to me on 26 June 2014. The Department's responses to each of my recommendations are set out in part 7 of my report.

I enclose a copy of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gillian Triggs'.

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into complaints by four men who are or were in immigration detention. Each of them made an unsuccessful application for protection and is liable to be removed from Australia. However, in each case there were significant delays in their removal. Each complainant made a complaint in writing in which he alleged that his detention was arbitrary and therefore inconsistent with or contrary to the human rights recognised in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).
2. This inquiry was undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. I have directed that the identities of each of the complainants not be published in accordance with section 14(2) of the AHRC Act. For the purposes of this report each complainant whose identity has been suppressed has been given a pseudonym beginning with F.
4. I find that in each case the significant delay in making a referral to the Minister for consideration of community detention meant that each complainant was not detained in the least restrictive manner possible.
5. Mr FA was first considered for community detention after 2 years in closed detention and in response to a recommendation from the Ombudsman. His medical reports attest that his prolonged stay in detention has resulted in a 'deteriorating mental illness'. Despite being found to meet the guidelines for referral to community detention, and despite an indication from the Minister that community detention would be approved subject to reporting conditions, the Department has failed to provide an appropriate recommendation to the Minister. He continues to be detained in closed immigration detention facilities more than 4 years and 7 months after his initial detention.
6. Mr FB was first considered for community detention after 2 years in closed detention. Mr FB was placed into community detention after 2 years and 8 months in closed detention. Mr FB is currently on a bridging visa pending his removal from Australia.
7. Mr FC was detained when he was 20 years old. He was first assessed as meeting the guidelines for community detention after a year and 8 months of detention. However, it took around 9 months from this date for the first submission to be forwarded to the Minister for consideration of community detention. In the meantime, contrary to the assessment that a less restrictive environment was appropriate given Mr FC's age, time in detention and particular vulnerabilities, Mr FC was instead placed in one of the highest security immigration detention centres in Australia. He continues to be detained in closed immigration facilities more than 4 years and 2 months after his initial detention and more than two and a half years since he was first assessed as meeting the guidelines for community detention.
8. Mr FD was first considered for community detention after a year and 3 months in closed detention following a recommendation by a treating psychologist from the International Health and Medical Service. Throughout this period of time he had exhibited negative mental health outcomes not present prior to his detention. Despite his history, the request for community detention took more than 6 months to process, during which period Mr FD engaged in at least two serious acts of self harm. Mr FD was placed into community detention after a year and 10 months in closed detention.
9. I find that the reasons given for the delay in consideration of a community detention placement for each of the complainants was not proportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system. My reasons for reaching this conclusion are set out in more detail below.

10. As a result, I find that these delays were inconsistent with or contrary to the rights of the complainants recognised under article 9(1) of the ICCPR.

2 Legal framework

2.1 Functions of the Commission

11. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly section 11(1)(f) gives the Commission the following functions:
- to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
12. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in section 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
13. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

2.2 Scope of ‘act’ and ‘practice’

14. The terms ‘act’ and ‘practice’ are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
15. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
16. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken;¹ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

2.3 Arbitrary detention

17. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.²

18. 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.

19. 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;³
- (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;⁴
- (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;⁵ and
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁶

20. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee (UNHRC) 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.⁷ Similarly, the UNHRC considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was 'considerably in excess of what is necessary'.⁸

21. The UNHRC 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.⁹

22. A draft General Comment published by the UNHRC on 28 March 2013 in relation to article 9 makes the following comments about immigration detention based on previous decisions by the Committee:¹⁰

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 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 absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or 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. The decision must also take into account the needs of children and the mental health condition of those detained. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.

23. In the case of the present complainants, it will be necessary to consider whether their prolonged detention in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to each of them, and in light of the available alternatives to closed detention.

3 General background

3.1 Detention of complainants

24. The four complainants separately arrived at Christmas Island by boat during late 2009 and early 2010. All four were initially detained pursuant to section 189(3) of the *Migration Act 1958* (Cth) (Migration Act) upon their arrival. The Department subsequently transferred them to mainland Australia and detained them under section 189(1) of the Migration Act.
25. An officer of the Department assessed that none of the complainants are refugees within the meaning of the *Convention Relating to the Status of Refugees*.¹¹ Each complainant sought an independent merits review of this assessment and was unsuccessful. Three of the complainants (Mr FA, Mr FB and Mr FC) sought judicial review of the independent merits review assessment. These applications were dismissed.
26. An officer of the Department also assessed that the Commonwealth did not owe any of the complainants *non-refoulement* obligations under certain other treaties, including the ICCPR.
27. All four complainants have spent prolonged periods in closed immigration detention facilities. Each of them has been assessed as meeting guidelines for community detention. Mr FA and Mr FC remain in closed detention at Villawood Immigration Detention Centre. Mr FB was transferred into community detention after 2 years and 8 months in closed detention and has now been granted a bridging visa. Mr FD was transferred into community detention after a year and 10 months in closed detention. The following table sets out the date that each of the complainants was first detained, the date they were first considered for community detention and (if relevant) the date that they were transferred into community detention.

Name	Detained	Met guidelines for community detention	Community detention commenced
Mr FA	1 October 2009	16 April 2012 (after 30 months of detention)	n/a (still in closed detention)
Mr FB	2 October 2009	9 January 2012 (after 27 months of detention)	1 June 2012 (after 32 months of detention)
Mr FC	28 February 2010	1 November 2011 (after 20 months of detention)	n/a (still in closed detention)
Mr FD	2 April 2010	27 January 2012 (after 22 months of detention)	6 February 2012 (after 22 months of detention)

3.2 Residence determinations

28. As noted above, lawful immigration 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. Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, and where detention in an immigration detention centre is not demonstrably necessary, prolonged detention in an immigration detention centre may be disproportionate to the goals said to justify the detention.
29. The Department has developed a detention services manual which provides a framework for decision making about where in the immigration detention network detainees should be placed.¹² The manual notes that detention in immigration detention centres (IDCs) established by the Minister under s 273 of the Migration Act will be used only as a last resort and for the shortest practicable time.¹³ The manual states that the key determinant of the need to detain a person in an IDC will be risk to the community. This includes:¹⁴
- unauthorised arrivals undergoing health, character and security checks
 - persons with a criminal history or who are of national security concern, or those whose identity is unknown
 - persons who repeatedly refuse to comply with visa conditions
 - persons who are to be removed involuntarily, particularly immediately prior to their planned involuntary removal.
30. The complainants claim that it was open to the Minister for Immigration to permit them to live in the community subject to a 'residence determination'. Section 197AB permits the Minister, where he thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. The residence determination may be made subject to other conditions such as reporting requirements.
31. On 1 September 2009, the then Minister published guidelines to explain the circumstances in which he may wish to consider exercising his powers under section 197AB to make a residence determination (guidelines).¹⁵ These guidelines were in operation when each of the complainants arrived in Australia and throughout the period of their detention.
32. The guidelines provide that priority for community detention will be given to certain categories of cases including those that will take a considerable period to substantively resolve and other cases with unique or exceptional circumstances.¹⁶ The present complainants fall within these identified circumstances.
33. The guidelines provide that the Department may refer cases to the Minister along with a submission that indicates 'how any potential risk can be mitigated through the use of conditions I may place on the residence determination'.
34. In addition to the power to make a residence determination under section 197AB, the Minister also has a discretionary non-compellable power under section 195A to grant a visa to a person in detention, again subject to any conditions necessary to take into account their specific circumstances.

4 Consideration of the circumstances of each of the complainants

35. The act of the Commonwealth to which I have given consideration in relation to each of the complainants is the failure by the Department (either at all or for a significant period of time) to make a submission to the Minister that he consider making a residence determination in the complainant's favour, if necessary subject to conditions. This act is considered in the context of article 9 of the ICCPR.
36. For the reasons set out below, I find that in each case this act was inconsistent with or contrary to the rights of the complainant under article 9 of the ICCPR.

4.1 Mr FA

37. Mr FA is a national of Vietnam and arrived at Christmas Island by boat on 1 October 2009. He was detained on Christmas Island for the first 22 months that he was in Australia. During this period, he was assessed by the Department as not being a refugee and this assessment was confirmed in an Independent Merits Review. A second Independent Merits Review was conducted following the High Court's decision in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319. This review also found that he was not a refugee. Towards the end of this period, on 10 May 2011, he was involved in an escape with two other detainees but was located the following day and returned to detention.
38. On 2 June 2011, after a year and 10 months in detention, the International Health and Medical Service reported that Mr FA is 'at ongoing risk of further deterioration in mental state due to prolonged detention'.
39. On 29 July 2011 Mr FA was transferred to Northern Immigration Detention Centre in Darwin and on 24 August 2011 his case manager referred his case to the Community Detention Branch for consideration of his placement in community detention. Just over 4 months after this referral was initiated, on 6 January 2012, he was found not to meet the guidelines for referral to the Minister. The Commission asked the Department why Mr FA did not meet the guidelines at this stage. The Department declined to provide an answer to this question, other than saying that the decision occurred during a telephone conversation between Mr FA's case manager and the Community Detention Branch.
40. After a person has been in immigration detention for two years, the Commonwealth Ombudsman is required to give the Minister for Immigration and Border Protection an assessment of the appropriateness of the arrangements for the person's detention.¹⁷ The first assessment by the Ombudsman was given on 27 March 2012 and recommended that the Minister consider placing Mr FA in the community with appropriate access to health and counselling services.
41. In response to this assessment, a second referral for community detention was initiated on 11 April 2012. This time, Mr FA was found to meet the guidelines (on 16 April 2012) and a submission to the Minister was sent on 27 June 2012. The following day, Mr FA was transferred from Darwin to Villawood Immigration Detention Centre in Sydney. The submission noted that International Health and Medical Services (IHMS) 'advise a non-institutionalised environment such as community detention would provide a conducive and stress-free alternative for Mr FA due to his deteriorating mental illness and prolonged stay in detention'.

42. The then Minister indicated that he would approve community detention for Mr FA. On 23 July 2012, the Minister made the following note on the departmental submission recommending the consideration of community detention for Mr FA and two other people:

I will approve these, but would like some additional reporting requirements in these cases.

43. Despite this, the Department did not provide a submission to the Minister recommending community detention subject to additional reporting requirements. The Department's explanation for this is as follows:

On [the] submission ... the then Minister indicated that he was willing to consider placing [Mr FA] into community detention subject to additional reporting requirements.

However, the then Minister did not sign a decision instrument in order to place [Mr FA] into community detention. Another submission seeking the then Minister's decision to place [Mr FA] into community detention was not completed when the then Minister decided that Vietnamese detainees could be referred to him for consideration of a Bridging Visa E (BVE) under s 195A of the *Migration Act 1958*.

[Mr FA] was then referred to the Illegal Maritime Arrivals (IMA) BVE team for BVE consideration. [Mr FA] was not granted a BVE under s 195A.

44. The Department says that Mr FA was referred for a third time for community detention some 9 months later, in April 2013. It says that at this time Mr FA did not meet the guidelines for community detention, despite having previously met the guidelines. The Department has not provided the Commission with any explanation for the change in Mr FA's circumstances in the period since July 2012 which meant that by April 2013 he no longer met the guidelines.

45. In December 2013, the Department told the Commission that it was currently considering Mr FA for community detention again, and was awaiting further medical information to assess him against the guidelines. He continues to be detained at Villawood Immigration Detention Centre.

46. By 1 January 2014, Mr FA had been in closed immigration detention for 4 years and 7 months. His medical reports attest that his prolonged stay in detention has resulted in a 'deteriorating mental illness'. In his statutory two year review of Mr FA's detention, the Ombudsman recommended that Mr FA be placed in community detention. Following this recommendation, Mr FA was found to meet the guidelines for community detention. The Minister for Immigration indicated that he would approve community detention subject to reporting conditions. However, against all of this background, the Department has failed to provide a submission to the Minister recommending community detention subject to reporting conditions.

47. I find that the protracted delay in making a referral to the Minister for community detention for Mr FA cannot be justified as either reasonable or necessary. No reasons have been provided by the Department which seek to show that detention for more than 4 and a half years is proportionate to some other public goal. I find that the continued detention of Mr FA in closed immigration detention facilities is arbitrary and contrary to article 9 of the ICCPR.

4.2 Mr FB

48. Mr FB is a national of Sri Lanka and arrived at Christmas Island by boat on 2 October 2009. He was detained on Christmas Island for the first 5 months that he was in Australia. During this period, he was assessed by the Department as not being a refugee.
49. On 27 March 2010 Mr FB was transferred to Villawood Immigration Detention Centre in Sydney. An Independent Merits Review affirmed the decision that he was not a refugee. A second Independent Merits Review was conducted following the High Court's decision in *Plaintiff M61*. This review also found that he was not a refugee. An application for judicial review of the second IMR decision in the Federal Magistrates Court was unsuccessful.
50. After two years in detention, Mr FB was first referred for consideration of a community detention placement on 4 October 2011. He was assessed as meeting the guidelines for community detention 3 months later on 9 January 2012. By April 2012, a submission in relation to community detention had not yet been sent to the Minister. The Department noted that Mr FB was still 'undergoing a number of pre-referral checks'. Eventually a submission was prepared and Mr FB was released into community detention on 1 June 2012, after being in closed detention for 2 years and 8 months.
51. The Minister's residence determination was revoked and Mr FB was returned to immigration detention on 11 December 2012. The revocation was in order to arrange for Mr FB's involuntary removal from Australia on 18 December 2012. It appears that the steps taken towards removing Mr FB were done on the basis that he had no matters ongoing with the Department and that he had no outstanding judicial review applications. Ultimately, Mr FB was not removed on 18 December 2012. It is unclear from the material before the Commission why this did not occur, but it appears that it may be because Mr FB has an ongoing judicial review matter.
52. On 16 January 2013, the Department made a submission to the Minister for consideration of a visa under section 195A. This application noted that Mr FB was at judicial review stage. On 30 January 2013, the Minister agreed to intervene and on the same day Mr FB was granted a bridging visa E until 30 July 2013. A further bridging visa has been granted since then, which expired on 8 February 2014. At the time the Commission's notice of findings in this inquiry was finalised, the Commission had not been provided with any information about whether a further visa has been granted.
53. Mr FB has spent two periods in closed immigration detention; the first for 2 years and 8 months and the second for 7 weeks. It took more than 2 years for him to be first considered for community detention. Once he was assessed as meeting the guidelines for community detention, it took almost 5 months for a submission to be prepared to the Minister and for a decision on community detention to be made.
54. I find that the protracted delay in making a referral to the Minister for community detention for Mr FB cannot be justified as either reasonable or necessary. No reasons have been provided by the Department which seek to show that detention for more than 2 years and 8 months is proportionate to some other public goal. I find that the detention of Mr FB in closed immigration detention facilities was arbitrary and contrary to article 9 of the ICCPR.

4.3 Mr FC

55. Mr FC is a Hazara man who was born in Afghanistan and grew up in Iran. His father is deceased and his mother, two brothers and one sister live in Iran. He arrived at Christmas Island by boat on 28 February 2010. When he arrived in Australia he was 20 years old. He was detained on Christmas Island for the first 8 months that he was in Australia. During this period, he was assessed by the Department as not being a refugee.
56. On 24 October 2010, Mr FC was transferred to Scherger Immigration Detention Centre near Weipa in Queensland. In a case review on 13 September 2011, his case manager said that he will 'refer client for counselling at his request as he appears to be struggling with detention. Client states he feels depressed, lacks motivation, is worried about his family and is ... increasingly isolating himself from friends'. The October 2011 case review by the same case manager said that a referral for community detention would be made 'based on client's unstable nature and previous history of self harm (VS) ['voluntary starvation'] and the increased length of time he would remain in detention if he receives a positive JR ['judicial review']'. The November 2011 case review by a different officer noted that, after a year in detention at Scherger, a referral for placement in community detention was made on 27 October 2011 'based on his age, time in detention and vulnerabilities (VS history and behavioural concerns)'. On 1 November 2011 Mr FC was assessed as meeting the guidelines for community detention.
57. However, a case review by his original case manager dated 1 December 2011 recommended that instead of being transferred into community detention, Mr FC be transferred to 'a more secure facility'. Part of the rationale for the referral for community detention consideration, namely Mr FC's behavioural issues arising as a result of being in closed detention, was now put forward as the basis for recommending that community detention not be granted and that Mr FC be placed in a more restrictive environment. The case review noted that over the previous 7 months Mr FC's behaviour had been 'erratic'. Three examples were given in this assessment:
- Mr FC engaged in a hunger strike as a protest to get an IMR hearing date, which involved him being admitted to Weipa Hospital as he had fallen unconscious. Three or four days into the strike a hearing date was provided. The case manager noted that 'the client believes he won'.
 - The case manager noted that this behaviour 'carried through' to the IMR hearing. Mr FC refused to participate in the IMR hearing. Notes made by a psychologist from IHMS record that this was because of Mr FC's concern that the particular reviewer rejected 90% of applicants. Mr FC requested a change of reviewer but this request was refused. The IMR proceeded without an interview and he was found not to be owed protection obligations.
 - Finally, in November 2011 when asked to present ID for a welfare check, Mr FC was alleged to have 'abused and attacked several Serco officers'. The detailed reports of this incident suggest that it involved five other detainees three of whom were responsible for starting the disturbance by throwing objects at officers including chairs, a paver and a microwave. The detailed report suggests that after the disturbance had commenced Mr FC punched one officer and threw a cup of coffee.

The case manager concluded that in his opinion 'these behaviors [sic] are not demonstrative of someone who should be released into the community'.

58. Around six weeks before the case manager prepared this report, and two weeks prior to the community detention referral being made, the case manager had a conversation with a psychologist from IHMS who was seeing Mr FC. The psychologist made the following note in Mr FC's file:
- Discussed client with his case manager [name]. Client appears to have a history of attempting to manipulate the immigration process. Community detention is an unlikely scenario at present.
- It appears that the reference to attempts to 'manipulate' the immigration process may be to the hunger strike and refusal to participate in the IMR hearing with a particular reviewer. One reading of this material is that the case manager recommended against community detention for reasons including that he was concerned that Mr FC would be rewarded for his protest action. If this was the case, it would be particularly concerning, especially in circumstances where Mr FC was found to have met the guidelines for referral.
59. On 22 December 2011, shortly before his 22nd birthday, Mr FC was transferred to Villawood Immigration Detention Centre in Sydney and placed in the highest security Blaxland compound. At the time, Blaxland was used to detain a mix of people including those who had had their visas cancelled on character grounds, usually following conviction for a criminal offence. This group would be detained in Blaxland following the expiration of their prison term while arrangements were made to remove them from Australia. On 22 January 2012, Mr FC was involved in an incident with two other clients in Blaxland where he was punched in the head, pushed into a refrigerator and had his arm broken – a midshaft fracture to his left ulna. On his return to Villawood after three days in Liverpool Hospital Mr FC said that he felt unsafe in Blaxland and following a review he was moved into the lower security Fowler compound on 3 February 2012.
60. On the day that he was moved to Fowler, a second application for referral to community detention was made by his new case manager. The assessment of this application was delayed because Mr FC was a 'person of interest' to the Australian Federal Police (AFP) in relation to the disturbance at Scherger in November 2011. Four months later, on 19 June 2012, the Department was advised by the AFP that Mr FC was no longer a person of interest. Eventually, on 5 July 2012, Mr FC was assessed for the second time as meeting the guidelines for referral for community detention.
61. The Department has indicated that a submission was subsequently sent to the Minister and that on 21 August 2012 the Minister declined to intervene under section 195A or to consider intervening under section 197AB. I invited the Department to provide the Commission with a copy of this submission but the Department declined to do so by the time the notice of findings was finalised. I deal in more detail below with the failure by the Department to respond to requests for information and documents.
62. Mr FC told the Commission that his application for community detention was not approved because the Department considered that he 'was not cooperating in regards to providing his identity'. The Commission asked the Department what steps it had taken to verify Mr FC's identity. On 20 November 2012, the Department said that it 'currently has a check in train with the [Identity Checking Unit] in Kabul. That check is still outstanding. However, delays on inter-country checks with Afghanistan are not unknown. As stated above, verifying information with Iranian authorities is all but impossible'.
63. In response, Mr FC's advocate submitted that Mr FC left Afghanistan when he was two years old and has little memory of his life there. He lived in Iran illegally for most of his life and was schooled informally before coming to Australia at the age of 20. He has no official documentation from his life in Iran although he notes that he had provided the Department with letters from a mosque.

64. The guidelines provide at [5.1.2] that the Minister prefers that persons satisfy the normal requirements for health, identity, character and security checking before being referred for consideration. However, where significant risks associated with ongoing detention in an immigration detention facility are identified, the Minister is prepared to consider persons where an assessment of risks and placement has been completed. As noted above, Mr FC has been identified as someone who has particular vulnerabilities in detention.
65. The Department has indicated that on 3 September 2013, Mr FC's case was referred to the former Minister for possible consideration under sections 195A and 197AB. This submission was returned to the Department on 10 September 2013 without any action being taken in relation to it due to the change in portfolio Minister following the Federal election on 7 September 2013. I invited the Department to provide the Commission with a copy of this submission but the Department declined to do so by the time the notice of findings was finalised.
66. On 11 November 2013, the Department indicated that Mr FC's case would be referred to the Minister for Immigration and Border Protection for possible consideration under sections 195A and 197AB 'in due course'. On 6 January 2014, the Department indicated that this referral had yet to occur. No further update in relation to this referral was provided by the Department by the time the notice of findings was finalised.
67. By 1 January 2014, Mr FC had been in closed immigration detention for 3 years and 10 months. As noted above, when he was first detained he was 20 years old. He was first assessed as meeting the guidelines for community detention on 1 November 2011. However, it took around 9 months from this date for the first submission to be forwarded to the Minister for consideration of community detention. In the meantime, contrary to the assessment that a less restrictive environment was appropriate given Mr FC's age, time in detention and particular vulnerabilities, Mr FC was instead placed in one of the highest security immigration detention centres in Australia. The first submission in relation to community detention resulted in community detention being refused by the Minister in August 2012. The Commission is unable to comment on the nature of any recommendations made in this submission as the Department had not provided a copy of it by the time the notice of findings was finalised. No further submission was made for more than a year, until September 2013 when a submission was given to the former Minister on 3 September, prior to the Federal election on 7 September. The Department has indicated that a third submission will be provided to the current Minister. It has been more than two and a half years since Mr FC was first assessed as meeting the guidelines for community detention and he remains detained in closed detention facilities.
68. I find that the protracted delay in making referrals to the Minister for community detention for Mr FC cannot be justified as reasonable, necessary or proportionate to the goal of verifying his identity, given his age, time in detention and particular vulnerabilities. I find that the continued detention of Mr FC in closed immigration detention facilities is arbitrary and contrary to article 9 of the ICCPR.

4.4 Mr FD

69. Mr FD is a Faili Kurd who was born in Iran. He claims that he is not an Iranian citizen and has no right to return to Iran. He claims to be stateless. Mr FD arrived at Christmas Island by boat on 2 April 2010. He was detained on Christmas Island for the first 14 months that he was in Australia. During this period, he was assessed by the Department as not being a refugee and this assessment was confirmed in an Independent Merits Review. Mr FD's legal representatives lodged an application for Ministerial intervention under section 195A of the Migration Act but Mr FD did not seek judicial review of the adverse IMR decision.

70. On 25 June 2011, Mr FD was transferred to Northern Immigration Detention Centre in Darwin. At the request of Mr FD's migration agent, an International Treaties Obligations Assessment was conducted which ultimately found that Mr FD's removal from Australia would not be in breach of Australia's *non-refoulement* obligations. On the same day that the ITOA was finalised, the section 195A referral request was 'finalised as not assessed'. That is, the Department declined to make a submission to the Minister for him to consider exercising the power to grant a visa under section 195A because the ITOA did not identify any unique and exceptional circumstances which indicated that Australia may have protection obligations to Mr FD.
71. Mr FD was first referred to the community detention area within the Department for consideration of community detention on 7 July 2011 'due to complex removal issues and mental health concerns identified by IHMS'. As a result of an administrative error this referral was resubmitted on 25 July 2011.
72. IHMS advised the Department that Mr FD has an extensive history with the Mental Health Team. He had been provided with supportive counselling due to low mood, depression and anxiety 'secondary to time in detention'. He had disclosed suicidal ideation and has self harmed on numerous occasions. He was being treated with medications for his mental health. The IHMS psychologist recommended a community detention placement.
73. UNHRC considers that compliance with the Standard Minimum Rules for the Treatment of Prisoners¹⁸ is relevant to a State's obligations to all detained persons under the ICCPR.¹⁹ The Standard Minimum Rules provides that at every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry.²⁰ The medical officer shall report to the director whenever he or she considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.²¹ The director shall take into consideration the reports and advice that the medical officer submits and, in case the director concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within the director's competence or if he or she does not concur with them, the director shall immediately submit his or her own report and the advice of the medical officer to higher authority.²²
74. On 21 or 22 November 2011, Mr FD engaged in a protest which involved him sewing his lips together. Four days later he signed a request to be returned to Iran. By this time, a submission had still not been sent by the Department to the Minister for consideration of community detention. Sometime in December 2011, the Department's records indicate that the request was escalated internally.
75. On 31 December 2011, Mr FD engaged in further actual self harm which required hospitalisation.
76. On 27 January 2012, more than 6 months after the initial community detention referral and a year and 10 months after Mr FD was detained, he was referred to the Minister for consideration of a community detention placement. The basis for the referral was Mr FD's length of time spent in immigration detention and concerns regarding his mental health. The Minister intervened on 28 January 2012 and on 6 February 2012, after a year and 10 months in closed detention, Mr FD was placed into community detention in Melbourne.
77. In the Department's response to the Commission's July 2012 report on Community arrangements for asylum seekers, refugees and stateless persons, it said:²³

Cases where a person does not engage Australia's protection obligations and who cannot be removed for reasons beyond their control, including if their statelessness is a practical barrier to removal, will be managed through the Ministerial Intervention process for consideration of case resolution options, including possible temporary or permanent visa pathways.

78. I invited the Department to indicate whether arrangements were being made to remove Mr FD from Australia and, if not, what steps have been taken to manage Mr FD's case through the Ministerial Intervention process, including any consideration of temporary or permanent visas. The Department did not respond to this invitation by the time the notice of findings was finalised.
79. By 6 February 2012, Mr FD had been in closed immigration detention for 1 year and 10 months. Throughout this period of time he had exhibited negative mental health outcomes not present prior to his detention. He was first considered for community detention after a year and 3 months in closed detention and on the recommendation of IHMS. Despite his history, this request took more than 6 months to process, during which period Mr FD engaged in at least two serious acts of self harm.
80. I find that the delay in making a referral to the Minister for community detention for Mr FD cannot be justified as either reasonable or necessary. No reasons have been provided by the Department for a failure to expedite the community detention referral for Mr FD once advice was received from IHMS about the serious mental health impacts on him as a result of his detention. I find that the detention of Mr FD in closed immigration detention facilities was arbitrary and contrary to article 9 of the ICCPR.
81. While the complainant has not raised article 7 of the ICCPR which provides for freedom from torture or cruel, inhuman or degrading treatment, I note the findings of the UNHRC in *C v Australia*. In relation to that communication, the UNHRC concluded that the continued detention of the complainant in immigration detention (in total for over two years) when the Australian Government was aware that his detention was contributing to his development of a psychiatric illness, constituted a violation of article 7 of the ICCPR.²⁴

5 Opportunity to respond to the Commission's preliminary view

82. On 23 January 2014, the Commission issued the Department and the complainants with its preliminary view in relation to these complaints. Pursuant to section 27 of the AHRC Act, where it appears to the Commission as a result of an inquiry that the respondent has engaged in an act or practice that is inconsistent with or contrary to any human right, the Commission is required to give the respondent a 'reasonable opportunity' to make submissions before the Commission reports to the Attorney-General. The Commission asked the Department to provide any submissions by 20 February 2014. No response was received by this date.
83. On 21 February 2014, an officer of the Commission sent an email asking for an update on the status of the response. The Department responded by email that 'the response to this complaint is being finalised in the department' and that 'immediate advice will be provided once we have an expected response date'.
84. On 27 March 2014 and 29 April 2014, the Commission again sent emails asking for an update on the status of the response. Each time the Department indicated that the response was being 'finalised'.
85. On 13 May 2014, the Commission sent an email setting a deadline to respond to the preliminary view of 30 May 2014. The Commission noted that despite regular follow up requests it had not received a response to the preliminary view, any explanation for the delay in providing a response, or any indication of when a response would be provided.

86. On 26 May 2014, the Department sent an email seeking a further week's extension to this deadline, until 6 June 2014. An officer of the Department wrote: 'It is our intent that this would allow us sufficient time to adequately respond to the notice and provide senior decision makers with enough time to adequately consider the response before it is released'.
87. I agreed to extend the deadline until 3 June 2014. I instructed an officer of the Commission to indicate to the Department that this was a final deadline and any response received after this date may not be taken into account by the Commission. I consider that a period of more than 4 months for the Department to provide a response to my preliminary views in this matter is more than a 'reasonable opportunity'.
88. By 6 June 2014, no response had been received to my preliminary view.
89. On 10 June 2014, I issued a notice of my findings under section 29 of the AHRC Act and made the recommendations described in section 6 below. I asked the Department to advise by 24 June 2014 whether the Commonwealth has taken or is taking any action as a result of the findings and recommendations. The Department responded on 26 June 2014. The Department's responses to each of my recommendations are set out in section 7 below.

6 Recommendations

6.1 Power to make recommendations

90. 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.²⁵ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²⁶
91. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.²⁷

6.2 Recommendation of referrals for community detention

92. Mr FA was found to meet the guidelines for community detention on 16 April 2012 following a report by the Ombudsman. The then Minister indicated on 23 July 2012 that he would approve community detention for Mr FA subject to additional reporting requirements. However, it appears that a submission has not since been put to the Minister that a residence determination be made in relation to Mr FA, subject to such reporting requirements.

Recommendation 1

I recommend that the Department promptly put a submission to the Minister that a residence determination be made in favour of Mr FA, subject to such reporting requirements as may be necessary.

93. Mr FC was found to meet the guidelines for community detention on 1 November 2011. It appears that submissions were put to the Minister in July or August 2012 and again on 3 September 2013. The second submission was not considered by the Minister prior to the Federal election on 7 September 2013. At the time that I provided the Department with my preliminary view in this matter, the Department had indicated that it would put a fresh submission to the new Minister 'in due course'. It did not appear that such a submission had been made at that stage.

Recommendation 2

I recommend that the Department promptly put a submission to the Minister that a residence determination be made in favour of Mr FC, subject to such reporting requirements as may be necessary.

6.3 Consideration of compensation

94. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
95. However, in considering the assessment of a recommendation for compensation under section 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.
96. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.
97. Notwithstanding this important distinction, the damages awarded in false imprisonment provide an appropriate guide for the award of compensation for a breach of art 9(1). This is because the damages that are available in false imprisonment matters provide an indication of how the courts have considered it appropriate to compensate for loss of liberty.
98. The principal heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).²⁸
99. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,²⁹ Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Siopis J referred to the case of *Nye v State of New South Wales*:³⁰
- ... the *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach recognized by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.³¹
100. Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).³² In that case at first instance,³³ the New South Wales District Court awarded the plaintiff, Mr Taylor, the sum of \$116,000 in damages in respect of wrongful imprisonment, consequent upon his detention following the cancellation of his permanent residency visa on character grounds.

101. Mr Taylor was detained for two separate periods. The first was for 161 days and the second was for 155 days. In that case, because Mr Taylor’s convictions were in relation to sexual offences against children, Mr Taylor was detained in a state prison under a ‘strict protection’ regime and not in an immigration detention centre. The detention regime to which Mr Taylor was subjected was described as a ‘particularly harsh one’.
102. The Court also took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.³⁴
103. On appeal, in the New South Wales Court of Appeal, Spigelman CJ considered the adequacy of the damages awarded to Mr Taylor and observed that the quantum of damages was low, but not so low as to amount to appellable error.³⁵ Spigelman CJ also observed that:
- Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as “the initial shock of being arrested”. (*Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 at 515.) As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.³⁶
104. Although in *Fernando v Commonwealth of Australia (No 5)*, Siopis J ultimately accepted the Commonwealth’s argument that Mr Fernando was only entitled to nominal damages,³⁷ his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando’s claim if his findings in respect of the Commonwealth’s argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre.
105. Siopis J accepted Mr Fernando’s evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages.
106. His Honour also noted that Mr Fernando’s evidence did not suggest that in immigration detention he was subjected to the harsh ‘strict protection’ regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of inmates in the same way that Mr Nye did whilst he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando in respect of his 1,203 days in detention the sum of \$265,000.³⁸

6.4 Recommendation that compensation be paid

107. I have found that the significant delay in assessing each of the complainants for a community detention placement was not proportionate to the Commonwealth’s legitimate aim of ensuring the effective operation of Australia’s migration system.
108. Each of the complainants met the guidelines for community detention, but they were only assessed to meet those guidelines after being detained for periods between 20 months and 30 months. Even after this assessment was made, it took 5 months for Mr FB to be released from closed detention. Mr FB was detained in closed detention for 2 years and 8 months. Mr FD was detained in closed detention for one year and 10 months.

109. At the time that I provided the parties with my preliminary view, Mr FA and Mr FC continued to be detained in closed detention despite having met the guidelines for community detention. As is noted in the Department's response below, Mr FC was granted a bridging visa shortly before the Commission's notice of findings was issued. At that time, each of Mr FA and Mr FC had been detained in closed detention for over 4 years.
110. Neither the complainants nor the Commonwealth have made any submissions on an appropriate sum of compensation.
111. I consider that the Commonwealth should pay to each of the complainants an amount of compensation to reflect the loss of liberty caused by their arbitrary detention. Had they been transferred earlier to community detention they would still have experienced some curtailment of liberty, and I have taken this into account when assessing compensation. I have not assessed the quantum of that compensation by utilising a strict 'daily rate'.
112. In determining an appropriate amount of compensation for Mr FA, I have taken into account the medical reports which indicate that his prolonged stay in closed detention has resulted in a 'deteriorating mental illness'.
113. In determining an appropriate amount of compensation for Mr FC, I have taken into account his youth and the significant impacts of closed detention on him that were identified by his case manager. I have also taken into account the fact that despite the recognition that community detention was appropriate for him because of his vulnerabilities, he was instead transferred to the highest security detention facility in Australia where he shortly became the victim of a violent attack that broke his arm.
114. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Taking into account the guidance provided by the decisions referred to above I consider that payment of the following amounts of compensation is appropriate.

Recommendation 3

I recommend that the Commonwealth pay to each of the complainants the following amounts by way of compensation:

Mr FA: \$280,000.

Mr FB: \$150,000.

Mr FC: \$320,000.

Mr FD: \$100,000.

6.5 Apology

115. In addition to compensation, I consider that it is appropriate that the Department provide a formal written apology to each of the complainants for the breach of their human rights identified in this report. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.³⁹

Recommendation 4

I recommend that the Department provide a formal written apology to each of the complainants for the identified breaches of their human rights.

7 The Department's response to my findings and recommendations

116. On 26 June 2014, the Department responded to my findings and recommendations.
117. In response to my first recommendation that the Department promptly put a submission to the Minister that a residence determination be made in favour of Mr FA, subject to such reporting requirements as may be necessary:

As per the recommendation, the department is currently working on a section 197AB Residence Determination submission for Mr FA for the Minister's consideration.

The department further advises that Mr FA has been identified as being potentially affected by the Full Federal Court (FFC) judgment in *Minister for Immigration and Citizenship v. SZQRB* [2013] FCAFC 33 ('SZQRB') and, therefore, a reassessment of his claims through the International Treaties Obligations Assessment process will now take place. The reassessment will include consideration of whether Mr FA engages Australia's protection obligations under *Refugees Convention* or the complementary protection criteria in section 36(2)(aa) of the *Migration Act 1958* (the Act).

The reassessment process is expected to commence in mid-July, with priority given to claimants in detention. A letter will be sent to each claimant notifying them that a reassessment of their claims has commenced and giving them the opportunity to provide further information. All of the claims submitted by Mr FA during previous assessments, as well as any further information he provides, will be considered and the correct threshold will be applied in the assessment of his claims against the complementary protection criteria in section 36(2)(aa) of the Act as determined by the FFC in SZQRB.

118. In response to my recommendation that the Department promptly put a submission to the Minister that a residence determination be made in favour of Mr FC, subject to such reporting requirements as may be necessary:

The department notes this recommendation and can advise that Mr FC was granted a BVE on 27 May 2014 and is currently residing in the community.

119. In response to my recommendation that the Commonwealth pay to each of the complainants the following amounts by way of compensation:

Mr FA: \$280,000;
Mr FB: \$150,000;
Mr FC: \$320,000;
Mr FD: \$100,000.

The department does not accept this recommendation.

The Commonwealth maintains its position that the complainants' immigration detention was authorised by section 189(3) and section 189(1) of the Act, carried out in accordance with applicable policy and procedure, and that their detention was not arbitrary within the meaning of article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

Monetary claims for compensation against the Commonwealth must be dealt with in a manner that is consistent with the *Legal Services Directions 2005*. The Legal Services Directions 2005 provide that a matter may only be settled where there is at least a meaningful prospect of liability being established against the Commonwealth. Furthermore, the amount of compensation that is offered must be in accordance with legal principle and practice.

The department is of the view that, as the four complainants' immigration detention was lawful, there is no meaningful prospect of liability under Australia domestic law and as such, no proper basis to consider a payment of compensation. The department is therefore unable to pay compensation to the four complainants on this basis and the department advises that no further action will be taken in relation to this recommendation.

120. In response to my recommendation that the Department provide a formal written apology to each of the complainants for the identified breaches of their human rights:

The department does not accept this recommendation.

The department does not agree that the Commonwealth's failure to detain the four complainants in the least restrictive manner possible was inconsistent with the prohibition on arbitrary detention in article 9(1) of the ICCPR.

Section 189 of the *Migration Act 1958* (the Act) requires the detention of unlawful non-citizens. Section 196 of the Act requires that an unlawful non-citizen must be detained until removed from Australia or alternatively, granted a visa.

In relation to community detention, the power to determine whether an individual who is detained under section 189 of the Act is placed into community detention or granted a visa lies with the Minister as non-compellable and non-delegable public interest powers under section 195A or section 197AB of the Act.

Continued detention of the complainants was justifiable on a number of bases. These include, but are not limited to, establishing detainee identity and security clearances, being on a removal pathway, and the exercise of the Minister's non-compellable and non-delegable power to determine the appropriateness of community detention.

Furthermore, following the expansion of the Community Detention Programme in October 2010, there were a large number of referrals for Community Detention received between July and September 2011 for adults not in family groups. The time required for finalising community detention for all four complainants was not unusual at that time.

As such, the detention of the four complainants was both reasonable and proportionate to the legitimate goal of mitigating risk to the Australian community and maintaining the integrity of Australia's immigration framework.

The department remains of the view that the four complainants' immigration detention was lawful and not arbitrary for the purposes of article 9(1) of the ICCPR. As such, the department advises that no further action will be taken in relation to this recommendation.

121. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

July 2014

-
- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
 - 2 The *International Covenant on Civil and Political Rights* (ICCPR) is referred to in the definition of 'human rights' in s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
 - 3 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).
 - 4 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].
 - 5 *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).
 - 6 *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 with not 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).
 - 7 *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).
 - 8 UNHRC, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
 - 9 *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, CCPR/C/87/D/1050/2002 (2006).
 - 10 UNHRC, Draft General Comment 35 (2013) *Article 9: Liberty and security of person*, UN Doc CCPR/C/107/R.3 at [18].
 - 11 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).
 - 12 Department of Immigration and Citizenship, Detention Services Manual, Chapter 2 — Client placement — Placement options within the immigration detention network.
 - 13 Detention Services Manual at [P A085.5] 5 Immigration detention centres.
 - 14 Detention Services Manual at [P A085.5] 5 Immigration detention centres.
 - 15 The Hon Chris Evans, Minister for Immigration and Citizenship, *Minister's Residence Determination under s 197AB and s 197AD of the Migration Act 1958, Guidelines*, 1 September 2009. The guidelines are incorporated into the Department's Procedures Advice Manual.
 - 16 Guidelines at [4.1.4].
 - 17 *Migration Act 1958* (Cth) s 486O.
 - 18 The Standard Minimum Rules were approved by the UN Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. They were adopted by the UN General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1.

- 19 UNHRC, General Comment 21 (Replaces General Comment 9 concerning humane treatment of persons deprived of liberty) UN Doc A/47/40/SUPP (13 March 1993) at [5]. See also *Mukong v Cameroon*, Communication No. 458/1991, UN Doc CCPR/C/51/458/1991 (1994) at [9.3].
- 20 Standard Minimum Rules, rule 22(1).
- 21 Standard Minimum Rules, rule 25(2).
- 22 Standard Minimum Rules, rule 26(2).
- 23 Department of Immigration and Citizenship, Response to the Australian Human Rights Commission report on the use of community arrangements for asylum seekers, refugees and stateless persons who have arrived to Australia by boat (2012). At <http://www.humanrights.gov.au/publications/diac-response-australian-human-rights-commission-report-use-community-arrangements> (viewed 17 October 2013).
- 24 UNHRC, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002) at [8.4].
- 25 AHRC Act s 29(2)(a).
- 26 AHRC Act s 29(2)(b).
- 27 AHRC Act s 29(2)(c).
- 28 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].
- 29 [2013] FCA 901.
- 30 [2003] NSWSC 1212.
- 31 [2013] FCA 901 at [121].
- 32 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 33 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 34 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
- 35 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 36 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 37 The court awarded nominal damages of one dollar for the unlawful detention of Mr Fernando because as a non-citizen, once he committed a serious crime, he was always liable to have his visa cancelled: *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [98]-[99].
- 38 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [139].
- 39 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

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

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

For detailed and up to date information about the
Australian Human Rights Commission visit our website at:
www.humanrights.gov.au

To order more publications from the Australian Human
Rights Commission download a Publication Order Form at:
www.humanrights.gov.au/publications/index.html
or call: (02) 9284 9600 fax: (02) 9284 9611
or email: publications@humanrights.gov.au

