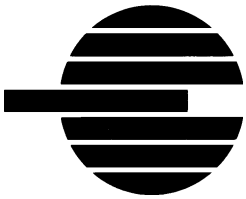
Human Rights and Equal Opportunity Commission



Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights in an Immigration Detention Centre

HRC Report No. 10

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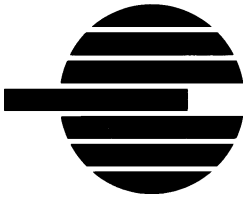
Human Rights and Equal Opportunity Commission



May 2000

The Hon Daryl Williams AM, QC
Attorney-General
House of Representatives
Parliament House
Canberra ACT 2600

Dear Attorney

Pursuant to my responsibilities under s. 29(2) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) I attach a report of my inquiry into a complaint of acts or practices inconsistent with or contrary to human rights in an immigration detention centre.

Yours sincerely,

Chris Sidoti
Human Rights Commissioner

Contents

1. Introduction

This report to the Attorney-General concerns inquiries made by the Human Rights and Equal Opportunity Commission ('the Commission') into a complaint concerning violations of human rights under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('the Act'). The Act provides for the Human Rights Commissioner ('the Commissioner') to perform these functions.

The subject of this report is a complaint of acts or practices inconsistent with or contrary to human rights which allegedly occurred during the detention of an unauthorised arrival at the Perth Immigration Detention Centre ('the Perth IDC') in 1997. In summary, the complainant alleged that he had suffered treatment during his detention at the Perth IDC which constituted breaches of his human rights.

1.1 Outline of complaint

On 22 April 1996 Mr George Johnson (the complainant), a Nigerian national, entered Australia at Perth Airport without valid travel documents. When questioned at Perth Airport, he stated that he was born in Liberia and that the passport in his possession was not his own passport but had been obtained from a person in South Africa. As a result of the complainant's unlawful entry into Australia, he was placed in immigration detention at the Perth IDC.

At the time the Perth IDC was operated by the Department of Immigration and Multicultural Affairs (the Department). The daily management of the Perth IDC was the responsibility of the Australian Protective Services (APS) on behalf of the Department.

On 15 May 1997 the complainant lodged a complaint with the Commission. He alleged that he had suffered treatment during his detention at the Perth IDC which constituted breaches of his human rights.

Allegation 1: Following an argument with an APS officer, the complainant was handcuffed and placed in a room without a window, where he remained for six days.

Allegation 2: APS officers at the Perth IDC required that the complainant be handcuffed when escorted to an external medical facility for treatment for a continuing medical condition. The complainant refused to be handcuffed and

accordingly was not treated for his condition.

Allegation 3: The complainant was held in detention at the Perth IDC for more than 12 months in poor conditions of detention.

1.2 Findings and recommendations

On 28 February 2000 I issued a notice of my findings and recommendations in relation to the complaint under section 29(2) of the Act. I made the following findings.

1. The initial placement of the complainant in the observation room on 8 May 1997 was a form of punishment to secure his cooperation in fingerprinting. This was an act or practice that did not meet the minimum requirements for humane treatment as required by article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) and was an act or practice contrary to or inconsistent with human rights under the Act.

2. The complainant's placement in the observation room ceased to be contrary to or inconsistent with human rights when he was asked to return to the main compound on 9 May 1997. His placement there on 9 and 10 May while he was refusing to eat may also have been justified.

3. The initial use of restraints on the complainant between 10 and 11 May 1997 was justified but their continued use while he was secured in the observation room, namely handcuffs for 8½ hours and shackles around the ankles for 7 hours, was an act or practice that did not meet the minimum requirements for humane treatment as required by article 10(1) of the ICCPR and was an act or practice contrary to or inconsistent with human rights under the Act.

4. The holding of the complainant in the observation room between 10 and 14 May 1997, which was more than 3 days after the security incident of 10 May 1997, was excessive, unnecessary and not justified in the circumstances. This act or practice did not meet the minimum requirements for humane treatment as required by article 10(1) of the ICCPR and was an act or practice contrary to or inconsistent with human rights under the Act.

5. The holding of the complainant in the observation room for 6 days between 8 and 14 May 1997, in which the conditions of the observation room were such that the fluorescent light was left on for 24 hours a day and there was no

window in the room to allow natural light and fresh air, was an act or practice that did not meet the minimum requirements for humane treatment as required by article 10(1) of the ICCPR and was an act or practice contrary to or inconsistent with human rights under the Act.

6. There were no violations of article 7 of the ICCPR in that the treatment of the complainant was not so severe as to constitute cruel, inhuman or degrading treatment.

7. The insistence by the APS officers that the complainant wear handcuffs while being escorted to medical appointments at an external facility in March 1997 resulted in the complainant not receiving medical treatment for his continuing medical condition of penile warts at least until equipment was provided at the IDC. However, this was not an act or practice which violated article 10(1) of the ICCPR nor was it an act or practice contrary to or inconsistent with human rights under the Act.

8. The period of the complainant's detention of over 12 months at the Perth IDC was prima facie excessive and arbitrary in breach of the ICCPR. However, it cannot in itself constitute an 'act or practice' under the Act. The complainant's detention flowed automatically from the operation of the *Migration Act 1958*. The Migration Act did not provide officers of the Department with the discretion to release the complainant from immigration detention. The provisions of the Migration Act are mandatory in their terms and conduct in accordance with them cannot constitute an 'act' or 'practice' by or on behalf of the Commonwealth.

9. The complainant was detained at the Perth IDC for a period of over 12 months between 22 April 1996 and 17 May 1997 in conditions of detention which did not meet the minimum requirement for prisoners at administrative detention centres as required by article 10(1) of the ICCPR. Therefore, the conditions of his detention were contrary to or inconsistent with human rights under the Act. However, the Commission has dealt with those issues in its report *Those who've come across the seas: Detention of unauthorised arrivals*.[1] Accordingly in accordance with section 20(2)(c)(v) of the Act the Commission has decided not to pursue inquiry into these matters.

Pursuant to section 29(2)(b) of the Act, I made the following recommendations for preventing repetition of the acts or continuation of the practices.

1. As part of its duty of care to detainees at the Perth IDC, the Department should ensure that any use of restraints, such as handcuffs, at the Perth IDC does not conflict with the guidelines set out in the Operational Orders of Australasian Correctional Management Pty Ltd[2] (ACM) applicable to the Perth IDC.

2. The Department should ensure that ACM's Operational Orders applicable to the Perth IDC state clearly that every use of force in the Perth IDC should be reported immediately by the staff member using force to the centre manager and a written incident report should be provided within 4 hours or before the staff member completes his or her shift, whichever is earlier.

3. The Department should ensure that ACM's Operational Orders applicable to the Perth IDC state clearly that, where force has been applied or restraint used against an immigration detainee in the Perth IDC, the detainee should be examined in private by a medical officer as soon as possible and under no circumstances any later than 12 hours after the incident.

4. The Department should ensure that ACM's Operational Orders applicable to the Perth IDC state clearly that instruments of restraint, including handcuffs, should not be applied to punish an immigration detainee in the Perth IDC.

5. The Department should ensure that ACM's Operational Orders applicable to the Perth IDC state clearly that chains, irons, leg-cuffs or shackles around the ankles should never be used to restrain an immigration detainee at the Perth IDC.

6. The Department should ensure that staff training at the Perth IDC includes training to enable them to assist and, where necessary, restrain distressed or aggressive immigration detainees. This training should emphasise techniques that allow detainees to be restrained in dignity and with minimum use of force.

7. As part of its duty of care to detainees at the Perth IDC, the Department should ensure that the use of the observation room at the Perth IDC does not conflict with the guidelines set out in the ACM's Operational Orders applicable to the Perth IDC.

8. The Department should ensure that ACM's Operational Orders applicable to the Perth IDC state clearly that an immigration detainee should not be placed in the observation room at the Perth IDC as a form of punishment.

9. The Department should ensure that ACM's Operational Orders applicable to the Perth IDC state clearly that the placement of detainees in the observation room at Perth IDC should be reported immediately by the staff member responsible for the placement to the centre manager and a written report should be provided by the staff member within 4 hours or before the staff member completes his or her shift, whichever is earlier. The centre manager should notify the Department in writing as soon as practicable in relation to such matters.

10. The Department should ensure that ACM's Operational Orders applicable to the Perth IDC state clearly that the observation room at the Perth IDC should only be used in circumstances where the centre manager is of the opinion that the medical or mental condition of an immigration detainee requires that he or she be placed under close supervision for his or her own wellbeing or health, or the wellbeing or health of other detainees.

11. The Department should ensure that ACM's Operational Orders applicable to the Perth IDC state clearly that any period of isolation of an immigration detainee in the observation room at the Perth IDC should not be extended beyond 24 hours unless authorised by a designated senior officer of the Department in writing.

12. The Department should install a night light in the observation room at the Perth IDC. The Department should also relocate the observation room to enable a window to provide natural light and ventilation to the room. The Department should install toilet and washing facilities in or directly adjacent to the observation room.

The complainant did not seek financial compensation and he is now uncontactable. Therefore I made no recommendation as to financial compensation in this respect. However, I left this question open and will re-examine it if and when the complainant is located. I consider that the complainant's treatment requires reparation by way of financial compensation.

1.3 The respondent's reply

Under section 29(2)(e) of the Act I am required to state in my report to the Attorney General whether the respondent has taken or is taking any action as a result of the findings and recommendations.

The Commission has adopted immigration detention centre guidelines which address its findings and recommendations in its 1998 report *Those who've come across the seas: Detention of unauthorised arrivals*.[3] These guidelines will be the basis for future assessment by the Commission of conditions in the centres and for its inquiry into complaints.

In a letter dated 13 April 2000, the Department submitted that the circumstances relating to the Perth IDC were now very different from when Mr Johnson was detained in the facility. The provision of detention services has been outsourced to Australasian Correctional Management Pty Ltd (ACM). Under the contractual arrangements in place between the Department and ACM, the Department submitted that there is a robust and vigorous performance assessment to ensure that such incidents do not occur. ACM's contractual obligations require that services and programs for detainees are delivered in accordance with the quality outcomes specified in the Immigration Detention Standards. ACM is required to deliver a full range of detention services, which had not been delivered by the previous provider of detention services, Australian Protective Services (APS). The Department submitted that there have been significant improvements in the quality of service across all immigration detention facilities, including Perth, since ACM took over the delivery of detention services.

In relation to the recommendations concerning amendments to the operational orders on the use of force and use of restraints, the Department attached a copy of the Operational Orders from ACM for Perth IDC which cover the use of force and the use of restraints. The Department submitted the following.

- These operational orders are followed as closely as possible and if it were to occur that they were not followed, the incident would be comprehensively investigated by this department, by ACM and if required by the relevant state authorities.

- The Immigration Detention Standards specify that restraints are not to be used as punishment. Any detainee to whom restraints are applied must be examined by medical staff as soon as possible after their use.

- Under incident reporting guidelines ACM is required to report all incidents where force is applied to the DIMA Business Manager at the Centre, orally immediately, and in writing within 4 hours.

- The Immigration Detention Standards require that all ACM staff have the skills and knowledge necessary to enable them to restrain aggressive detainees. The training provided to ACM officers emphasises techniques which allow detainees to be restrained with minimum force.

- The use of force and reporting requirements are measures against which ACM's performance is measured on a quarterly basis by the department.

On the recommendations concerning amendments to the operational order on the use of the observation room at Perth IDC, the Department submitted the following.

- The Department proposes to write to ACM requesting that official policies and procedures for the use of the observation room at Perth IDC be formalised, in line with the recommendations made by the Commission.

- In the interim it is recognised by both the Department and ACM that there are inadequacies in the observation room at the Perth IDC and it is used only as a last resort, for serious health or behavioural issues and for the minimum period of time.

- ACM staff carefully monitors any detainee placed in the observation room to ensure that no harm can occur.

- A night-light has been installed in the observation room.

- A study will be conducted into the other recommendations made by the Commission for the infrastructure of the room.

The Department submitted that it was fully aware of the inadequacies of Perth IDC as a detention facility and that the future detention needs of the Department were currently being reviewed and the status of Perth IDC was being addressed in this context.

2. Process of the inquiry

2.1 The nature of the complaint

The complainant made the following allegations.

Allegation 1: The complainant alleged that, following an argument with an APS Officer, he was handcuffed and placed in a room without a window, where he remained for six days.

Allegation 2: The complainant alleged that, while in immigration custody at the Perth IDC, he did not receive adequate medical care. It became apparent to the nurse of the Perth IDC that the complainant would require treatment at an external medical centre to receive adequate treatment for penile warts. APS officers at the Perth IDC required that the complainant be handcuffed when escorted to the external medical facility. The complainant refused to be handcuffed and accordingly was not treated at an external medical facility.

Allegation 3: The complainant alleges that he was held in immigration custody at the Perth IDC in poor conditions for more than 12 months.

2.2 The respondent's response

The Department conceded the facts as alleged but denied that the facts constituted violations of the complainant's human rights under the Act.

2.3 Conciliation

As the complainant had been removed from Australia and his whereabouts were unknown, I was of the view that conciliation was not possible.

2.4 Submissions and evidence

As a result of my investigation of this complaint pursuant to section 11(1)(f) of the Act, I formed the preliminary view that the alleged acts or practices were inconsistent with or contrary to human rights under that Act.

On 12 November 1998, pursuant to section 27 of the Act, I invited the Department to make submissions orally or in writing or both in relation to the alleged acts or practices. On 25 March 1998 the Department forwarded written submissions in this matter, which I have carefully considered.

On 23 May 1997 an officer of the Commission contacted the Department to advise of the complaint and to arrange for officers of the Commission to interview the complainant during their visit to the Perth IDC on 26 May 1997. On 23 May 1997

an officer of the Department advised the Commission that the complainant was at that stage being held in the Casuarina Prison and that arrangements would be made for the complainant to attend the Perth IDC at the time of the Commission's visit to the Perth IDC. Subsequently the Department advised the Commission that the complainant would not be able to be interviewed by the Commission as he was being removed from Australia on 26 May 1997.

Documents provided later by the Department indicate that arrangements were made to remove the complainant on 26 May 1997 prior to the Commission approaching the Department about the complaint. It also appears from the documents that, because the complainant refused to take prescribed travel medication, his removal from Australia was delayed until about 16 June 1997.

The Commission was not advised of the delay in the removal of the complainant, although the Department was aware that officers of the Commission were in Western Australia until 2 June 1997 and able to interview him about his allegations. The subsequent removal of the complainant from Australia prevented the Commission from interviewing him but it does not affect the Commission's jurisdiction in relation to his complaint. However, in making its finding on this complaint the Commission has had to rely principally on documentary evidence from the Department and APS, including statements from officers at the Perth IDC at relevant times. The Commission sought the assistance of the Department of Foreign Affairs and Trade to locate the complainant. These attempts proved unsuccessful, however.

3. Findings and recommendations

3.1 The evidence

3.1.1 The complainant's evidence

In his letter of complaint dated 15 May 1997 the complainant stated that

- he was from Liberia
- he fled Liberia due to civil war, poverty and fear for his life because of his involvement with a rebel group
- he arrived in Australia on 22 April 1996 and was taken from Perth Airport to

the detention centre where he was held until 15 May 1997

- he lodged an application for a protection visa but was not successful
- he was afraid to return to Liberia
- he felt that he was treated like a criminal while in detention
- he had an argument with an APS officer and he was handcuffed and put in a room without a window for 6 days
- he had medical problems and before he was taken to hospital the APS officers wanted to handcuff him, which he refused because he was not a criminal
- he suffered considerable mental and physical pain and anguish and was denied personal care and attention throughout the months in detention.

3.1.2 The respondent's evidence

In a written response to the complaint dated 26 November 1997, the Department stated that the complainant arrived in Australia on 22 April 1996 at Perth Airport and presented a South African passport in the name of Timothy John Raaf, date of birth 2 February 1952. When the complainant was questioned at Perth Airport, he advised that he was born in Liberia and that he had arrived on someone else's passport that he had obtained from a person in South Africa. As a result, the complainant was detained in immigration custody at the Perth IDC. The Department stated that on 16 May 1996 the complainant made an application to the Department for a protection visa, which was refused on 25 June 1996. The complainant applied to the Refugee Review Tribunal for a review of the Department's decision. The Department's decision was affirmed by the Refugee Review Tribunal on 12 September 1996.

In October 1996 the complainant, represented by the WA Legal Aid Commission, made two applications to the Minister for Immigration and Multicultural Affairs to intervene on humanitarian grounds. On 28 February 1997 the Minister advised that he would not intervene.

The Department advised that on 10 May 1997, while in immigration custody, the complainant assaulted an APS officer, was charged and then placed in police custody on 17 May 1997. On 19 May 1997 the complainant was placed in court

custody at Casuarina Prison. On 23 May 1997 the complainant appeared in the Magistrate's Court. In light of the complainant's imminent removal from Australia scheduled to occur with British Airways on 26 May 1997, the charges against him were withdrawn and the Magistrate remanded him back into immigration custody. Because of the complainant's previous assault on an APS officer at the Perth IDC, it was decided that he would not be returned to that centre but would remain in the remand centre until his departure from Australia. The Department submitted that at the time of his departure the complainant decided he did not want to leave and refused to take medication for the flight. British Airways refused to remove him without medical security and he was not removed from Australia until 9 June 1997 (although departmental records indicate that the complainant departed Australia on 16 June 1997).

The Department stated that in an interview with the Liberian Consul the complainant stated that he was from Nigeria. The Department further stated that the Nigerian High Commissioner had verified his identity and the complainant had been returned to Nigeria. According to the Department, for people who enter Australia unlawfully and seek to engage Australia's protection obligations, the average period of time in detention at the Perth IDC was in the range of 6 to 12 months, although longer periods were not uncommon. The Department stated that in the complainant's case the period of detention would have been considerably less if he had advised the Department of his true identity from the start.

The Department indicated that the altercation on 10 May 1997 between the complainant and the APS officers did not involve officers of the Department and so a report was not prepared by the Department. However, the following documents (many of which were obtained by the Department from the APS) were forwarded by the Department for the Commission's consideration:

- report of APS Inspector Paul Booth of the Perth IDC dated 1 August 1997, attaching a photograph of the injury (bite to the arm) to APS Officer Smart
- statements of APS Officer Chris Mason dated 8 and 10 May 1997
- statement of APS Officer B C Smart dated 22 March 1998
- statement of APS Officer Elizabeth Beamish dated 27 March 1998
- copy of the General Order 9 of the General Orders Manual of the APS entitled 'Use of Force'

- APS Perth Immigration Detention Centre Local Procedures (also known as the 'Perth Station Instructions') dated 1 May 1996
- Migration Series Instructions 173 and 6 relating to the removal of persons in detention
- facsimile from the Department to the APS at the Perth IDC dated 8 May 1997 authorising the APS to fingerprint the complainant
- facsimile from the Department to the Perth IDC dated 14 May 1997 authorising the complainant's return to the general population of the Perth IDC
- APS incident report dated 10 May 1997 by APS Officer Mason
- medical records of the complainant during his detention at the Perth IDC
- APS Resident Observation Form for the complainant at the Perth IDC between 10 May and 19 May 1997
- APS Daily Occurrence Log at the Perth IDC between 8 and 18 May 1997
- documentation relating to the deportation of the complainant.

On 31 August 1999 the Department advised the Commission that APS had no further information to provide on this matter.

3.2 Issues to be determined

One of the functions conferred on the Commission is to inquire into any act or practice that may be inconsistent with or contrary to human rights (section 11(1)(f) of the Act). In deciding whether the matters complained of fall within the terms of section 11(1)(f) of the Act, I was required to consider two main issues:

- whether there is an act or practice under the Act; and if so
- whether the act or practice is inconsistent with or contrary to any human right under the Act.

3.2.1 Whether there is an act or practice

Section 3 of the Act defines an 'act' or 'practice' as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth.

The Department is a federal government department, under the Minister for Immigration and Multicultural Affairs. The *Migration Act 1958* (Cth) gives the Minister authority to establish immigration detention centres and make regulations for the operation of detention centres, including the conduct and supervision of detainees and the powers of persons performing functions in connection with the supervision of detainees.[4]

Until the end of 1997 the APS was engaged by the Department to provide a custodial service and to manage the daily running of the Perth IDC pursuant to a Memorandum of Understanding. The APS was also responsible for the management of services such as education and medical welfare. The APS is also a federal government agency.

The acts or practices complained of relate to the conditions in which the complainant was held and the treatment of the complainant in detention under the *Migration Act 1958*. Whether the responsibility of APS alone or both the Department and APS, I am satisfied that the matters complained of are acts and practices of the Commonwealth for the purposes of the Act.

3.2.2 Whether the act or practice is inconsistent or contrary to human rights

Section 3 of the Act defines 'human rights' as including the rights and freedoms recognised in the ICCPR, which is Schedule 2 to the Act.

Article 7 of the ICCPR states:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 10(1) of the ICCPR states:

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

The standards set out in the ICCPR are authoritatively, although not yet comprehensively, interpreted by the Human Rights Committee established under the ICCPR. The Human Rights Committee's members are elected by the State Parties to monitor the implementation of the ICCPR.

In interpreting the protection afforded to prisoners by articles 7 and 10(1) of the ICCPR, the Human Rights Committee has stated that the UN Standard Minimum Rules for the Treatment of Prisoners ('Standard Minimum Rules')[5] and the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment ('the Body of Principles')[6] are relevant UN standards applicable to the treatment of prisoners.[7] In addition, the Third Committee of the General Assembly in its 1958 report made reference to the Standard Minimum Rules and stated that they should be taken into account when interpreting and applying article 10(1) of the ICCPR.[8]

As a matter of international law, the Standard Minimum Rules are not binding of themselves on Australia and there is no specific obligation to implement them in Australia. However, the Standard Minimum Rules do elaborate the standards which the international community considers acceptable and therefore offer guidance to the scope of article 10 of the ICCPR.

Most of the Standard Minimum Rules apply to people detained for any reason, including those in remand before a criminal trial or following conviction but prior to sentencing and those imprisoned for debt or other non-criminal process (Standard Minimum Rule 94). While the Standard Minimum Rules do not refer explicitly to administrative detention (that is, as in the case of the detention of unauthorised arrivals in Australia, detention not ordered by a court), the vulnerability of these detainees is even greater than that of civil prisoners detained by order of a court. People in administrative detention are clearly protected by articles 7 and 10 of the ICCPR and the Human Rights Committee has extended to them the protection of the Standard Minimum Rules.[9] Certainly at a minimum, the Standard Minimum Rules and the Body of Principles are relevant to interpreting the scope and content of the protection given to persons deprived of their liberty in articles 7 and 10 of the ICCPR.

The Standard Minimum Rules and the Body of Principles describe minimum acceptable standards concerning the use of restraints on detainees, medical care of detainees and the physical conditions of detention, to all of which this complaint relates. I am satisfied that the acts or practices complained of relate to 'human rights' under the ICCPR and Act.

3.3 General findings of fact

I have made the following general findings of fact.

1. The complainant is a Nigerian national.

2. The complainant arrived in Australia at Perth Airport on 22 April 1996 without valid travel documents.

3. As a result his unlawful entry, the complainant was detained under the *Migration Act 1958* and taken into immigration custody. The complainant was remanded in immigration custody at the Perth IDC between 22 April 1996 and 17 May 1997.

4. The complainant came to Australia from Nigeria seeking asylum as a refugee. On 16 May 1996 the complainant made an application to the Department for a protection visa, which was refused by the Department on 25 June 1996. The complainant applied to the Refugee Review Tribunal for a review of the Department's decision. However, the Department's decision was affirmed by the Refugee Review Tribunal on 12 September 1996.

5. The complainant was removed from Australia on or about 16 June 1997.

3.4 Allegation 1

3.4.1 The evidence

The complainant alleged that, following an argument with an APS Officer, he was handcuffed and placed in a room without a window, where he remained for six days.

Departmental records provide the following account of events involving the complainant between 8 and 14 May 1997.

On Thursday 8 May 1997 the Department requested APS officers to take photographs and fingerprints of the complainant to verify his identity. At 7.30 pm that day the complainant consented to being photographed but refused to allow the APS to take his fingerprints.

Departmental records indicate that the complainant was then placed by APS officers in an observation room adjacent to the fingerprinting area to 'think about his refusal' to be fingerprinted. At 8.00 pm the complainant again refused to be fingerprinted. Following this, the complainant read a book and refused to acknowledge the presence of APS officers when spoken to. The complainant was kept in the observation room overnight.

At 8.35 am on 9 May 1997 the complainant refused to eat or respond to APS officers. He also refused to leave the observation room to return to the main compound. When the complainant refused to eat lunch, the Perth IDC nurse was called. The nurse attempted to speak with the complainant on three occasions but he did not respond. APS officers decided to leave the complainant in the observation room.

At 4.00 pm on 10 May 1997 a doctor visited the complainant as he was still not eating. The doctor did no more than observe the complainant as the complainant refused to speak with him.

At 11.20 pm on 10 May 1997 the complainant asked for the light in the observation room to be switched off. The APS officers on duty then entered the observation room to talk to the complainant about his request. APS Officer Mason spoke to the complainant and the complainant ignored him. The complainant was heard stating words to the effect of 'off fucking lights'.

APS reports indicate that an incident then took place. According to those reports, as APS Officer Mason was closing the door of the observation room, the complainant kicked the door open causing it to hit Officer Mason on the left side of the face. APS Officer Mason then re-entered the room and the complainant lunged at him and attacked him, grabbing and ripping his shirt. APS Officer Mason and at least two other officers then held the complainant and attempted to restrain him. During the struggle to handcuff the complainant, the complainant bit APS Officer Smart on the left arm.

The Resident Observation Form and the Daily Occurrence Log record that the complainant was restrained at 11.20 pm on 10 May 1997 by handcuffs to the front of his body and flexi-cuffs around his ankles. The flexi-cuffs were removed almost seven hours later at 6.15 am the next day and the handcuffs were removed about 8 ½ hours later at 7.53 am the next day. Following the incident, the complainant was held in the observation room for more than three days. During the course of the complainant's detention in the observation room, APS officers escorted the

complainant to the toilet on several occasions.

The complainant was held in the observation room until 14 May 1997. On that day an officer of the Department sent a facsimile to the Perth IDC directing that the complainant be returned to the main compound area as his behaviour had settled down and he had 'overcome/addressed his depression'.

Officers of the Commission inspected the observation room and noted that at that time the fluorescent light was left on for 24 hours a day, making it hard for detainees to sleep and keep track of time, there was no window in the room to allow natural light and fresh air to enter it and video observation equipment was not installed.

Responding to the complaint by a letter dated 1 August 1997, APS Inspector Paul Booth of the Perth IDC stated that the only physical force used against the complainant was reasonable and necessary to ensure that the detainee was handcuffed to prevent him from injuring himself or others. He also stated that the only injury sustained in the incident was by an APS officer who was bitten by the complainant.

In his letter of complaint the complainant indicated that, following an argument with an APS officer, he was handcuffed and put in a room without a window for 6 days and that generally speaking he had suffered mental and physical pain and anguish during his immigration detention at the Perth IDC.[10] Because Commission staff were not aware that the complainant was in Australia between 26 May and about 16 June 1997 and because of the complainant's removal on or about 16 June 1997, no fuller statement was taken from the complainant.

3.4.2 Relevant guidelines

The acts or practices of the staff of the Perth IDC were subject to a number of departmental guidelines and instructions in force at the time in relation to the maintenance of order and the use of force at the Perth IDC.

The Migration Series Instructions were issued by the Department and applied to all immigration detention centres. Migration Series Instruction 92 on General Detention Procedures authorised the use of limited force in the management of immigration detention. It stated:

> The definition of the term 'detain' in s.5(1) of the Migration Act 1958 permits officers to take such action and use such force as is reasonably necessary to keep a

> person in immigration detention. Officers have also had the common law right to use reasonable force to protect themselves.
>
> While use of force is permissible in self defence and the defence of others, officers should be aware that the use of greater force than necessary to secure and restrain a detainee may amount to an assault.

The Migration Instructions also provided principles governing the use of physical restraints. The key guiding principle was:

> Handcuffs represent a use of force in securing and restraining a detainee. Therefore, they must only be used if the person handcuffed has conducted his or herself or his or her demeanour was such to suggest that he or she would be likely to escape, injure or interfere with persons or property or that he or she threatened violence. If a person is unreasonably handcuffed then he or she is entitled at common law to bring an action to recover damages for the indignity and the detention of him or her may be ruled to be unlawful.

The APS General Orders Manual prescribed general orders applicable to the conduct of APS Officers. General Order 9 entitled 'Use of Force' is relevant to this inquiry and stated as follows:

> 2.1 General Principles
>
> Pursuant to their responsibilities, a PSO [Protective Services Officer] from time to time may be required to exert some level of force upon another person:
>
> (i) to effect or attempt to effect an arrest;
>
> (ii) to prevent a person who has been arrested from escaping;
>
> (iii) to protect themselves or another person; or
>
> (iv) otherwise as lawfully required in the execution of their duties.
>
> 2.4 Protection of Dignity
>
> A PSO shall not subject a person to greater indignity than is reasonable and necessary in the circumstances.
>
> 2.7 Reporting Use of Force

In addition to any other requirements and in all cases where a PSO is required to use force, including handcuffs… a PSO must, as soon as practicable thereafter, submit through their officer in charge, a 'use of force' report form, setting out the circumstances of the incident and a detailed description of the force used.

5.1 Handcuffs

5.1.1 General

(a) The use of handcuffs to restrain a person in lawful custody is an unusual measure, however it may at times to be necessary and appropriate.

5.1.2 Considerations for use

(b) When deciding whether to use handcuffs on a person who is in lawful custody a PSO shall give consideration to:

(i) whether the person is violent or their demeanour gives rise to the apprehension of violence;

(ii) whether the person in custody has attempted, or is likely to attempt, to escape;

(iii) whether the person in custody is required to be escorted with other persons in custody; and

(iv) the need to prevent the person in custody from injuring themselves or any other persons.

5.1.3 Restriction on the use of handcuffs

If a PSO has reason to use handcuffs they should be applied to the wrists held in front of the person in custody, unless circumstances exist which would make this impracticable or unsafe.

General Order 9 did not contain any guidelines on the cuffing of feet.

Perth Immigration Detention Centre's Local Procedures (also known as the Perth Station Instructions) in force at the time of the alleged events prescribed instructions for conduct by APS Officers at the Perth IDC. Chapter 11 entitled 'Detainees requiring special detention facilities' is relevant to this inquiry and stated as follows:

Sick Bay/Observation Room

1105 - Where the Designated OIC is of the opinion that the medical or mental condition of a detainee requires that he or she be placed under close supervision for their own wellbeing or health, or the wellbeing or health of other detainees, the Designated OIC may order the close supervision of the detainee in a sick bay.

1111 – Detainees are not to be placed in a sick bay for punishment and are therefore entitled to all rights and privileges, subject to conditions of their isolation.

1112 - OIC IDC is to be notified of any placement of a detainee in a sick bay/ observation room. OIC IDC will notify DIMA [the Department].

1114 - The period of isolation is not to extend beyond 24 hours unless DIMA authorises an extension.

1115 - Detainees held in isolation are to be given the opportunity of adequate open air recreation for a minimum period of 1 hour per day during the isolation period unless their conduct is considered to be dangerous to other detainees or staff.

3.4.3 Relevant international instruments

Article 7 of the ICCPR prohibits inhuman or degrading treatment or punishment of persons.

Article 7 of the ICCPR covers 'not only … acts that cause physical pain but also…acts that cause mental suffering to the victim'.[11] Practices that are deliberate and are known to inflict emotional or mental distress on detainees, such as isolation or withdrawal of privileges, may breach the international prohibition on inhuman treatment of detainees.

Article 10(1) of the ICCPR requires that a person in detention be treated in a humane manner. The scope and content of the rights declared in article 10(1) can be interpreted with the assistance of the Body of Principles and the Standard Minimum Rules.

Principle 1 of the Body of Principles states:

> All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 6 of the Body of Principles states:

> No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

*The term 'cruel, unhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporally or permanently, of the use of any of his natural senses such as sight or hearing, or of his awareness of place and the passing of time.

Standard Minimum Rule 10 states:

> All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

Standard Minimum Rule 11 states:

> In all places where prisoners are required to live or work
>
> (a) the windows shall be large enough to enable the prisoner to read or work by natural light, and shall be constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation.

Standard Minimum Rule 21(1) states:

> Every prisoner who is not employed in outdoor work shall have at least 1 hour of suitable exercise in the open air daily if the weather permits.

Standard Minimum Rule 31 states:

> Corporal punishment by placing in a dark cell and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

Standard Minimum Rule 33 states:

> Instruments of restraint, such as handcuffs, chains, irons and straightjackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:
>
> (a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;
>
> (b) On medical grounds by direction of the medical officer;
>
> (c) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.

Standard Minimum Rule 34 states:

> The patterns and manner of use of instruments of restraint shall be decided by the central prison administrations. Such instruments must not be applied for any longer time than is strictly necessary.

Standard Minimum Rule 54 states that custodial officers shall not, in their relations with detainees,

> …use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

3.4.4 Relevant international case law and commentary

Article 7 of the ICCPR relevantly states:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 10(1) of the ICCPR states:

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

The Human Rights Committee (the Committee) has expressed the view in a number of cases that conditions of detention can violate both articles 7 and 10(1) of the ICCPR. However, the views of the Human Rights Committee have been limited to the factual circumstances of the cases. In addition, in cases where there was mistreatment during detention, the Committee often found a violation of both articles 7 and 10, without making a clear distinction between the two provisions.[12] In a number of cases, the Committee came to the conclusion that the conditions of detention represented inhuman treatment pursuant to article 10(1) but not a violation of article 7. It is clear from Committee conclusions that 'inhuman treatment' within the meaning of article 10(1) involves a lower intensity of disregard for human dignity than that within the meaning of article 7.[13]

Commentator Manfred Nowak has stated:

> … the Committee's case law in this area reveals occasional inconsistencies, although it is faced with the difficulty that violations of human dignity and personal integrity ultimately are able to be ascertained only on a case-by-case basis by weighing all the circumstances, including the subjective impressions of the person concerned. Nevertheless, several general conclusions may be drawn for the interpretation of article 10(1): In contrast to article 7, article 10 relates only to the treatment of persons who have been deprived of their liberty. Whereas article 7 primarily is directed at specific, usually violent attacks on personal integrity, article 10 relates more to the general state of a detention facility or some other closed institution and to the specific conditions of detention. As a result, article 7 principally accords a claim that State organs refrain from certain action (prohibition of mistreatment), while article 10 also covers positive State duties to ensure certain conduct: Regardless of economic difficulties, the State must establish a minimum standard for humane conditions of detention (requirement of humane treatment). In other words, it must provide detainees and prisoners with a minimum of services to satisfy their basic needs (food, clothing, medical care, sanitary facilities, communication, light, opportunity to move about, privacy, etc). Finally, it is … stressed that the requirement of humane treatment pursuant to article 10 goes beyond the mere prohibition of inhuman treatment under article 7 with regard to the extent of the necessary 'respect for the inherent dignity of the human person'.[14]

Article 7: inhuman and/or cruel treatment

The terms in article 7 include all forms of imposition of severe suffering that are unable to be qualified as torture. They also cover those practices imposing suffering that do not reach the necessary intensity to be classified as torture. For example, in *Tshisekedi v Zaire*[15] deprivation of food and drink for four days after arrest was considered inhuman treatment.

Particularly harsh conditions of detention may represent inhuman treatment within the meaning of article 7. In *Buffo Carballal v Uruguay*[16] the prisoner was held for over a year without being charged. After a period of interrogation, he was held incommunicado, blindfolded, with his hands bound; his only food was a cup of soup morning and night; relatives were not allowed to bring food or medicine, despite the fact that he suffered from chronic diarrhoea and frequent colds. The Committee found inhuman conditions of detention within the meaning of article 7.

In *Massiotti v Uruguay*[17] the convicted prisoner was held in a cell where, during the rainy period, the water was 5 to 10cm deep on the floor of the cells. The cells measured 4m by 3 m and held 35 prisoners. The prisoners were kept indoors under artificial light all day and the prison had no open courtyard to permit exercise. The prisoner was transferred to another prison where there was overcrowding of cells and insufficient sanitary conditions. The prisoner was subjected to hard labour and poor food and was subject to interrogation, harassment and severe punishment. The Committee found inhuman treatment with the meaning of article 7.

In *Marais v Madagascar* and *Wight v Madagascar*[18] the prisoners were forced to spend several months incommunicado in tiny cells (1.5 by 2 metres), at times without light or chained to a bed spring. The Committee found inhuman conditions of detention within the meaning of article 7.

In *Ambrosini v Uruguay*[19] the prisoner was held incommunicado in an unidentified place, confined with 4 other political prisoners in a cell measuring 4.2 by 2.5 metres in conditions seriously detrimental to his health. The Committee held that articles 7 and 10 had been violated. Article 10 was violated because the prisoner was held incommunicado for months and was denied the right to be visited by a family member. However, the Committee did not indicate whether the conditions amounted to 'cruel treatment', 'inhuman treatment' or 'degrading treatment'.

In *De Bouton v Uruguay*[20] the prisoner was subjected to 'moral and physical ill treatment' including once being forced to stand for 35 hours, her wrists were bound causing pain and her eyes kept continuously bandaged. The conditions of detention grew worse with the prisoner kept sitting on a mattress, blindfolded, not allowed to move for many days and only being allowed to take a bath every 10 to15 days. The Committee expressed the view that there had been violations of articles 7 and 10(1) on the basis of evidence of 'inhuman and degrading treatment'.

In *Vasilskis v Uruguay*[21] the Committee found violation of articles 7 and 10(1) on the basis that the prisoner's failure to perform her tasks led to punishment by solitary confinement for up to 3 months and prohibition of visits.

Article 7: Degrading treatment

Degrading treatment is the weakest level of a violation of article 7. The severity of the suffering imposed is of less importance here than the humiliation of the victim, regardless of whether this is in the eyes of others or those of the victim. The overriding considerations are the circumstances of the individual case and the principle of proportionality. While the use of force may be justified or necessary in connection with an arrest or breaking up a violent demonstration, mere handcuffing, slapping or hairpulling may constitute degrading treatment when this contradicts the principle of proportionality in light of the specific circumstances of the case.[22]

In *Conteris v Uruguay*[23] the Committee expressly designated as 'degrading treatment' within the meaning of article 7 certain arbitrary prison practices in the Libertad Prison in Montevideo aimed at humiliating prisoners and making them feel insecure (repeated solitary confinement, subjection to cold, persistent relocation to a different cell). The Committee found violation of article 7 because the prisoner had been subjected to harsh and degrading conditions of detention. In addition to repeated solitary confinements, the prisoner was held in the coldest part of the prison despite suffering from severe rheumatism in his spine, which often prevented him from leaving his cell for a few minutes exercise.

Some cases involved women prisoners in Uruguay, who were subjected to specific humiliation in the form of hanging naked from handcuffs or being forced to maintain a certain position for long periods of time. The Committee stressed, in addition to the severe violations of article 7, the special element of degrading treatment.[24]

In *Larrosa v Uruguay* [25] the prisoner was frequently punished in prison and from October 1980 to March 1981 he was allowed to receive only one visitor. He had also been held in what was called 'La Isla' – a prison wing of small cells without windows, where the artificial light was left on 24 hours a day and the prisoner was kept in solitary confinement for over a month. The Committee found that articles 7 and 10(1) had been violated.

Article 7: Cruel, inhuman or degrading punishment

Since all punishment contains an element of humiliation and perhaps also inhumanity, an additional element of reprehensibleness must also be present for it to amount to a violation of article 7. It is insufficient that punishment is extraordinary, although this may be indicative of degrading, inhuman or cruel punishment.[26]

In its General Comment 20, the Committee stated that it was not necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinction depends on the nature, purpose and severity of the treatment applied.[27]

The Committee noted that the prohibition in article 7 relates to acts of physical pain *and* mental suffering of the prisoner and that the prohibition extends to corporal punishment, including excessive chastisement ordered as an educative or disciplinary measure.[28]

The Committee noted that prolonged solitary confinement may amount to acts prohibited by article 7.[29]

In *Vuolanne v Finland*[30] where the prisoner was subject to solitary confinement, the Committee found that no severe pain or suffering, whether physical or mental, was inflicted upon the prisoner in this case nor did it appear that the solitary confinement, having regard to its strictness and duration, produced any adverse effects on the prisoner. Furthermore, it had not been established that the prisoner suffered any humiliation or that his dignity was interfered with apart from the embarrassment inherent in the disciplinary measure to which he was subjected. The Committee expressed the view that 'for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty'.

Article 10: Humane treatment while in detention

Article 10(1) extends to all cases of detention and imposes a minimum requirement of humane treatment with respect for the inherent dignity of the human person. In its General Comment No 21, the Committee stated that for detainees article 10(1) complements the ban on torture or other cruel, inhuman or degrading treatment or punishment in article 7.[31] While the Committee has found that inhuman conditions of detention can constitute violation of article 7, in a large number of cases in

which the Committee termed the conditions of detention inhuman it merely found violations of article 10. In a number of cases, the conditions of detention at the Libertad Prison in Montevideo during the period of military dictatorship were deemed by the Committee to be in violation of article 10 in their entirety (constant harassment, threats, humiliation and arbitrary punishment by prison personnel, lack of food and natural light, withholding of newspapers or radios, state of permanent fear and insecurity).[32] As previously noted, however, in the notorious punishment cells 'La Isla', where prisoners of Libertad were forced to spend up to 90 days, the conditions as such (minute cells without windows or facilities, 24 hours of artificial light) reached the limit of inhuman treatment pursuant to article 7.[33]

Solitary confinement may represent inhuman treatment within the meaning of Article 10 and perhaps article 7 as well, particularly where accompanied by aggravating circumstances such as lengthy duration, being kept incommunicado, small cell and little light.[34]

In *Gomez de Voituret v Uruguay*[35] the prisoner was 'kept in solitary confinement for several months in conditions which failed to respect the inherent dignity of the human person'. The conditions in question seemed to refer to the fact that her cell was 'almost without natural light' and that she as not allowed to leave it. The Committee found that article 10(1) was violated but not article 7.

In *Parkanyi v Hungary*[36] the Committee found that permitting only five minutes a day for personal hygiene and five minutes for exercise in the open air were incompatible with article 10.

Other jurisprudence on inhuman or degrading treatment or punishment

The European Court of Human Rights (the European Court) was established to ensure compliance by State Parties with the European Convention on Human Rights (the European Convention).[37] Until recently, cases which reached the Court originated from applications lodged with the European Commission of Human Rights (the European Commission).

The European Court and European Commission have considered the phrase 'inhuman or degrading treatment or punishment' when examining allegations of violations of article 3 of the European Convention. Article 3 is similar to ICCPR article 7 and states:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Because article 3 of the European Convention and article 7 of the ICCPR are in virtually identical terms, the jurisprudence of the European Court and Commission in interpreting article 3 of the European Convention assists the interpretation of article 7 of the ICCPR.

The European Court has stated that the assessment of the minimum level of severity of 'inhuman' and 'degrading' treatment contrary to article 3 is relative and must take account of all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in the some cases, the sex, age and state of health of the victim.[38]

'Inhuman treatment' covers 'at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable'.[39]

Treatment which constitutes 'degrading treatment' occurs where the victim had undergone, in the eyes of others or in his or her own eyes, humiliation or debasement attaining a minimum level of severity. This too had to be assessed with regard to the circumstances of the case.[40]

Treatment is 'degrading' if it is such as to arouse in the person subjected to it feelings of fear, anguish and inferiority capable of humiliating and debasing this person and possibly breaking his or her physical or moral resistance.[41] Treatment may also be said to be 'degrading' if it grossly humiliates a person in front of others or drives him or her to act against his or her will or conscience.[42]

A measure which does not involve physical ill-treatment but lowers a person in rank, position, reputation or character may also constitute 'degrading' treatment but again provided it is of a minimum level of severity, thereby interfering with human dignity.[43]

For punishment to be 'degrading', the humiliation or debasement must attain a particular level and must be more than the usual level of humiliation arising from generally accepted forms of judicial punishment, such as imprisonment. The nature and the context of the punishment itself and the manner and method of its execution should be considered in determining whether a punishment constituted degrading punishment. [44]

In addition to the objective nature of the treatment and its effects on the person subjected to it, the purpose of the authority which resorted to the measure may be of relevance in determining whether the measure fulfils the essential elements of treatment prohibited by article 3. It is essential to consider whether the treatment in question denotes contempt or lack of respect for the personality of the person subjected to it and whether it was designed to humiliate or debase him or her instead of, or in addition to, achieving other aims.[45]

In *Denmark, Norway, Sweden and the Netherlands v Greece*[46] the European Commission distinguished between acts prohibited by article 3 and what was called 'a certain roughness of treatment', which was tolerated by most detainees and even taken for granted. It 'may take the form of slaps and blows of the hands on the head or face. This underlines the fact that the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive varies between different societies and even between different sections of them.'

In that case the European Commission found that conditions of detention at three detention camps violated article 3 of the European Convention. At one camp prisoners were placed under strict solitary confinement for 3 days immediately after their arrest, were deprived of access to elementary sanitary facilities and were kept alone for this period, without food. There were no beds or mattresses. Medical treatment was not provided on request or given inadequately or belatedly. Solitary confinement cells in the basement area allowed prisoners hardly any form of recreation; there was no access to open air; the cells were too small to permit exercise; and the lack of light virtually excluded reading. The European Commission did not explain which particular aspects of the conditions involved violations of article 3, as the accumulation of poor conditions was more than sufficient for its finding. In relation to another camp the European Commission referred specifically to the complete absence of heating in winter, the lack of hot water, the poor lavatory facilities, the unsatisfactory dental treatment and the restriction of letters and visits to prisoners as evidence aggregating as a combination of conditions of detention which was unjustifiable and a violation of article 3. In relation to the third camp the European Commission referred to the conditions of 'gross overcrowding and its consequences'[47] where the detainees were housed in dormitories of 100 to 150 persons. It considered that these conditions endangered the physical and mental health of the detainee. Without prescribing time limits, it considered the duration of bad conditions relevant to its findings. It found no violation of article 3 of the Convention where the period of detention in small isolation cells was comparatively short.

In *Ireland v United Kingdom*[48] the European Court considered five techniques of interrogation: (a) spending hours spreadeagled against a wall with fingers high above the head and legs spread apart and the feet back, causing then to stand on their toes with their weight mainly on the fingers; (b) being hooded; (c) continuous loud and hissing noise; (d) deprivation of sleep; (e) deprivation of food or drink. It found that these practices constituted inhuman and degrading treatment but not torture. The European Court stated that the distinction between torture and inhuman or degrading treatment was the level of intensity and cruelty of the suffering the acts occasioned. It stated that the five techniques constituted inhuman treatment because they were applied in combination, with premeditation and for hours at a stretch and caused, if not actual bodily injury, physical and mental suffering. The techniques were also degrading because they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance.[49]

In cases where the question was raised whether solitary confinement of a detainee constituted inhuman treatment, the European Commission took the position that such confinement was in principle undesirable, particularly when the prisoner was in detention on remand, and might only be justified for exceptional reasons. For the question of whether the treatment is inhuman or degrading, regard must be had to the surrounding circumstances, including the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.[50]

In *Krocher and Moller v Switzerland*[51] prison conditions included isolation, constant artificial lighting, permanent surveillance by closed-circuit television, denial of access to newspapers and radio and lack of physical exercise. After one month, the isolation regime gradually eased. The European Commission found no violation of article 3 of the European Convention. The period of isolation, the close medical supervision of the prisoners and the necessity of the conditions to ensure security to the prison were relevant factors, as the prisoners were considered dangerous terrorists and there was a risk of escape and collusion. The European Commission reaffirmed the view stated in previous cases 'that complete sensory isolation coupled with total social isolation, can destroy the personality and constituted a form of treatment which cannot be justified by the requirements of security or any other reasons'.[52] In this case, however, the sensory isolation was not considered total, apparently because the cells had not been soundproofed.[53]

In relation to the use of physical force against a detainee, a certain amount of force may be inevitable in the instances of resisting arrest or an attempt to flee or

assault an officer or fellow detainee. However the form and intensity of the force must be proportionate to the nature and seriousness of the resistance or threat.[54]

The European Commission has held on the one hand that handcuffing a prisoner in public is clearly not so serious a measure as to amount to degrading treatment within the meaning of article 3.[55] On the other hand, although the publicity surrounding a particular measure may be of relevance for the assessment under article 3, the absence of publicity does not necessarily prevent the treatment from attaining the prescribed level of severity. It may suffice that the victim is humiliated in his or her own eyes.[56]

Recently, the European Court emphasised that, in respect of a person deprived of liberty, any recourse to physical force which has not been made strictly necessary by his or her own conduct diminishes human dignity and is in principle an infringement of the right set forth in article 3.[57]

In *Tomasi v France*[58] the applicant was subjected to considerable ill treatment over a period of 2 years while in police custody, including being slapped, kicked, punched, made to stand for long periods without support, handcuffed behind his back, made to stand naked in front of an open window, being deprived of food and threatened with a firearm. The Government was unable to offer an explanation for the injuries suffered by the applicant. The European Court did not accept the argument that the injuries suffered did not meet the level of severity required to constitute a violation of article 3 and found that there had been such violation.

By contrast, in *Klaas v Germany*[59] a female social worker and her 8 year old daughter were stopped by police for allegedly failing to stop at a traffic light. She was requested to provide a breath specimen and an altercation and struggle ensued, which resulted in Mrs Klaas being handcuffed. In the scuffle, she suffered bruising, was rendered unconscious for a short period and received long-term injury to her left shoulder. The European Commission concluded that the treatment of Mrs Klaas was a disproportionate use of force but the European Court disagreed and found no violation of article 3, primarily on the basis of insufficient evidence that the force used was unnecessary in the circumstances.

In *Raninen v Finland*[60] the applicant was arrested, detained, convicted and sentenced for refusing to perform military service. After a court hearing he was transported back to prison to be released. On his arrival he was handcuffed in public and escorted to a military hospital. Only after being questioned the next day was he formally arrested. In the particular circumstances the European

Commission found that the recourse to physical force by placing the applicant in handcuffs for 2 hours in connection with the deprivation of his liberty had not been made strictly necessary by his own conduct or any other legitimate consideration. It noted that he appeared handcuffed in public, including in front of his support group. It considered that his handcuffing diminished his human dignity and amounted to 'degrading treatment' within the meaning of article 3.[61] The Government conceded that the handcuffing of the applicant had not been made necessary by his own conduct. However, the European Court found that there was no violation of article 3 because it did not attain the minimum level of severity required. There was no evidence to suggest a causal link between the treatment and mental or physical suffering of the applicant. There was no evidence that the handcuffing was aimed as debasing or humiliating him, as the officer believed he had complied with relevant military orders.[62] The European Court stated that, in considering whether a punishment or treatment is 'degrading', it would have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with article 3. The public nature of the punishment or treatment may be relevant but the absence of publicity would not necessarily prevent a treatment from falling into that category; it may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others.[63]

3.4.5 The Department's submissions

The Department conceded that with the benefit of hindsight the complainant's management in the observation room could have been better handled by the APS. The Department also conceded that the matter was not fully investigated at the time by the Department or the APS.

In relation to the complainant's placement in the observation room, the Department submitted that the complainant was placed in the observation room to think about his decision to refuse to be fingerprinted as this room was in close proximity to the room where fingerprinting was conducted. The Department submitted that it was an issue of operational convenience and was not intended as 'punishment'.

In relation to the use of restraints by the APS Officers, the Department submitted that the APS General Order 9 provided for the use of restraints in certain circumstances including consideration of whether the person is violent or his or her demeanour gives rise to the apprehension of violence and of the need to prevent the person in custody from injuring himself or herself or any other person. The

Department submitted that, in the circumstances of the security incident, the initial restraint of the complainant was justified and in accordance with instructions. The Department conceded that at face value it would appear that the complainant was restrained for a lengthy period. The Department indicated that it regrettably did not have any documentation from the APS that would explain the necessity for the length of time that the complainant was restrained. The Department further argued that there was no evidence that the intention of the APS officers in restraining the complainant was to humiliate and debase him such as to be 'degrading treatment' nor did the complainant appear to have suffered intense physical and mental suffering to the level required to constitute 'inhuman treatment' within the meaning of article 7 of the ICCPR.

In relation to the period of time that the complainant was held in the observation room, the Department indicated that the complainant was placed in the observation room on 8 May 1997 and was held there until 14 May 1997. The violent incident that led to the restraining of the complainant occurred on the evening of 10 May. The Department's evidence indicates that between 8 and 10 May the complainant was asked a number of times to leave the observation room and to return to the main part of the compound but he either refused to do so or did not respond to these requests. Consequently, the Department submitted that it was the complainant's own actions which led to his being held in the observation room for this period. The Department further submitted that the complainant was under observation for his own wellbeing and protection and that he was also visited regularly by the centre's nurse and a doctor during these periods. The Department conceded that it did not have documentation from the APS that would explain the reason for the complainant's continued holding by the APS in the observation room until 14 May 1997.

In relation to the physical conditions of the observation room, particularly its lighting 24 hours a day and the absence of a window to provide natural light and fresh air, the Department submitted that the observation room at the Perth IDC was introduced to lessen the risk of deaths in custody on the advice of the Western Australian Correctional Services and as a consequence of the recommendation of the Royal Commission into Aboriginal Deaths in Custody. The Perth IDC was a small facility and unfortunately the only room available for observation was an internal room. The Department submitted that, while the room was in use, constant lighting for 24 hours a day was required to enable the observation and the protection of the person. The room was provided with air through the air conditioning system, as is the remainder of the detention centre. The Department argued that, while the observation room may not meet the international standard contained in Standard

Minimum Rule 10, this did not necessarily mean that the placing of persons in the observation room amounted to inhumane treatment and a breach of article 10 of the ICCPR.

3.4.6 Findings

I made the following findings.

1. The initial placement of the complainant in the observation room on 8 May 1997 was a form of punishment to secure his cooperation in fingerprinting. This was an act or practice that did not meet the minimum requirements for humane treatment as required by article 10(1) of the ICCPR and was an act or practice contrary to or inconsistent with human rights under the Act.

2. The complainant's placement in the observation room ceased to be contrary to or inconsistent with human rights when he was asked to return to the main compound on 9 May 1997. His placement there on 9 and 10 May while he was refusing to eat may also have been justified.

3. The initial use of restraints on the complainant between 10 and 11 May 1997 was justified but their continued use while he was secured in the observation room, namely handcuffs for 8½ hours and shackles around the ankles for 7 hours, was an act or practice that did not meet the minimum requirements for humane treatment as required by article 10(1) of the ICCPR and was an act or practice contrary to or inconsistent with human rights under the Act.

4. The holding of the complainant in the observation room between 10 and 14 May 1997, which was more than 3 days after the security incident of 10 May 1997, was excessive, unnecessary and not justified in the circumstances. This act or practice did not meet the minimum requirements for humane treatment as required by article 10(1) of the ICCPR and was an act or practice contrary to or inconsistent with human rights under the Act.

5. The holding of the complainant in the observation room for 6 days between 8 and 14 May 1997, in which the conditions of the observation room were such that the fluorescent light was left on for 24 hours a day and there was no window in the room to allow natural light and fresh air, was an act or practice that did not meet the minimum requirements for humane treatment as required by article 10(1) of the ICCPR and was an act or practice contrary to or inconsistent with human rights under the Act.

6. I did not find any violations of article 7 of the ICCPR.

I gave the following reasons for my findings.

1. The Perth Station Instructions stated that where, due to the detainee's medical or mental condition, close supervision of a detainee was required for the wellbeing of the detainee or others, then that supervision could occur in a sick bay/observation room. There is no evidence that the complainant was initially placed in the observation room because his medical or mental condition required that he be kept under close supervision for the wellbeing of himself or other detainees. Perth Station Instructions also stated that detainees were not to be placed in a sick bay/observation room for punishment. The evidence indicates that the complainant was initially placed in the observation room overnight because he refused to be fingerprinted. In my view, the complainant was placed in the observation room as a form of punishment for his refusal to be fingerprinted and to secure his cooperation. After the complainant had spent from 8 to 10 May 1997 in the observation room and after the complainant had requested that the lights be turned out at night presumably so that he could sleep, there was an altercation between the complainant and an APS Officer. It can be inferred from the circumstances that the placement in the observation room contributed to the complainant's fear, anguish and insecurity, which in turn contributed to the altercation with the APS Officer. In my view, the complainant's initial placement in the observation room, which was contrary to Perth Station Instructions, was not reasonable in the circumstances of this case. The placement in the observation room constitutes inhumane treatment and/or punishment because it was disproportionate in the circumstances and unjustified. In addition, the treatment and/or punishment was capable of humiliating and debasing the complainant, and arousing fear, anguish or inferiority in the complainant and possibly breaking his resistance. The complainant indicated in his letter of complaint that he suffered considerable mental and physical pain and anguish as a result of these events during his detention at the Perth IDC. Accordingly, I consider that he was not treated with humanity or in a humane manner and with respect for the inherent dignity of the human person.

2. While held in the observation room and following an altercation between the complainant and an APS officer during which an APS officer was injured, the complainant was handcuffed for approximately 8½ hours and was shackled by flexi-cuffs around his feet for approximately 7 hours. During the period in which the complainant was restrained, he was already secured in the observation

room, which was locked from the outside. In my view, the initial handcuffing of the complainant was justified due to fear of injury. However, the extended period in which the complainant was left handcuffed and shackled by his feet alone in the observation room was totally inappropriate. Standard Minimum Rule 33 forbids the use of restraints as punishment and prohibits the use of chains and irons as restraints. Standard Minimum Rule 34 states that instruments of restraint must not be applied for any longer time than is strictly necessary. Standard Minimum Rule 54 states that officers must use no more force than is necessary. APS General Order 9 on the 'Use of Force' permitted use of handcuffs to protect the detainee or another person. There is no evidence to suggest that the continued use of the restraints was justified on the basis that the complainant was intending to injure himself and there is no evidence that, after a period of time, there was still a fear of injury to others. General Order 9 did not contain guidelines on the shackling of feet but provided for the use of handcuffs applied to the hands in front of the person as an unusual measure which at times may be appropriate or necessary. The shackling of the complainant's feet was not authorised under General Order 9 and was contrary to Standard Minimum Rule 33. The use of handcuffs as punishment was not in accordance with General Order 9, which restricted the use of handcuffs to instances where the person was likely to escape or was at risk of injuring himself or others.

3. The Department and the APS have not provided any reasonable explanation for the period of time during which the complainant was restrained. The Department conceded that this matter was not fully investigated by the Department or APS and that there was minimal documentary evidence explaining the circumstances. It is at least open to the conclusion that the complainant was handcuffed and shackled for an extended period of time as punishment. In my view, the use of restraints for an extended period of time in the circumstances of this particular case was neither appropriate nor necessary. In my view, the intensity of the force used was not proportionate to the nature and seriousness of the resistance or threat posed by the complainant. The shackling of the complainant for a period of approximately 7 hours and his handcuffing for approximately 8½ hours constituted inhumane treatment and/or punishment in the circumstances of the case because it was a disproportionate use of force and unjustified. In addition, I consider that the use of physical restraints in the circumstances had not been made strictly necessary by the complainant's conduct and it therefore diminished human dignity.

4. The Perth Station Instructions in force at the time stated that the sick bay/observation room was not to be used for punishment and the period of isolation

in the sick bay/observation room was not to extend beyond 24 hours unless the Department authorised an extension. The Department has not provided any reasonable explanation for the isolation of the complainant in the observation room for the period between 10 May 1997 and 14 May 1997 nor indicated whether it authorised continued isolation. The Department conceded that there was minimal documentary evidence explaining the circumstances. In my view, the period of the isolation in the observation room was a form of punishment and constituted inhumane treatment and punishment. I consider that it was disproportionate punishment in the circumstances and unjustified. In addition, this treatment was capable of humiliating and debasing the complainant and of arousing fear, anguish or inferiority in the complainant and possibly breaking his resistance.

5. Principle 6 of the Body of Principles prohibits cruel and degrading treatment or punishment of detainees which includes holding the detainee in conditions which deprive him or her temporarily of his or her awareness of the passing of time. Standard Minimum Rules 10 and 11 prescribe standards for the physical premises in which detainees are held, including the requirement for a window for natural light and fresh air. The conditions in the observation room were such that the fluorescent light was left on for 24 hours a day, making it hard for detainees to keep track of time and to sleep. There was no window in the room to allow natural light and fresh air to enter and video observation equipment was not installed. There were no toilet or bathing facilities in the observation room, although I note that APS officers accompanied the complainant to the toilet on several occasions during his detention in the observation room. In my view, the physical conditions of the complainant's detention did not respect the inherent dignity of the human person. Accordingly, I consider that the physical conditions of the observation room, particularly its artificial lighting 24 hours a day and the absence of a window to allow natural light or fresh air, did not meet minimum requirements for article 10(1) of the ICCPR.

6. The facts of the complainant's treatment, as I have found them and as the Department has admitted them, clearly constitute inhumane treatment and treatment that fails to respect the inherent dignity of the human person. I have considered carefully whether the treatment also constitutes cruel, inhuman and degrading treatment within article 7 of the ICCPR. I have reviewed the jurisprudence of the Human Rights Committee on article 7 of the ICCPR and of the European Commission and Court on the corresponding article of the European Convention, article 3. The jurisprudence makes it clear that treatment

> that violates article 7 must be more intense and serious than that required to constitute a violation of article 10. I do not consider that the placement or continued detention of the complainant in the observation cell reaches the required level of intensity and seriousness but that the lengthy period during which he was cuffed and shackled comes very close to doing so. However on balance I am not satisfied that the treatment of the complainant violates article 7 of the ICCPR.

3.5 Allegation 2

3.5.1 The evidence

The complainant alleged that, while in immigration custody at the Perth IDC, he did not receive adequate medical care. It became apparent to the nurse of the Perth IDC that the complainant would require treatment at an external medical centre to receive adequate treatment for penile warts. APS officers at the Perth IDC required that the complainant be handcuffed when escorted to the external medical facility. The complainant refused to be handcuffed and accordingly was not treated at an external medical facility.

On-site medical services at the Perth IDC at the relevant time included a nurse from a local medical centre who visited the Perth IDC regularly. Doctors were on call and attended when required. Referral to the hospital, dentist and psychiatrist was conducted on a needs basis. APS officers were responsible for dispensing medication to detainees.[64]

The complainant alleged that he did not receive medical care, as APS officers would only take him to a medical centre if he wore handcuffs. He states:

> I have a medical problem on my private parts and back of head. They say before I go to hospital that they have to handcuff me which I refuse because I'm not a criminal.[65]

Departmental medical records indicate that between December 1996 and May 1997 the complainant complained of two medical conditions, a superficial skin growth on the back of his neck and penile warts. The complainant was examined and treated by both the nurse of the Perth IDC and a visiting medical practitioner inside the Perth IDC. The evidence indicates that the complainant received adequate medical attention in relation to his skin condition. However, it became apparent to the nurse of the Perth IDC that the complainant should attend the local medical

centre for treatment of his penile warts. The medical records indicate that in March 1997 APS officers required that the complainant wear handcuffs while being escorted from the Perth IDC to the external medical facility. The complainant refused to wear handcuffs and as a result he was not escorted to the local medical centre for treatment of his penile warts. This caused the complainant discomfort and distress, as the warts were not removed. In April 1997 the nurse of the Perth IDC made arrangements for the necessary medical equipment to be available at the Perth IDC for the visiting medical practitioner to treat the complainant and remove the penile warts on his next visit there. The medical records do not indicate whether the warts were treated prior to the complainant's removal from Australia on or about 16 June 1997.

3.5.2 Relevant guidelines

General Order 9, 'Use of Force', of the APS General Orders Manual limited the use of force by APS officers to circumstances to effect or attempt to effect an arrest; to prevent a person who has been arrested from escaping; to protect themselves or another person; or otherwise as lawfully required in the execution of their duties. General Order 9 also stated that an APS officer shall not subject a person to greater indignity than is reasonable and necessary in the circumstances.

Migration Series Instructions 92 on General Detention Procedures restricted the use of handcuffs to where the person was violent or his or her demeanour gave rise to the apprehension of violence; the person in custody had attempted or was likely to attempt to escape; the person in custody was required to be escorted with other persons in custody; and there was a need to prevent the person in custody from injuring himself or herself or any other persons.

3.5.3 Relevant international instruments

Article 10(1) of the ICCPR requires that a person in detention be treated in a humane manner. The scope and content of the right declared in article 10(1) can be interpreted with the assistance of the Body of Principles and the Standard Minimum Rules.

Principle 24 of the Body of Principles states:

> A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary.

This care and treatment shall be provided free of charge.

Standard Minimum Rule 22 states:

(2) Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of the sick prisoners, and there shall be a staff of suitable trained officers.

Standard Minimum Rule 33 states:

The instruments of restraint, such as handcuffs, chains, irons and straightjackets, shall never be applied as punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:

(a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;

(b) On medical grounds by direction of the medical officer;

(c) By order of the Director, if other methods of control fail, in order to prevent the prisoner from injuring himself or others or from damaging property; in such instances the Director shall at once consult the medical officer and report to the higher administrative authority.

Standard Minimum Rule 34 states:

The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary.

Standard Minimum Rule 54(1) states:

Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

3.5.4 The Department's submissions

The Department has submitted that the use of handcuffs can be considered reasonable in certain circumstances, such as the prevention of escape or the protection or safety of the person being restrained or others. It has submitted that the appropriate and proportional use of handcuffs in proper circumstances cannot in itself be a breach of the ICCPR. It has argued that in the complainant's case there is insufficient evidence to indicate that the requirement to restrain him was unreasonable. The Department has further argued that there is no information or evidence to indicate that APS General Order 9, 'Use of Force', which required officers not to subject a person to greater indignity than was reasonable and necessary in the circumstances, was not complied with by APS officers at the time of this incident. The Department submitted that this was particularly the case as the complainant's past behaviour and the likely timing of his removal from Australia could have given rise to legitimate security concerns by the APS that the complainant should be restrained while outside the Perth IDC. It also noted that as it turned out the complainant was not in fact restrained, due to his refusal to attend the medical appointment in such circumstances.

The Department submitted that the Commission should not assume that the complainant's medical condition could only be treated in an external medical facility. It conceded that treatment at the external facility would have been more congenial to the complainant and convenient to the operators of the Perth IDC. However, the Department argued that this did not necessarily imply that treatment at the Perth IDC would have been inappropriate in the circumstances. It submitted that appropriate medical treatment could be and was in fact arranged within the IDC. The complainant's medical records indicate that the Perth IDC nurse made arrangements on 9 April 1997 to have appropriate cryotherapy tools available for the visiting medical practitioner to treat the complainant on his next visit.

The Department has conceded that treatment within the Perth IDC was not the first preference but that it was subsequently regarded as the best choice when treatment was delayed due to the complainant's refusal to attend the external medical provider while handcuffed. The Department has submitted that whether or not the penile warts were ultimately removed prior to the complainant's departure from Australia does not affect this conclusion.

The Department has further argued that, while the non-removal of the warts may have caused the complainant some discomfort, they had previously been treated within the Perth IDC and there was no suggestion that his condition constituted a

threat to the complainant's immediate health and well being. The Department submitted that this treatment had not yet become necessary as opposed to being preferred or convenient. It emphasised that there is no evidence that the complainant was deliberately or arbitrarily denied the necessary or appropriate medical treatment.

3.5.6 Finding

I made the following finding.

1. The insistence by the APS officers that the complainant wear handcuffs while being escorted to medical appointments at an external facility in March 1997 resulted in the complainant not receiving medical treatment for his continuing medical condition of penile warts at least until equipment was provided at the IDC. I do not consider, however, that this was an act or practice that did not meet the minimum requirements for humane treatment as required by article 10(1) of the ICCPR or that it was an act or practice contrary to or inconsistent with human rights under the Act.

I gave the following reasons for my finding.

1. Standards set out in Principle 24 of the Body of Principles and Standard Minimum Rule 22 indicate that adequate health care in detention is essential to the requirement of humane treatment under article 10(1) of the ICCPR and the Act.

2. Standard Minimum Rule 33 states that handcuffs must not be used except as a precaution against escape during transfer or injury or on medical grounds by the direction of the medical officer. Standard Minimum Rule 54 states that the force exerted on detainees must be no more than is strictly necessary. APS General Order 9 stated that handcuffs were an unusual measure but may be necessary and appropriate at times. General Order 9 restricted the use of handcuffs to instances where it was likely that the detainees will be violent or attempt to escape or to prevent injury or whether the detainee was to be escorted with other persons in custody. General Order 9 also stated that APS officers shall not subject detainees to greater indignity than was reasonable and necessary in the circumstances. The Department has submitted that the complainant's past behaviour and timing of removal from Australia may have given rise to legitimate security concerns. I am not satisfied on the limited evidence available that this was not a genuine and reasonably held concern.

3. The complainant was not handcuffed in fact and was not taken to the external medical facility for treatment. Had his condition presented a significant risk to life or general wellbeing this may have meant that he did not receive adequate medical treatment. But this was not that case here. The condition, though distressing, did not require urgent treatment. I consider it significant that alternative arrangements were made for the complainant to receive treatment within a reasonable period of time. I do not consider that the procedure adopted was inhumane. On the contrary the Department made commendable efforts to accommodate the complainant.

3.6 Allegation 3

3.6.1 The evidence

The complainant alleges that he was held in immigration custody at the Perth IDC for more than 12 months in poor conditions of detention.

The Department has advised that

- between 22 April 1996 and 17 May 1997 the complainant was held at the Perth IDC in immigration custody
- between 17 May 1997 and 19 May 1997 the complainant was held in police remand
- between 19 May 1997 and 23 May 1997 the complainant was held in court remand at Casuarina Prison
- between 23 May 1997 and 16 June 1997 the complainant was held in immigration custody but it was decided that, in light of his previous assault on an APS officer, the complainant should not return to the Perth IDC but remain at the remand centre until his departure from Australia
- on or about 16 June 1997 the complainant departed Australia.

Therefore, the complainant spent a period of over 12 months in immigration detention at the Perth IDC.

The conditions and services at the Perth IDC were examined by the Commission and described in my report to the Attorney-General *Those who've come across the*

seas: Detention of unauthorised arrivals.[66] In summary, the Commission reported that the Perth IDC is a medium-security facility located at Perth Airport. It is designed, like a police lock-up, for overnight and other very short-term detention pending deportation. The conditions in the Perth IDC in 1996-97 included dormitory accommodation, and consequent loss of privacy, surveillance cameras throughout, inadequate natural lighting and ventilation, the absence of welfare officers and on-site interpreters, very limited recreational opportunities, especially external recreation facilities (only a small open-air exercise yard enclosed by a 20 foot brick wall is available), restrictions on movement and very limited educational services. These made detention at the Perth IDC for longer than seven days inhuman and degrading and a serious violation of human rights.[67]

In his letter of complaint, the complainant claimed that he had suffered considerable mental and physical pain and anguish as a result of his immigration detention at the Perth IDC.[68]

3.6.2 The Department's submissions

The Department has submitted that it did not wish, for the purposes of this complaint, to make submissions in relation to the findings of the Commission in its report *Those who've come across the seas: Detention of unauthorised arrivals,* as this was a matter the Department was considering separately.[69]

In relation to the period of the complainant's detention, the Department submitted that, for people who enter Australia unlawfully and seek to engage Australia's protection obligations, the average period of time in detention at the Perth IDC was in the range of 6 to 12 months, although longer periods were not uncommon. It submitted that in the complainant's case the period of detention would have been considerably less if he had advised the Department of his true identity from the start.

The Department further submitted that the complainant's detention flowed automatically from the operation of the *Migration Act 1958*. The Migration Act did not provide officers of the Department with discretion to release the complainant from immigration detention.

However, the Department conceded that the Perth IDC was a less than ideal facility for the long-term detention of unlawful non-citizens. Unfortunately, it is the only facility available for administrative detention in Perth outside the Western Australian prison system.

The Department submitted that, in recognition of the deficiencies of the Perth IDC, it had introduced a policy of transferring women and family groups to other detention centres and seeking to relocate longer term detainees from the facility. While acknowledging that there were areas for improving the facility, the Department indicated that it did not accept that the Perth IDC failed to meet minimum standards or breached human rights. The Department submitted that since the complainant's detention there had been a number of significant improvements to the facility.

3.6.3 Findings

I made the following findings.

1. The period of the complainant's detention of over 12 months at the Perth IDC was prima facie excessive and arbitrary in breach of the ICCPR. However, it cannot in itself constitute an 'act or practice' under the Act. The complainant's detention flowed automatically from the operation of the *Migration Act 1958*. The Migration Act did not provide officers of the Department with the discretion to release the complainant from immigration detention. The provisions of the Migration Act are mandatory in their terms and conduct in accordance with them cannot constitute an 'act' or 'practice' by or on behalf of the Commonwealth.

2. The complainant was detained at the Perth IDC for a period of over 12 months between 22 April 1996 and 17 May 1997 in conditions of detention which did not meet the minimum requirement for prisoners at administrative detention centres as required by article 10(1) of the ICCPR. Therefore, the conditions of his detention were contrary to or inconsistent with human rights under the Act. However, the Commission has dealt with those issues in its report *Those who've come across the seas: Detention of unauthorised arrivals*.[70] Accordingly, in accordance with section 20(2)(c)(v) of the Act I have decided not to pursue my inquiry into these matters.

I gave the following reasons for my findings.

1. The *Migration Act 1958* provides for a statutory regime of mandatory detention of all unlawful non-citizens. All persons who have no authority to be in Australia are known as 'unlawful non-citizens'. The Migration Act states that a non-citizen who does not hold a valid visa is an unlawful non-citizen.[71] Section 189 of the Migration Act states that, if a migration officer knows or reasonably

suspects that a person is an unlawful non-citizen, the officer must detain the person. Section 196 of the Migration Act states that, once detained, unlawful non-citizens must be kept in detention unless otherwise authorised. Under the Act, the Commission has jurisdiction to inquire into 'acts' or 'practices' which are inconsistent with or contrary to human rights. Section 3 of the Act defines an 'act' or 'practice' as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth. The provisions of the Migration Act are mandatory in their terms and conduct in accordance with them does not constitute an 'act' or 'practice' by or on behalf of the Commonwealth.

2. I refer to the conclusions and finding made in respect of the Perth IDC at Part 3, Chapter 5.5 of the Commission's report *Those who've come across the seas: Detention of unauthorised arrivals*[72] that the standard of conditions and facilities at the Perth IDC at the time of the complainant's detention did not meet the minimum requirements for prisoners at administrative detention centres; that the conditions and facilities at the Perth IDC were inadequate for the detention of adults for any period of time in excess of seven days; and that the general conditions at the Perth IDC breached article 10(1) of the ICCPR and human rights under the Act. The Department has addressed many of the issues in that report. I have now reported separately on the situation of the Perth IDC since 1997.[73]

Endnotes

1. Human Rights and Equal Opportunity Commission, *Those who've come across the seas; Detention of unauthorised arrivals*, May 1998, in particular Part 3, Chapter 5.5 at p 79.
2. In 1997 the Department called for tenders to provide the custodial service in immigration centres. In November 1997 the Australasian Correctional Management (ACM), a private custodial service provider, was selected by the Department as the preferred custodial service provider in its immigration detention centres and contractual arrangements were entered into between the Department and ACM. Operational orders were developed by ACM detailing security procedures to be employed at each of the detention facilities. These operational orders appear to have replaced the Perth IDC's Local Procedures (also known as the Perth Station Instructions) which previously prescribed instructions for conduct by APS officers in the period prior to 1997 during which the APS was the custodial service provider.
3. Human Rights and Equal Opportunity Commission, *Those who've come across the seas; Detention of unauthorised arrivals*, May 1998, in particular Part 3, Chapter 5.5 at p. 79.
4. *Migration Act 1958* (Cth), section 273.

5. The Standard Minimum Rules were approved by the United Nations Economic and Social Council in 1957. They were subsequently adopted by the United Nations General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc.A/COMF/611, Annex 1.
6. The Body of Principles were adopted by the United Nations General Assembly in 1988: GA Res. 43/173. Annex: UN Doc. A/43/49 (1988).
7. United Nations Human Rights Committee, General Comment No. 21 (1992), paragraph 5.
8. United Nations, Official Records of the General Assembly, 13th Session, Third Committee, 16th September to 8th December 1958, pp. 160-173 and 227-241.
9. United Nations Human Rights Committee, General Comment No. 21 (1992), paragraph 2.
10. Letter of complaint dated 15 May 1997, p. 2.
11. United Nations Human Rights Committee, General Comment No. 20 (1992), paragraph 5.
12. Nos. 4, 5, 7, 8/1977; Nos. 25, 28, 30, 33, 37/1978; Nos. 49, 63/1979; Nos. 73, 80/1980; Nos. 88, 107, 110/1981; No. 115/1982; No. 159/1983; No. 188/1984; Nos. 240, 242, 255/1987; Nos. 270, 271, 277/1988; M Nowak *UN Covenant on Civil and Political Rights CCPR Commentary* 1993 at pp. 186 et al; D McGoldrick *The Human Rights Committee* 1994, chapter 9, pp. 367 et al.
13. Nowak, at p. 186.
14. Nowak, at p. 188.
15. No. 242/1987.
16. No. 33/1978.
17. No. 25/1978.
18. *Marais v Madagascar*, No. 49/1979; *Wight v Madagascar*, No. 115/1982.
19. UN Doc. A/34/40, p. 124.
20. UN Doc. A/36/40, p. 143.
21. No. 80/1980.
22. Nowak, at p. 133.
23. No. 25/1983.
24. *Arzuaga Gilboa v Uruguay*, No. 147/1983; *de Bouton v Uruguay* No. 37/1978.
25. No. 88/1981.
26. Nowak, at p. 134.
27. United Nations Human Rights Committee, General Comment No. 20 (1992), paragraph 4.

28. Ibid, paragraph 5.
29. Ibid, paragraph 6.
30. UN Doc. A/44/40, p. 249, paragraph 9.2.
31. United Nations Human Rights Committee, General Comment No. 21 (1992), paragraph 3.
32. Nos. 66, 74/1980; Nos.88, 92, 105/1981; Nos. 159, 162/1983; McGoldrick, p. 372 ff; Nowak, at p. 187.
33. No. 88/1981. Nowak, at p. 187.
34. Nos. 88, 90, 109/1981; No. 123/1982; No. 176/1984; No. 265/1987.
35. No. 109/1981.
36. No. 410/1990.
37. The European Convention on Human Rights was signed in 1950.
38. *Ireland v United Kingdom* (1978) 2 EHRR 528, paragraph 162.
39. Yearbook of the European Convention on Human Rights – *The Greek case* (1969) at p. 504 and p. 186.
40. *Ireland v United Kingdom* (1978) 2 EHRR 528, paragraph 162.
41. Ibid, paragraph 167: *Hurtado v Switzerland*, Comm. Rep. 8.7.93, paragraph 67.
42. Yearbook of the European Convention on Human Rights – *The Greek case* (1969) at p. 186.
43. *East African Asians v United Kingdom*, Comm. Rep. 13.12.73, 78-A DR 5, paragraphs 195 and 208.
44. *Tyrer v United Kingdom* 25 April 1978, Series A, Vol. 26 (1979-80) 2 EHRR 25 at paragraph 162.
45. *Raninen v Finland* (1998) 26 EHRR 563 at p. 574, paragraph 52.
46. Yearbook of the European Convention on Human Rights – *The Greek case* (1969) at p. 504.
47. Ibid, p. 497.
48. (1978) 2 EHRR 528.
49. Ibid, paragraph 167.
50. *X v Germany*, Coll.44 (1973), p. 115 (119); *Baader, Meins, Meinhof and Grundman v Germany*, Yearbook XVIII (1975), p. 132 (144-146); *Enslin, Baader and Raspe* v *Germany*, Yearbook XXI (1978), p. 418 (454-460).
51. Application No. 8463/78 (1983).
52. Ibid, paragraph 62.

53. Ibid, paragraph 66.
54. Dijk, Hoof *Theory and Practice of the European Convention on Human Rights*, 3rd Edition 1998.
55. Eg, App.No. 12323/86, Dec 6.3.87, not published.
56. Cf., *Tyrer v United Kingdom* 25 April 1978, Series A, Vol. 26 (1979-80) 2 EHRR 25 at paragraphs 30-35.
57. *Ribitsch v Austria* (A/336), paragraph 38.
58. Judgment of 27 August 1992, Series A, No. 241-A (1993) EHRR 1.
59. 22 Sep 1993, Series A, No. 269 (1994) 18 EHRR 305.
60. (1998) 26 EHRR 563.
61. Ibid, p. 574, paragraph 59.
62. Ibid, p. 588-589, paragraphs 55-56.
63. Ibid, p. 588, paragraph 55.
64. Human Rights and Equal Opportunity Commission, *Those who've come across the seas; Detention of unauthorised arrivals*, May 1998, Chapter 10 'Medical Services' at p. 157.
65. Letter of complaint dated 15 May 1997, p. 2.
66. Human Rights and Equal Opportunity Commission, *Those who've come across the seas; Detention of unauthorised arrivals*, May 1998, in particular Part 3, Chapter 5.5 at p. 79.
67. Ibid, Recommendations at Chapters 5.7-11 and 12.3.
68. Letter of complaint dated 15 May 1997, pp. 1-2.
69. Subsequently the Minister for Immigration and Multicultural Affairs, the Hon Phillip Ruddock, tabled in Parliament a full response to the Commission's report in which many of the Commission's recommendations in relation to the Perth IDC were accepted in whole or in part.
70. Human Rights and Equal Opportunity Commission, *Those who've come across the seas; Detention of unauthorised arrivals*, May 1998, in particular Part 3, Chapter 5.5 at p. 79.
71. *Migration Act 1958* (Cth), sections 13 and 14.
72. Human Rights and Equal Opportunity Commission, *Those who've come across the seas; Detention of unauthorised arrivals*, May 1998, at p. 79 et al.
73. http:/www.hreoc.gov.au/human_rights/asylum/index.html#idc_review

Appendix A: Functions of the Human Rights and Equal Opportunity Commission

The Commission has specific legislative functions and responsibilities for the protection and promotion of human rights under the Act. Part II Divisions 2 and 3 of the Act confers functions on the Commission in relation to human rights. In particular, section 11(1)(f) of the Act empowers the Commission to inquire into acts or practices of the Commonwealth that may be inconsistent with or contrary to the rights set out in the human rights instruments scheduled to or declared under the Act.

Section 11(1)(f) of the Act states:

> 1) The functions of the Commission are:
>
> (f) 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.

Section 3 of the Act defines an 'act' or 'practice' as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth.

The Commission performs the functions referred to in section 11(1)(f) of the Act upon the Attorney General's request, when a complaint is made in writing or when the Commission regards it desirable to do so (section 20(1) of the Act).

The Human Rights Commissioner performs these functions on behalf of the Commission (section 8(6) of the Act).

In addition, the Commission is obliged to perform all of its functions in accordance with the principles set out in section 10A of the Act, namely with regard for the

indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

The Commission attempts to resolve complaints under the provisions of the Act through the process of conciliation. Where conciliation is not successful or not appropriate and the Commission is of the opinion that an act or practice constitutes a breach of human rights, the Commission shall not furnish a report to the Commonwealth Attorney-General until it has given the respondent to the complaint an opportunity to make written or oral submissions in relation to the complaint (section 27 of the Act).

If, after the inquiry, the Commission finds a breach of human rights, it must serve a notice on the person doing the act or engaging in the practice setting out the findings and the reasons for those findings (section 29(2)(a) of the Act). The Commission may make recommendations for preventing a repetition of the act or practice, the payment of compensation or any other action or remedy to reduce the loss or damage suffered as a result of the breach of a person's human rights (section 29(2)(b) and (c) of the Act).

If the Commission finds a breach of human rights and it furnishes a report on the matter to the Attorney-General, the Commission is to include in the report particulars of any recommendations made in the notice and details of any actions that the person is taking as a result of the findings and recommendations of the Commission (section 29(2)(d) of the Act). The Attorney-General must table the report in both Houses of Federal Parliament within 15 sitting days in accordance with section 46 of the Act.

It should be noted that the Commission has a discretion to cease inquiry into an act or practice in certain circumstances (section 20(2) of the Act), including where the subject matter of the complaint has already been adequately dealt with by the Commission (section 20(2)(c)(v) of the Act).

Appendix B: Overview of human rights provisions and principles relevant to this inquiry

Section 3 of the Act defines 'human rights' as those rights and freedoms recognised in the international human rights instruments scheduled to or declared under the Act (section 3). Schedule 2 to the Act is the *International Covenant on Civil and Political Rights* (ICCPR), which is the instrument relevant to this inquiry.[1]

The 'fundamental and universally applicable'[2] requirement of international law is that people in detention must be treated 'with humanity and with respect for the inherent dignity of the human person' (article 10(1) of the ICCPR).

Australia is obliged to respect the human rights of all persons within its jurisdiction, including non-citizens. As a State Party to the ICCPR, Australia is bound by international law to ensure the rights in the ICCPR for 'all individuals within its territory and subject to the jurisdiction … without distinction of any kind'.[3] Under the ICCPR, Australia has undertaken to 'take the necessary steps…to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the …Covenant' and to ensure that any person whose rights are violated 'shall have an effective remedy… determined by competent … authorities'.[4]

The Human Rights Committee has emphasised:

> In general, the rights set forth in this Covenant [the ICCPR] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.[5]

The human rights law and principles relevant to this complaint are described further at sections 3.4, 5.2, 6.9, 10.7 of the Commission's report *Those who've come across the seas: Detention of unauthorised arrivals.*[6]

International Covenant on Civil and Political Rights (ICCPR)

Articles 7 and 10(1) of the ICCPR are relevant to this complaint. Article 7 states:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 10(1) states:

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

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonme nt (1988) (the Body of Principles)

The Body of Principles prescribes relevant UN standards for the treatment of detainees for the purposes of articles 7 and 10(1) of the ICCPR.[7] The UN Working Group on Arbitrary Detention has considered the status of the Body of Principles and noted that most of the provisions are declaratory of existing rights under customary international law.[8]

The principles most relevant to this complaint are numbers 1, 6 and 24.

> Principle 1
>
> All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.
>
> Principle 6
>
> No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.
>
> * The term 'cruel, unhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporally or permanently, of the use of any of his natural senses such as sight or hearing, or of his awareness of place and the passing of time.
>
> Principle 24
>
> A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Standard Minimum Rules for the Treatment of Prisoners

As a matter of international law, the Standard Minimum Rules are not directly binding on Australia and there is no specific obligation to implement the Standard Minimum Rules in Australia. However, the Standard Minimum Rules elaborate the standards which the international community considers acceptable and therefore provide guidance to the scope and content of articles 7 and 10(1) of the ICCPR.

The 'Preliminary Observations' in the Standard Minimum Rules state that their objective is 'to stimulate a constant endeavour to overcome practical difficulties in the way of their application' because 'they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations' (Standard Minimum Rule 2).

The rules most relevant to this complaint are Standard Minimum Rules 10, 11, 22, 31, 54 and 94.

> Standard Minimum Rule 10
>
> All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.
>
> Standard Minimum Rule 11
>
> In all places where prisoners are required to live or work,
>
> (a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation.
>
> (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.
>
> Standard Minimum Rule 22
>
> (1)At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organised in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis

and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialised institutions or the civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

Standard Minimum Rule 31

Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.

Standard Minimum Rule 54

(1) Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

(2) Prison officers shall be given special physical training to enable them to restrain aggressive prisoners.

(3) Except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been trained in their use.

Standard Minimum Rule 94

In countries where the law permits imprisonment for debt, or by order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall be not less favourable than that of untried prisoners, with the reservation, however, that they may possibly be required to work.

Detention of unauthorised arrivals under the *Migration Act 1958*

All persons who enter Australia without valid entry documents are known as 'unlawful non-citizens'. The *Migration Act 1958* states that a non-citizen who does not hold a valid visa is an unlawful non-citizen.[9] Section 189 of the Migration

Act states that, if a migration officer knows or reasonably suspects that a person is an unlawful non-citizen, the officer must detain the person. Section 196 of the Migration Act states that, once detained, unlawful non-citizens must be kept in detention unless otherwise authorised.

Under the Act, the Commission has jurisdiction to inquire into 'acts' or 'practices' which are inconsistent with or contrary to human rights. Section 3 of the Act defines an 'act' or 'practice' as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth. The detention provisions of section 189 of the Migration Act are mandatory in their terms and conduct in accordance with them does not constitute an 'act' or 'practice' by or on behalf of the Commonwealth. However, the conditions in which persons are detained under the Migration Act are 'acts' and 'practices' of the Commonwealth for the purposes of the Act.

Section 273 of the *Migration Act 1958* gives a statutory function to the Minister to establish and maintain immigration detention centres. Section 273 states:

> (1) The Minister may, on behalf of the Commonwealth, cause detention centres to be established and maintained.
>
> (2) The regulations may make provision in relation to the operation and regulation of detention centres.
>
> (3) Without limiting the generality of subsection (2), regulations under that subsection may deal with the following matters:
>
> (a) the conduct and supervision of detainees;
>
> (b) the powers of persons performing functions in connection with the supervision of detainees.
>
> (4) In this section:
>
> 'detention centre' means a centre for the detention of persons whose detention is authorised under this Act.

Therefore, while the custodial service provider of the immigration centre, through arrangements with the Department, is responsible for the daily management of the immigration centres, the Commonwealth, through the Minister and his department is ultimately responsible for the maintenance, conditions and

management of its immigration centres.

For further discussion of relevant migration legislation, see section 2.1 of the Commission's report *Those who've come across the seas: Detention of unauthorised arrivals.*[10]

Endnotes

1. The ICCPR was adopted by the United Nations General Assembly in 1966: UN Doc. A/6316 (1966). Australia ratified the ICCPR on 13 August 1980: Act Schedule 2; Australian Treaty Series (1980) No 23; United Nations Treaty Series Volume 999 Page 171.
2. United Nations Human Rights Committee, General Comment No. 21 (1992), paragraph 4.
3. Article 2.1 of the ICCPR. A proviso must be entered here to point out that article 25 of the ICCPR concerning participation in public affairs, including the right to vote, is stipulated to benefit only citizens. Article 13, on the other hand, applies exclusively to aliens and stipulates the circumstances in which they may be expelled from a country.
4. Article 2.2 and 2.3 of the ICCPR. A similar obligation is imposed with respect to children's rights by article 4 of CROC.
5. United Nations Human Rights Committee, General Comment No. 15 (1986), paragraph 1.
6. Human Rights and Equal Opportunity Commission, *Those who've come across the seas; Detention of unauthorised arrivals,* May 1998.
7. United Nations Human Rights Committee, General Comment No. 21 (1992), paragraph 5.
8. Deliberation 02, Report of the Working Group on Arbitrary Detention: UN Doc. E/CN.4/ 1993/24, p. 9.
9. *Migration Act 1958* (Cth), sections 13 and 14.
10. Human Rights and Equal Opportunity Commission, *Those who've come across the seas; Detention of unauthorised arrivals,* May 1998.