



Australian
Human Rights
Commission

Mr OA, Miss OB and Master OC v
Commonwealth of Australia
(Department of Home Affairs)

[2024] AusHRC 161

April 2024

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Australian Human Rights Commission
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Report into arbitrary detention and arbitrary interference with family

Australian Human Rights Commission 2024

The Hon Mark Dreyfus KC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into the human rights complaint of Mr OA, alleging a breach of his human rights by the Department of Home Affairs (Department), including on behalf of his minor children, Miss OB and Master OC.

Mr OA arrived in Australia by boat at Christmas Island in 2010. He was detained in July 2017 in closed immigration detention, where he would remain for 4 years and 3 months until his release in October 2021. I have found this was a consequence of a series of delays by the Department, including with respect to determining alternatives to detention. Mr OA complained that his detention was consequently arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

Mr OA further complained that his detention by the Commonwealth involved interference with his family under articles 17 and 23 of the ICCPR, and articles 3, 9 and 16 of the *Convention on the Rights of the Child* (CRC). Notwithstanding Mr OA's repeated requests to be detained in a detention centre closer to his family in Victoria, Mr OA transferred to Western Australia. Mr OA and his family, including two infant children Miss OB and Master OC, suffered in trying to maintain their relationship. This caused Mr OA much distress, resulting in thoughts of self-harm.

As a result of this inquiry, I have found that the Department's delay in referring Mr OA's case to the Minister for consideration of his discretionary intervention powers under s 195A and/or s 197AB of the *Migration Act 1958* (Cth), or otherwise for a section 46A submission, was inconsistent with, or contrary to, the right to freedom from arbitrary detention under article 9(1) of the ICCPR.

I have also found that the Department's failure to adequately consider holding Mr OA in a facility closer to his family was inconsistent with the Commonwealth's obligations under articles 17(1) and 23(1) of the ICCPR and articles 3(1) and 16(1) of the CRC.

On 21 November 2023, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 27 February 2024. That response can be found in Part 8 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM FAAL
President
Australian Human Rights Commission
April 2024

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1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr OA on his own behalf and on behalf of his 2 children, Miss OB and Master OC, against the Commonwealth of Australia (Department of Home Affairs) (Department),¹ alleging a breach of human rights. This inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr OA is a national of Afghanistan of Hazara ethnicity who arrived in Australia on 27 October 2010. Mr OA was detained in July 2017 and remained in closed immigration detention for 4 years and 3 months until his release in October 2021. He complains that his detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
3. The right to liberty and freedom from arbitrary detention is not directly protected in the Australian Constitution or in legislation. As a result, there are limited avenues for an individual to challenge the lawfulness of their detention, outside seeking a writ of *habeas corpus*, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.²
4. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights. Detention may be lawful under domestic law but still arbitrary and contrary to international human rights law.
5. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary, and proportionate on the basis of the individual's particular circumstances. There is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the immigration policy, for example the imposition of reporting obligations, sureties or other conditions, in order to avoid the conclusion that detention was 'arbitrary'.
6. Mr OA was detained in facilities in a different state from his family, including his 2 young children for the time he was held in closed detention, with the exception of a 4-month period. He complains that this constituted arbitrary interference with family, contrary to articles 17(1) and 23(1) of the ICCPR. He also complains that this interfered with the rights of his children, contrary to articles 3(1), 9(1) and 16(1) of the *Convention on the Rights of the Child* (CRC).
7. This document comprises a notice of my findings in relation to this inquiry and my recommendations to the Commonwealth.
8. Given that Mr OA has been found to be in need of protection by Australia

as a refugee, and given that he makes complaints on behalf of his 2 minor children, I have made a direction under section 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

2 Summary of findings and recommendations

9. As a result of the inquiry, I find that the following acts of the Commonwealth are inconsistent with, or contrary to, articles 9(1), 17(1) and 23(1) of the ICCPR and articles 3(1) and 16(1) of the CRC:
 - the failure of the Department to refer the case to the Minister in order to assess whether to exercise his discretionary powers under section 195A of the Migration Act 1958 (Cth) (Migration Act) prior to October 2018, or again thereafter
 - the failure of the Department to refer the case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under section 197AB of the Migration Act at any time
 - the delay of the Department in referring to the Minister a section 46A submission between July 2018 and July 2020.
10. I find that the Department's failure to give adequate consideration to holding Mr OA in a facility closer to his family, was inconsistent with the Commonwealth's obligations under articles 17(1) and 23(1) of the ICCPR and articles 3(1) and 16(1) of the CRC.
11. I make the following recommendations:

Recommendation 1

The Commission recommends that a Departmental policy is created to require Departmental officers to document their assessment of a child's best interests with respect to all decisions which may affect a child but where the decision does not involve granting a visa to the child, or cancelling a visa. Such scenarios would include decisions to detain a child's parent, decisions not to refer a case to the Minister, or decisions with respect to placement within the immigration detention network.

Recommendation 2

The Commission recommends that training is provided to Departmental officers upon implementation of the policy to ensure that best interests assessments are properly conducted and documented.

Recommendation 3

The Commission recommends that the Department ensure that detainees' personal information is checked regularly and that any updated information regarding relationship and/or familial status is recorded appropriately and promptly.

Recommendation 4

The Commission recommends that the Department review current policy and procedures with respect to the completion of detention placement assessments in light of the concerns raised in this inquiry, including requiring Departmental officers to ensure that:

- information is correctly recorded
- information that is no longer relevant is removed, for example when a police investigation has concluded, rather than being carried forward in all subsequent assessments
- consideration be given to whether it is necessary to include incidents that occurred many years ago, and if it is necessary, the date the incident occurred also be included
- the best interests of any minor children affected by the decision are considered and recorded

to ensure that detainees are not inappropriately assigned a high risk profile which may affect their placement within the immigration detention network.

3 Background

12. Mr OA is a national of Afghanistan of Hazara ethnicity. He arrived in Australia by boat on 27 October 2010 at Christmas Island, where he was initially detained.

(a) Visa history

13. Mr OA applied for Refugee Status Assessment, which was refused on 20 January 2011. Mr OA was granted a Bridging E visa on 27 March 2012 while awaiting the outcome of the Independent Merits Review, which affirmed the original decision to refuse refugee status on 10 September 2012.
14. Due to the expiration of his Bridging E visa on 11 July 2013, Mr OA became an unlawful non-citizen under the Migration Act.
15. Mr OA continued to reside in the Australian community for 4 years as an

unlawful non-citizen.

16. Mr OA did not attend 2 appointments scheduled by the Department to regularise his status during this period (20 August 2013 and 29 February 2016). The Department also endeavoured to contact Mr OA by letter sent by registered post on 2 occasions in 2015 and 2016, however these letters were returned to sender. The Department called the mobile number on file for Mr OA, and another person answered the phone. This person was asked to give Mr OA a message to call the Department as soon as possible, and a text message to the same effect was also sent.
17. Mr OA did attend an information session on 8 April 2014 at the Department's Melbourne office where he signed a Form 1443 Code of Behaviour. And, on 7 October 2014, Mr OA was informed by a Departmental officer that he did not need to attend a bridging visa appointment that day. Mr OA raised concerns about his unlawfulness and inability to access Medicare on that date. The reason given by the Department for this is that Mr OA was 'subject to an unresolvable MAL status alert and the team managing the section 195A regrant had removed him from the list for this day'.
18. Mr OA was detained under section 189(1) of the Migration Act on 17 July 2017, where he remained for 1559 days. The background to this occurring is set out in the proceeding section on criminal issues.
19. On 17 July 2018, Mr OA was found to meet the ministerial guidelines to lift the bar to allow him to lodge an application for a Safe Haven Enterprise visa (SHEV). The bar was lifted 27 months later on 11 November 2020 and he was notified of this decision on 2 February 2021.
20. On 27 July 2018, the Department commenced a ministerial intervention process, and found that he met the guidelines for a section 195A referral to the Minister to consider intervening to grant Mr OA a Bridging E visa on 31 August 2018.
21. A submission was put forward to the Minister on 18 October 2018 to consider intervening under sections 195A to grant him a Bridging E visa and 46A so as to allow for Mr OA to make his own bridging visa applications. The Minister declined to intervene under either power.
22. Mr OA was referred to status resolution for a further consideration against the section 195A guidelines on 28 May 2019. On 10 February 2020, Mr OA was found to meet the guidelines for referral to the Minister under section 195A of the Migration Act however no referral to the Minister was made by the Department.

23. Mr OA lodged a SHEV application on 21 February 2021, was granted the SHEV on 22 October 2021 and he was released from detention on the same day.

(b) *Criminal and behavioural issues*

24. During Mr OA's first period of detention upon arrival in Australia, he and another detainee attempted to escape from Curtin Immigration Detention Centre in August 2011 by climbing a fence. He was not charged or convicted of any offences with respect to this incident.

25. On 29 November 2016 Mr OA was convicted of offences including possession of illicit drugs, theft of a motor vehicle and negligently dealing with proceeds of crime. He was sentenced to 37 days imprisonment and a 12-month community correction order with drug rehabilitation.

26. Mr OA was detained under section 189(1) of the Migration Act on 17 July 2017 at Maribyrnong Immigration Detention Centre (IDC) after an appointment arranged by the Victoria Police's Armed Crimes Squad.

27. No official documentation with respect to the reason for this appointment has been provided by the Department, but I understand that Mr OA may have been of interest to Victoria Police in relation to an ongoing investigation.

28. At the time of Mr OA's detention, a compliance client interview was conducted by the Department at the Victoria Police station.

29. The Department's record of this interview is by way of a template document setting out information required by the Department for the purpose of establishing 'reasonable suspicion', being a reference to the legislative requirement to detain as set out in section 189(1) of the Migration Act.

30. Mr OA's criminal convictions are noted on the form, and from a series of boxes available under the heading 'Client demeanour and risk issues', boxes for 'Cooperative' and 'Unacceptable risk to the community' are ticked. No explanation is given in the comments section regarding this assessment.

31. On 24 October 2017, an intervention order was made against Mr OA protecting his partner and children, and later revoked in December 2017 or January 2018.

32. The Community Protection Assessment Tool (CPAT) is a risk-based placement tool used by the Department to help make assessments of the suitability of detainees for release into the community.³ The CPAT results in a risk category or 'tier' that corresponds to a recommended placement for a detainee.

33. The first CPAT, prepared after Mr OA was detained, was completed on 1 August 2017. Included in the CPAT are conclusions that Mr OA was not removal ready, was a medium risk of harm to the community, and a high risk of not engaging with the Department. These assessments were predominantly based on his criminal convictions (plus other criminal investigations which appeared to be ongoing at the time), and his perceived disengagement from status resolution during the period he was unlawful in the community. Despite these indicators, the CPAT recommendation was 'Tier 1 – Community Detention'.
34. A further CPAT prepared on 22 February 2019 contained substantially similar information, with references to criminal investigations no longer appearing. The heading 'behaviour impacting others' identified no issues.
35. Under the heading 'Engagement with Status Resolution', the following comments appear:
- Evaded engagement in the community
- Disengaged from the Department from July/August 2015, until located by Compliance Field on 17/07/2017.
36. The CPAT assessments on this occasion were that Mr OA was not removal ready, was a low risk of harm to the community, and a high risk of not engaging with the Department. This time however, the CPAT recommendation of 'Tier 1 – Bridging Visa with conditions' was substituted manually, with a recommendation of 'Tier 3 – Held Detention', with the following reason inserted:
- Detainee has a history of disengaging from the department from July/August 2015, until located by Compliance Field on 17/07/2017. Also, 195A intervention submission was not considered by Minister Coleman on 31/10/2018. Detainee not eligible to be considered for a BVE.
37. The next CPAT was prepared on 28 May 2019. Included under the heading 'Engagement with Status Resolution' is the following:
- Lawful links in the community – two Australian citizenship children.
Engages with Status Resolution officers in detention when required.
38. Under the heading 'Strengths', the CPAT lists Mr OA's regular contact with his partner and children in the community.
39. The risk indicator with respect to non-engagement with the Department is manually substituted with the following reason for doing so:

Mr [OA] has demonstrated a willingness to engage with the Department, as well as continuing engagement with a Migration Agent to progress possible visa pathways.

40. The CPAT recommendation on this date again appears as 'Tier 1 – Bridging Visa with conditions', and remained so for the remainder of Mr OA's time in held detention.
41. The section 195A guidelines assessment conducted by the Department in February 2020 states:

Since Mr [OA] was detained in 2017, he has been involved in two incidents of abusive/aggressive behaviour and one incident of minor assault. None of these incidents were referred to the police for investigation and have all since been closed off. Mr [OA]'s recent CPAT assessments indicates [sic] that there are no concerns regarding aggression or behaviour towards others, and SERCO have reported positive behaviour and interactions with others while in detention.

(c) *Relationship and family history*

42. In early 2013, Mr OA started a relationship with his partner, Ms OD, with whom he now has 2 children: 7-year-old Miss OB, who was born in November 2015; and 6-year-old Master OC, who was born in March 2017. Each of these family members is an Australian citizen.
43. At the time of Mr OA's detention, he was interviewed by an officer of the Department. A record of that interview indicates that Mr OA explained that he had been in a de facto relationship for the last 6 months, and that he had 2 children with his previous partner, with full time access to the children.
44. Similarly, once Mr OA was detained, another interview was conducted on 18 July 2017. The record of that interview also shows handwritten notes with names of his 2 children, a former partner and a new partner (all names redacted).
45. The first CPAT assessment conducted by the Department on 1 August 2017 indicates that Mr OA and Ms OD separated around March 2015, and record his relationship/marital status as 'girlfriend'. Elsewhere in the document the relationship is recorded as 'fiancé'.
46. In response to questions put by the Commission after the complaint was made, the Department stated that the first record of the existence of a current relationship with Ms OD on their system is found in case notes made on 21 August 2019 by status resolution, and an email from Mr OA's migration agent of 30 May 2019 with an impact statement from Ms OD.
47. As a result of this email communication, a status resolution officer made a note on the system:

30 August 2019 – SRO phoned Mr [OA] on his mobile phone at Yongah Hill Immigration Detention Centre (IDC) to clarify if he was still with his partner, the mother of his two Australian citizen children. He confirmed they were still together, that he is no longer in contact with the woman whom he listed as his fiancé in his DCI Part C Interview in on 18 July 2017, and that he would reside at the following address with his current partner if he were released from immigration detention: at her address.

48. However, in response to my preliminary view, the Department provided to the Commission an email from Ms OD dated September 2018 indicating an ongoing relationship with Mr OA, and outlining the impact of their separation on her and the children.
49. During the 4 years and 3 months Mr OA was held in closed immigration detention, he was regularly transferred between different immigration detention facilities. The location of his detention since 2017 is set out in the table below.

Dates	Facility
17 Jul 2017 – 8 Aug 2017	Maribyrnong IDC
8 Aug 2017 – 27 Jul 2018	North West Point IDC (Christmas Island)
27 Jul 2018 – 5 Aug 2018	Yongah Hill IDC
5 Aug 2018 – 29 Sep 2018	North West Point IDC (Christmas Island)
29 Sep 2018 – 15 Nov 2018	Brisbane Immigration Transit Accommodation
15 Nov 2018 – 21 Dec 2018	Maribyrnong IDC
21 Dec 2018 – 25 Feb 2019	Melbourne ITA
25 Feb 2019 – 22 Oct 2021	Yongah Hill IDC

50. Detention placement assessments were conducted prior to major

transfers on 20 July 2017, 18 July 2018, 24 September 2018, and 18 February 2019.

51. Mr OA's partner and children live in Geelong, Victoria and were unable to visit Mr OA during his time in immigration detention for practical and financial reasons.
52. Over this time, Mr OA made several requests for transfer to be closer to his family.
53. An internal email between the Department and Australian Border Force dated 5 September 2018 is included in the material before me stating that the Department had been provided a report from IHMS that stated:

Mr [OA] has self-referred for IHMS mental health team support in February 2018 where he expressed frustration to an IHMS counsellor regarding the impact separation from his children in Melbourne was having on his mental health, to the point where he experienced thoughts of self-harm. It appears at this time that family separation may be a contributor to exacerbating Mr [OA]'s mental health concerns.

54. The first documented request to the Department for transfer to Melbourne to be closer to his family appearing on the materials before me was on 13 March 2019, but the above extract seems to suggest it was raised, possibly informally by him, prior to this date.
55. The record of this 13 March 2019 request (which was denied) features the following note under the heading action taken:

No as at 25/03/19

Welfare to engage & encourage period of good behaviour (2+ months) + evidence children will be able to visit, then re-asses [sic].

56. In another request by Mr OA dated 19 February 2020, he states that it is the fifth request made for transfer. Serco provided Mr OA a letter in response to his request on 5 March 2020.
57. That letter states:

Your request for transfer is noted but is not approved in this instance.

Non-citizens who are detained under the *Migration Act 1958* are subject to placement at any place of detention within the immigration detention network. In making placement decisions many factors are taken into consideration including immigration pathways available to each individual detainee, capacity constraints and operational requirements.

All transfer requests are considered in line with the Department's duty of care obligations and your individual circumstances, with medical needs given priority. Placement of detainees within the network is continuously

reviewed and assessed. While transfer requests to other facilities cannot always be accommodated, requests for changing your placement within the IDN can be reconsidered if circumstances change.

All detainees in immigration detention have access to welfare (including medical) and psychological support. You are able to submit a request with the medical service provider IHMS if you require medical assistance. [emphasis in original]

58. Another request made by Mr OA on 21 May 2021 received the same letter from Serco in response dated 2 June 2021.

3.2 Functions of the Commission

59. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with, or contrary to, any human right.
60. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.
61. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

3.3 What is an 'act' or 'practice'

62. The terms 'act' and 'practice' are defined in section 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
63. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
64. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.⁴

3.4 What is a human right?

65. The phrase 'human rights' is defined in section 3(1) of the AHRC Act to include, among others, the rights and freedoms recognised in the ICCPR and the CRC.

4 Arbitrary detention

66. Mr OA complains about the period between July 2017 and October 2021 when he was detained in closed immigration detention. This requires consideration to be given to whether his detention was 'arbitrary' contrary to article 9(1) of the ICCPR.

4.1 Law on article 9 of the ICCPR

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

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

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

- 'detention' includes immigration detention⁵
- lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system⁶
- arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability⁷
- detention should not continue beyond the period for which a State party can provide appropriate justification.⁸

69. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR Committee) found detention for a period of 2 months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁹

70. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.¹⁰

71. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on

16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the UN HR Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.¹¹

72. The United Nations Working Group on Arbitrary Detention has expressed the view that the use of administrative detention for national security purposes is not compatible with international human rights law where detention continues for long periods or for an unlimited period without effective judicial oversight.¹² A similar view has been expressed by the UN HR Committee, which has said:

if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law ... information of the reasons must be given ... and court control of the detention must be available ... as well as compensation in the case of a breach.¹³

73. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.¹⁴
74. A short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, closed detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.¹⁵

75. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, closed immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth) in order to avoid being arbitrary.¹⁶
76. Accordingly, where alternative places or modes of detention that impose a lesser restriction on a person's liberty are reasonably available, and in the absence of particular reasons specific to the individual, prolonged detention in an immigration detention centre may be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.
77. It is therefore necessary to consider whether the detention of Mr OA in a closed immigration facility can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

4.2 Act or practice of the Commonwealth

78. At the time of his detention, Mr OA was an unlawful non-citizen within the meaning of the Migration Act, which required that he be detained.
79. Mr OA was prevented from making a valid bridging or substantive visa application himself due to a legislative bar in place pursuant to section 46A of the Migration Act.
80. There are a number of powers that the Minister could have exercised either to grant a visa, or to allow the detention in a less restrictive manner than in a closed immigration detention centre.
81. Section 197AB of the Migration Act permits the Minister, where the Minister thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. The residence determination may be made subject to other conditions such as reporting requirements.
82. In addition to the power to make a residence determination under section 197AB, the Minister also has a discretionary non-compellable power under section 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
83. I consider 3 acts of the Commonwealth as relevant to this inquiry:

- the failure of the Department to refer the case to the Minister in order to assess whether to exercise his discretionary powers under section 195A prior to October 2018, or again thereafter
- the failure of the Department to refer the case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under section 197AB of the Migration Act at any time
- the delays of the Department in referring to the Minister a section 46A submission between July 2018 and July 2020, and then notifying Mr OA of the Minister's decision between November 2020 and February 2021.

4.3 Findings

(a) *Delays with respect to alternatives to detention*

84. Mr OA was taken into immigration detention on 17 July 2017 and remained in detention at various immigration detention facilities until 22 October 2021, approximately 51 months.
85. No explanation has been provided as to why the Department waited until July 2018 to initiate consideration of Mr OA for an alternative to held detention, when he had already been detained for 12 months.
86. Successive Ministers have issued guidelines to assist the Department to determine which matters should be referred to the Minister for consideration of the exercise of powers pursuant to section 195A to grant a visa to a person in detention, or pursuant to section 197AB to make a residence determination. The guidelines in place at the relevant times are referred to below.
87. There were grounds for Mr OA to be considered immediately under either the section 195A guidelines or the section 197AB guidelines.
88. The section 195A guidelines signed in November 2016 state that cases may be referred to the Minister where:

there are strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or permanent resident), or there is an impact on the best interests of a child in Australia.
89. The section 197AB guidelines signed in March 2015 and those of October

2017 both allow for adult detainees to be referred to the Minister where there are unique or exceptional circumstances.

90. The Department was aware from the time of Mr OA's detention that he had 2 Australian citizen children, and this should immediately have been identified as grounds for referral to the Minister for consideration of the discretion to grant him a Bridging E visa or make a residence determination.
91. The Department did commence this assessment a year later, which was followed by Mr OA's own request to the Minister on 5 October 2018.
92. The Minister declined to consider intervening on 31 October 2018.
93. The Department's submission to the Minister with respect to this request identified as key issues:
 - the CPAT recommendation of tier 1 – bridging visa placement
 - the inability to remove Mr OA due to plausible protection claims
 - the length of his detention.
94. Under the heading 'Character, behaviour in detention and security', the Department outlines the criminal convictions, failure to comply with departure related conditions on his previous Bridging E visa, and 3 incidents in detention which were not referred to police. It was not suggested in this submission that Mr OA was considered by the Department to pose a risk to the community, and he was not considered a risk to national security.
95. The submission referred to Mr OA's 'previous relationship' with an Australian citizen and his 2 minor Australian citizen children, but did not identify this as a key issue.
96. The Minister's decision was recorded by circling the words 'not consider' on the front page of the decision. No reasons were provided by the Minister (nor are they required by law).
97. This was the only time during Mr OA's 4 years in detention that the Department asked the Minister to consider making a decision to release him from detention on a Bridging E visa. This is despite the fact that the Department's own CPAT assessments recommended either a residence determination or a Bridging E visa for Mr OA (except for a 3-month period between February and May 2019).
98. The Department again commenced consideration of a section 195A request on 28 May 2019. After 9 months, Mr OA was found to meet the guidelines for referral to the Minister to consider the grant of a Bridging E visa on 10 February 2020, but referral to the Minister did not occur.

99. The Department in its assessment of Mr OA against the section 195A guidelines in February 2020 identifies the reason for referral to the Minister as ‘strong compassionate circumstances that would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit’ and provides the following reasons:
- Mr [OA] has an Australia [sic] citizen partner, [redacted] and two Australian citizen children, [redacted] and [redacted].
- In a letter of support from [redacted], she states that their children, particularly their daughter [redacted], desperately misses her father and speaks to him over the phone on a regular basis. As mentioned above in character, [redacted] also revoked the Intervention Order against Mr [OA] on 12 January 2018.
100. The submission then provides a summary of article 3 of the CRC and articles 17(1) and 23(1) of the ICCPR without making any specific application of these articles to Mr OA’s situation. In my opinion however it demonstrates the Department’s awareness of its human rights obligations to this family in February 2020.
101. The Department provided a response to Mr OA’s complaint which stated:
- It is not a legal requirement that a detention case be considered for assessment against Ministerial Intervention guidelines, or be referred to the Minister for consideration of his personal intervention powers. There are no requirements that a case should be reviewed against the guidelines or referred to the Minister within a certain timeframe or at regular intervals. The Department only refers cases to the Minister where it is determined that a case meets the Ministerial Intervention guidelines.
- Mr [OA] has a current Ministerial Intervention request in progress, which on 10 February 2020, was found to meet the section 195A Ministerial Intervention guidelines. From March 2020, Ministerial Intervention slowed as the Department focused its efforts on the Government’s COVID-19 response and diverted resources to critical functions only. Non-critical functions were ceased or slowed during this period but have progressively been returning to more normal activity since 1 June 2020.
102. This explanation lacks detail as to why Mr OA was not found to meet the guidelines for a section 195A referral prior to February 2020, and even if the COVID-19 response were a reasonable explanation for the period between March and June 2020, there is no adequate reason provided for why the Department did not refer his case to the Minister for intervention at any time between October 2018 and October 2021 when Mr OA was released on a SHEV. There is also no explanation as to why the

Department did not assess Mr OA against the s 197AB guidelines for referral to the Minister to consider a residence determination at any time during his detention, other than that the status resolution officer considered it was more appropriate to refer his case for consideration under the s 195A guidelines.

103. In this regard, I wish to highlight the Commission's June 2021 report, *Management of COVID-19 risks in immigration detention*, which noted that under international law, Australia is obliged to adopt measures that address risks associated with COVID-19 in ways that minimise any negative human rights implications.¹⁷ The pandemic should have been a basis to consider an alternative to held detention for Mr OA, rather than a reason for the failure to refer matters to the Minister for consideration of the grant of a visa or a community detention placement.
104. I note that in the submission to the Minister with respect to the section 46A and section 48B bar lifts cleared in July 2020 (and signed by the Minister on 11 November 2020), it is expressly stated that the Department was not at that time seeking a Bridging E visa for Mr OA. This is inconsistent with the February 2020 assessment against the section 195A guideline, which recommended referral.
105. In response to my preliminary view, the Department provided the following explanation:

The Department progresses all cases consistent with internal processes and caseload priorities within available resources at any point in time. Mr [OA]'s case was progressed consistent with this. The Department acknowledges that his case was not referred under section 195A before his status was resolved through the grant of a SHEV. The Department's current practice would be that the section 195A submission would be progressed concurrently with the subsection 46A(2) submission.

...

The Department has updated its processes for preparing a submission for section 46A and/or section 48B statutory bar lift to permit a TPV or SHEV application. The Department will also include an option for the Minister to consider lifting the section 46A and/or section 46B statutory bars to allow the person to make a BVE application.

106. It is pleasing to note that the Department has updated this internal process, so that in future, a person who is invited to be reconsidered under Australia's protection obligations is not unnecessarily left in detention while doing so.
107. No information before me indicates that the basis for Mr OA's detention was that he was considered a risk to the Australian community. I do accept that he was convicted of minor criminal offences and served a short custodial sentence. While an intervention order was in place for 2 or

3 months, the order was made after Mr OA was already detained, and I do not have any information before me setting out the basis for the order.

108. On the information provided by the Department, it does not appear that an individualised risk assessment regarding Mr OA was conducted. On the materials before me, his assessed risk to the community fluctuates greatly, and those assessments which show a high risk generally (such as the Detention Placement Assessments described at paragraphs 173-185 below) do not demonstrate an accurate consideration of his profile.
109. The offences for which he was convicted were of a minor nature, and the investigations into further criminal offending seem to have been discontinued. Mr OA did make an attempt to escape from immigration detention in 2011, but no charges were laid in respect of this incident, and I have no information before me regarding the seriousness of the attempt. Mr OA has never had a visa cancelled.
110. I do not agree with the Department's assessment that the timeline and events prior to his detention demonstrate Mr OA 'evading' status resolution (see paragraph 35). I accept that the Department did on occasion make unsuccessful attempts to contact Mr OA. For example, the Department sent 2 letters by registered post between 28 August 2015 and 26 March 2016, but appears to have made no attempt to contact him at all from March 2016 until July 2017. The latter contact was initiated by Victoria Police.
111. Mr OA did, at least in the early years of his unlawfulness, attempt to regularise his status, and raised concerns about its impact on him. He was informed not to attend an appointment previously scheduled for the grant of a bridging visa on 7 October 2014.
112. At the time of Mr OA's detention, and throughout its duration, Mr OA was able to demonstrate unique and exceptional circumstances that warranted consideration of an alternative to held detention and brought his case within the guidelines for referral to the Minister. Predominantly, these circumstances arose from his having 2 Australian citizen children in the community. It may also have arisen from the deterioration in his mental health as his detention became more prolonged. Mr OA demonstrated good behaviour while in detention, and did not have any significant criminal history that would have suggested he was a risk to the Australian community.
113. Applying then the test of whether the Commonwealth has demonstrated that Mr OA's placement in held detention was reasonable, necessary and proportionate, I find that it has not. I find that the Department's delays

and failures to act in relation to Mr OA's detention were 'arbitrary', contrary to article 9(1) of the ICCPR:

- the failure of the Department to refer the case to the Minister in order to assess whether to exercise his discretionary powers under section 195A prior to 5 October 2018, or again in the following 3 years
- the failure of the Department to refer the case to the Minister for the Minister to assess whether to exercise his discretionary powers under section 197AB of the Migration Act at any time during Mr OA's 4 years in detention.

(b) *Delays with respect to allowing Mr OA to apply for a protection visa*

114. At a similar time to their assessment of Mr OA against the section 195A guidelines in July 2018, the Department also found Mr OA to meet the section 46A guidelines for referral to the Minister to consider lifting the bar to allow him to lodge an application for a TPV or SHEV.

115. Despite this positive assessment against the Ministerial guidelines, the Department did not refer Mr OA's case to the Minister at this time.

116. The Department clarified this in response to my preliminary view. It stated:

During this period, due to the rapidly changing country situation and volatile security environment in Afghanistan, the Department was considering the Afghanistan cohort in a holistic manner. Involuntary removals to Afghanistan was [sic] suspended from April 2018, due to the changing in-country circumstances. During this period, the Department was also attempting to resolve the status of finally determined Afghan nationals as a cohort rather than individually, in order to refer to the Minister on a group submission. The suspension of involuntary removals to Afghanistan continued to be periodically reviewed by the Department in view of the continued changes to in-country information.

117. However, also included with the Department's response to my preliminary view was an email dated 7 September 2018 which stated:

I just had a quick chat to [redacted] and she advised you can go ahead and put the Afghan cases up to Minister [redacted] in a bulk sub. [Redacted] also advised that you can start putting up any 48B subs that you have been holding onto. Grateful if these can be staggered so as not to overwhelm the new Minister.

118. On 27 July 2020, some 2 years later, Mr OA was included in a grouped section 46A referral to the Minister.

119. Mr OA was notified through his representative that he had been assessed

as meeting the 46A guidelines on 2 October 2020, which appears to have been the first time this was formally communicated to him, despite the assessment having been made in July 2018.

120. The bar lift allowing him to make a valid application for a SHEV was made on 11 November 2020, with notification provided to Mr OA's representative on 2 February 2021.

121. In response to my preliminary view, the Department clarified that:

Whilst the submission was signed by the Minister on [11] November 2020, two of the required attachments were returned to the Department unsigned and as such, the submission was returned to the Minister's office on 16 November 2020 for these to be actioned. The submission, including all attachments was returned on 25 November 2020. As submissions were progressed to the Minister by way of group submission, Mr [OA] was included in a submission with other unauthorised maritime arrival applicants from Afghanistan (total of 85 persons).

The submission referred the individuals to the Minister to consider under section 46A of the Act, and included sections 46B, 48B and 91L of the Act, as applicable to the individual circumstances of all applicants included in the submission. Appreciating that notification of the Minister's decision is required to each applicant and to ensure that a valid application is lodged upon notification, the Department contacted each individual person or their representative prior to commencing to issue notification of the Minister's decision. In this regard, Mr [OA]'s representative was contacted by the Department by telephone on 29 January 2021, to coordinate their readiness to lodge a valid application within the required period of 28 calendar days, upon receipt of the Department's notification of the Minister's decision to lift the application bar under section 46A of the Act. Following this consultation, notification was issued on 2 February 2021 and a valid application was received by the Department on 18 February 2021 (within the required 28 day timeframe).

122. Mr OA lodged an application for a SHEV on 18 February 2021 and was interviewed by the Department with respect to that application on 29 March 2021.

123. It took a further 7 months for the Department to grant him a SHEV on 22 October 2021, with the effect that he was no longer an unlawful non-citizen. It was this act that caused him to be released from detention.

124. Despite Mr OA being found to meet the guidelines for a section 46A bar lift on 17 July 2018 (for the grant of a TPV or SHEV), the Department did not refer his case to the Minister for intervention. The referral to the

Minister that did go forward was only with respect to considering the grant of a bridging visa. A section 46A referral allowing an application for a TPV or SHEV was ultimately made by the Department to the Minister on 27 July 2020, some 2 years after the Department found that Mr OA met the guidelines for referral. The Minister lifted the bar on 11 November 2020.

125. While I acknowledge the potential bureaucratic advantages identified by the Department in addressing all finally determined Afghan nationals as a cohort rather than individually, I do not accept that these justified the continued detention of Mr OA (and potentially other detainees in a similar situation) for 2 years. Being aware as it was from July 2018 that removal to Afghanistan was not to occur, the Department should have prioritised ending the detention of those among the cohort deprived of their liberty sooner. Detention in circumstances where removal from Australia is not practicable in the reasonably foreseeable future may in some circumstances be unlawful,¹⁸ although I express no views as to whether Mr OA's detention was at any stage unlawful.
126. Indeed, advice was received that the submissions should have been sent to the Minister's office in September 2018, but this does not appear to have been followed.
127. I find that the Department's 2-year delay between July 2018 and July 2020 in referring a section 46A submission to the Minister despite having found that Mr OA met the guidelines for referral is a further act or practice that caused Mr OA's detention to become arbitrary, contrary to article 9(1) of the ICCPR.
128. I note the Department's explanation as to the reason it took a number of months to notify Mr OA that the Minister had lifted the bar to allow him to apply for a SHEV. I do however remain concerned that it took the Department 2 months to notify Mr OA of this very significant decision, However, in light of the Department's explanation I do not make any finding on this issue.
129. I do not have sufficient information before me to make findings with respect to the period between March and October 2021, as to why it took 7 months for the Department to grant Mr OA's SHEV.

5 Interference with family

130. Mr OA complains on behalf of himself and his children of breaches of rights under the ICCPR and CRC. Broadly, these complaints relate firstly to the separation of the family unit as a result of Mr OA's detention, and secondly, to the fact that the 'best interests' of Miss OB and Master OC were not considered by the Department and Minister when making decisions which impacted them.

131. The complainants claim that the Commonwealth has engaged in acts which are inconsistent with or contrary to their rights under articles 17 and 23 of the ICCPR, and articles 3, 9 and 16 of the CRC.

5.1 Law on arbitrary interference with family

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

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

133. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

134. Article 16(1) of the CRC provides:

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

135. For the reasons set out in the Australian Human Rights Commission report, *Nguyen and Okoye v Commonwealth*,¹⁹ the Commission is of the view that in cases alleging a State's arbitrary interference with a person's family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person's family, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).

136. To make out a breach of article 17 of the ICCPR, the complainants must be identifiable as a 'family'.

137. In its General Comment 16, the UN HR Committee states:

Regarding the term 'family', the objectives of the Covenant require that for the purpose of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.²⁰

138. The UN HR Committee has confirmed on a number of occasions that 'family' is to be interpreted broadly.²¹ Where a nation's laws and practice recognise a group of persons as a family, they are entitled to the protections in articles 17 and 23.²² However, more than a formal familial relationship is required to demonstrate a family for the purposes of

article 17(1). Some degree of effective family life or family connection must also be shown to exist.²³ For example, in *Balaguer Santacana v Spain*,²⁴ after acknowledging that the term 'family' must be interpreted broadly, the UN HR Committee went on to say:

Some minimal requirements for the existence of a family are, however, necessary, such as life together, economic ties, a regular and intense relationship, etc.²⁵

139. There is no clear guidance in the jurisprudence of the UN HR Committee as to whether a particular threshold is required in establishing that an act or practice constitutes an 'interference' with a person's family. However, in relation to one communication, the UN HR Committee appeared to accept that a 'considerable inconvenience' could suffice.²⁶

140. In its General Comment on article 17, the UN HR Committee confirmed that a lawful interference with a person's family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the Covenant and is reasonable in the particular circumstances.²⁷

141. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness.²⁸ In relation to the meaning of reasonableness, the UN HR Committee stated in *Toonen v Australia*:

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.²⁹

142. Whilst the *Toonen* case concerned a breach of article 17(1) in relation to the right of privacy, these comments would apply equally to an arbitrary interference with the family.

5.2 Act or practice of the Commonwealth

143. Decisions regarding the placement of a detainee within the network of detention facilities are made by officers of the Australian Border Force (ABF), a body that falls within the Department of Home Affairs.

144. In addition to the acts identified above in section 4.2 in consideration of the arbitrary detention of Mr OA, I consider one further act relevant to this inquiry, being the placement of Mr OA within the detention network in locations away from his family.

5.3 Findings

(a) *Family*

145. Mr OA commenced a de facto relationship with Ms OD in 2013, and they are the parents of 2 children, Miss OB and Master OC.

146. With his complaint, Mr OA has provided a statement describing his relationship with Miss OB and Master OC prior to his detention, and his comments are confirmed by Ms OD in her own statement.

147. Mr OA was a present and engaged caregiver to his 2 children. He states:

We were very busy with two young children and I was totally involved in their daily care. [OD] and I were a close team. I would often take the children out of the house, to the park, to the supermarket, and play with them at home. I would cook for them, put them to bed, change nappies, do all the usual things that a loving father does for his young children.

148. It appears on the information before me that the couple may have separated prior to Mr OA's detention, and that he commenced a relationship with another person. Mr OA and Ms OD had reconciled and recommenced their relationship by late 2018.

149. At the time of his detention, Mr OA informed the Department that he was the father of Miss OB and Master OC, and during the interview conducted at that time, he described himself as having full-time access to them.

150. There are many references on the material before me to show that after his detention, Mr OA maintained regular communication with his children. Given their age, this by necessity involved the assistance of Ms OD, regardless of whether she and Mr OA were in a relationship at all times.

151. As such, I am satisfied that Mr OA and Miss OB and Master OC were a 'family' for the purposes of article 17 of the ICCPR at all times.

(b) *Interference*

152. I am of the view that the detention of Mr OA involves an interference with the complainants' family. That decision by necessity meant that their family unit was unable to cohabit or interact in a way that was beneficial to the children and family life, because Miss OB and Master OC could not also be detained.

153. The interference was also caused by the decision of the ABF to place Mr

OA in IDCs outside of Melbourne, and the refusal of his requests to be transferred to Melbourne, which would have allowed him to be closer to his family.

154. For these reasons, it is my view that the detention of Mr OA interfered with their family and family life contrary to articles 17(1) and 23(1) of the ICCPR and article 16(1) of the CRC.

(c) *Arbitrary interference*

(i) *Detention*

155. My reasons outlined above with respect to my finding that Mr OA's detention may be considered arbitrary, informs my view that the interference with the family unit may also be considered arbitrary.

156. The Department was aware of the existence of Mr OA's 2 children from 17 July 2017 and of the resumption of his relationship with his partner from at least May or August 2019 (but possibly from September 2018). Despite their clarification of this point, Mr OA's relationship status on his case reviews was 'Nev Mar/Defacto'.

157. The Department was asked to comment as to whether an incorrect recitation of Mr OA's relationship status could have had any impact on the CPAT recommendation made. The Department's response was as follows:

The Relationship/Marital Status field of a Community Protection Assessment Tool (CPAT) Client Data has no bearing on the resulting assessment in CPAT Placement Recommendation. In this and all CPAT's the final assessment would not change based on the Relationship/Marital Status field entered.

158. I accept this explanation, and that the incorrect classification of Mr OA's relationship status on the case reviews likely did not affect the decisions which were made regarding his ongoing detention.

159. The Department has identified that their first record of Mr OA having an ongoing relationship with the mother of his 2 children was in August 2019 as a result of communications from Mr OA's migration agent in May 2019.

160. I have reviewed the email from the migration agent of May 2019, and it refers to having previously provided an email containing a statement from Ms OD to the Department on 26 September 2018 in which she outlined the impact of the separation on her and the children. This email was provided to the Commission with the Department's response to my preliminary view, indicating that they were likely aware of the relationship earlier than August 2019.

161. Ms OD provided a statement in support of Mr OA's complaint to the

Commission. In it, she states:

I consider [OA] to be my life-long partner and the person that I want to spend my life with

...

Despite all these difficulties, and despite [OA] being separated from us and detained for two and a half years now, I still remain very committed to our relationship and to our future together. We have been through a lot together and we are both determined and persisting. ... I am willing to do whatever it takes to make our family one and for [OA] and I to create a strong family environment for our children.

...

For most of the time that [OA] has been in detention, he has been in daily contact with myself and his children.

162. As outlined above in respect to my consideration of the article 9 complaint, the Department could have initiated its consideration of referring Mr OA's case to the Minister to consider less restrictive alternatives to detention much sooner than it did.
163. The Minister decided against exercising the discretion to intervene in Mr OA's case to consider the grant of a Bridging visa in October 2018, despite having been made aware of the existence of Mr OA's Australian citizen children.
164. The Department then did not refer Mr OA's case again for consideration, despite the guidelines assessment of February 2020 recommending referral to the Minister under the section 195A guidelines. In July 2020, the Department expressly stated that a Bridging E visa was not being sought from the Minister (refer to paragraph 104, above).
165. I find that the acts identified above at section 4.2 as contrary to article 9(1) of the ICCPR can also be considered contrary to articles 17(1) and 23(1) of the ICCPR and article 16(1) of the CRC.

(ii) *Placement decisions*

166. A further act which the Department had available to it to minimise the impact of Mr OA's detention on him and his family was to hold him in a detention centre closer to his family.
167. Of the 1,558 days of Mr OA's detention, he spent 58 of them at the Maribyrnong Immigration Detention Centre (Maribyrnong), and 66 at the

Melbourne Immigration Transit Accommodation (MITA). These were the only 2 centres located in Victoria.

168. With respect to the short period in which Mr OA was detained in Melbourne, Ms OD explains the following in her statement of January 2020:

I was very happy when [OA] was transferred to Melbourne for a short period in late 2018. Even though I live in Geelong and it is not so easy to get to MITA with two young children, I was totally committed to making that journey and visiting him. When he was first moved to Melbourne I contacted the detention centre to find out what was required so I could visit him and what food I was allowed to bring etc. My problem was that I couldn't meet the ID requirements. I don't have a licence or a passport and my key pass ID was missing. After searching everywhere for it, I started the process to replace it. I was finding the replacement requirements difficult so also looked into obtaining a proof of age card. I was in the process of sorting out my identification when I finally found my key pass card.

Unfortunately this happened right at the time that [OA] was transferred to Perth in February 2019, so I never had the chance to visit him in Melbourne with the children. [OA] and I were both devastated when he was transferred from Melbourne to Perth. He had only been in Melbourne for a couple of months. He has been asking to be transferred back to Melbourne ever since. I don't understand why Australia Border Force won't do that, which would allow us to have personal visits. It would mean the world to [OB] and give [OC] a chance to establish a proper relationship with his father. We are missing out on so much with him being thousands of kilometres away. If he was returned to Melbourne, I have my identification now ready to go and would visit him with the children as often as we could manage, hopefully weekly.

169. In a communication dated 17 March 2021, the Department responded to the Commission's request for an explanation of the consideration given to the location of Mr OA's place of detention:

In considering the placement of an individual, the broader Immigration Detention Network is also considered. There is finite capacity across the national network and there is often an operational need to transfer detainees to rebalance the network and ensure detention facility stability. In making placement decisions regarding individual detainees, their medical needs are given priority, and family and community links are carefully considered.

170. This sentiment is mirrored in the Department's policy statement on placements and transfers, which states:

In making placement and transfer decisions, medical needs and family and community links are carefully considered. Placement or transfer

decisions take into consideration the current personal circumstances and health and wellbeing of the detainee. The standards governing these considerations include:

- physical, cognitive and mental health needs and concerns
- the detainee's needs, including age, length of detention, family connections, status resolution considerations, vulnerabilities and fitness to travel

...

Placement decisions will also take into account welfare issues such as maintaining family unity, recognising community links, health and welfare needs, child safeguarding and child wellbeing considerations and pending and extant marriages.³⁰

171. Detention placement assessments were conducted prior to major transfers on 20 July 2017, 18 July 2018, 24 September 2018 and 18 February 2019.
172. Despite the time that passed between each assessment, each of these documents is essentially a duplicate of the previous one. This may suggest that no genuine ongoing assessment of Mr OA's profile (and particularly his risk profile) was made with respect to the transfers.
173. For example, under the heading 'Criminality and Non-Compliance' on each placement assessment, a list of the offences for which Mr OA was convicted appears, but in addition, the list features 'Immigration offences'. This is incorrect information, as Mr OA has never been convicted of immigration offences.
174. It states that the criminal offences were serious and showed a pattern of offending behaviour. In my opinion, this is not a correct categorisation of offending for which Mr OA received a sentence of 37 days imprisonment and a community corrections order with rehabilitation.
175. Non-compliant behaviour in immigration detention includes the following summary:
 - Abusive aggressive – Multiple (2-7)
 - Assault – Multiple (2-3)
 - Contraband – Excessive (4+)
 - Disturbance – Single
 - Other – FFR
176. The comments made by the officer completing the forms includes a statement that 'VicPol' advised that Mr OA was a person of interest to

them in relation to an armed robbery involving a firearm. This appears to have been the case in 2017 when Mr OA was first detained, but this document was completed 2 years later, when no further concerns of that nature had been raised on the CPATs or elsewhere.

177. Similarly, the documents make multiple mentions of an incident occurring in August 2011 when Mr OA had been detained at the time of his arrival in Australia, when he and another detainee made an attempt to climb over a fence to escape from Curtin IDC.

178. In the 2017 assessment, the following comment appears:

Mr [OA] has the propensity to attempt an escape from MIDC based on his previous attempt, physical ability and time/knowledge within the community, his knowledge of Australia (custom, systems, government processes) is strong due to his extensive time in the community.

179. With respect to associations in the community, the assessments from July 2018 onward identify that Mr OA has a partner and 2 children but then states, 'Children have not visited at MIDC'.

180. MIDC refers to Maribyrnong IDC, a place where Mr OA was detained between 17 Jul 2017 to 8 Aug 2017 only – less than a month. This appears to be the only assessment of Mr OA's family connections, despite the Department's own policy documents requiring detainee's needs, including family connections, to be considered, and stating that 'placement decisions will also take into account welfare issues such as maintaining family unity, recognising community links, health and welfare needs, child safeguarding and child wellbeing considerations'.

181. The placement assessment reached at the conclusion of the document on each occasion was Category A, with suitable facilities for his detention including Maribyrnong IDC and MITA. However, this category was overridden to Category B on the assessment of March 2019, with the note:

Detainee identified for transfer from MITA to YHIDC to ease capacity pressures and ensure the good order of the Centre.

182. A description of each category (A through E) is contained on the final page of the form. Category A in my opinion does not accurately represent Mr OA's profile.

Category A:

A Category A rating may be applied in the following circumstances:

- following a recent escape, or serious attempt to escape, from a correctional, police or other custodial, or immigration detention facility

- where an escape or placement of the detainee at a less secure location would engender a high level of public anxiety
 - where the detainee is assessed as being likely to constitute a significant danger to the community if at large and possesses the motive, capacity and/or resources to effect an escape
 - where the detainee poses a significant threat to the safety of other detainees or officers, or the good order and security of the facility.
183. While I do not have sufficient information before me to assess the seriousness of Mr OA's escape attempt in 2011, it certainly was not a recent one.
184. My position, that the placement assessment conducted contained incorrect summations of the facts as they related to Mr OA, is supported by the covering email of the March 2019 assessment from Vic Transfers to National Detention Placements. In this email, the fact that Mr OA has a high SRAT rating is highlighted, and the following warnings appear in red font:
- Escape
 - Escape – High risk/Invol. Removal
 - Finally Determined
 - High/Extreme risk rating
 - Invol. Removal Pathway
185. With a thorough consideration of Mr OA's history, this does not reflect a correct categorisation of his behaviour and risk profile. It stands in stark contrast with the CPAT records which include a note that, on 24 May 2019, Serco reported positive behaviour and interaction with others in detention. The 24 May 2019 CPAT also records Mr OA's willingness to engage with the Department and refers to Mr OA's regular contact with his partner and children in the community.
186. On 26 November 2018, the Commonwealth Ombudsman recommended that, while he remained in immigration detention, Mr OA be transferred to Melbourne 'to reside closer to his family, in light of the adverse impact of separation from his children'.
187. On 21 February 2019, Minister Coleman tabled a statement in response to the Commonwealth Ombudsman's recommendations in the following terms:
- I note the Ombudsman's recommendations. The Department is currently preparing a submission for my consideration under section 46A of the *Migration Act 1958* (the Act), to lift the bar to allow this person to lodge a further protection visa application.

I have recently considered this person's case under section 195A of the Act for the grant of a Bridging E visa (BVE) and declined to intervene.

This person's placement was reviewed and a transfer to a facility close to this person's support network has already been facilitated by the Department.

188. Four days later, Mr OA was transferred to Yongah Hill IDC, and remained there until 22 October 2021 when he was released on a SHEV. The Department has provided no explanation of the inconsistency between the Minister's statement to Parliament and the Department's actions.
189. After his transfer to Yongah Hill, Mr OA made a number of requests for a transfer to Melbourne to be closer to his family, which were all denied on capacity grounds. The first refusal however seemed to give him an indication that, if he demonstrated good behaviour for 2 months, his transfer could be reassessed. This is not what transpired.
190. The note appearing on the record of this request states:

No as at 25/03/19

Welfare to engage & encourage period of good behaviour (2+ months) + evidence children will be able to visit, then re-asses [sic].

191. An email chain dated 21 March 2019 regarding this request explains the note. An officer of the ABF writes:

I was initially concerned regarding the mention of an IVO on the SRAT, however I have located an extract of court documents indicating all orders are now revoked.

IAW the attached placement request from NDP [National Detention Placements], *Mr [OA]'s Family consists of his partner [redacted] (NFD), daughter [redacted] and son [redacted]. [Redacted] has tested positive on 21/07/2017 for methamphetamine and placed on non-contact visits. **Children have not visited.*** The detail that is missing is that his 2 young children are to his ex-partner [redacted] and may be the reason for the children never visiting.

Given the very short timeframe the detainee has been accommodated here and the children have never visited, I suggest we seek the following clarification/undertaking from the detainee prior to considering further escalation of this request to NDP.

Assurance/evidence from detainee re appropriate behaviour and adherence to the code of conduct for a stipulated period (2 months?).

Given this information I would **not recommend** an escalation of this request to NDP at this time. [emphasis in original]

192. The fourth redacted name does not refer to Mr OA, but rather an unknown person who was visiting Maribyrnong IDC and somehow associated with Mr OA.
193. A further Commonwealth Ombudsman report dated 31 January 2020 recommended (among other things), that the Department consider transferring him to a facility closer to his family, and that if placement was not possible at that time due to capacity issues, that it be facilitated as soon as a place became available.
194. In summary, insufficient reasons have been provided for the decisions to move Mr OA to IDCs outside of Melbourne, and to refuse his requests to be transferred to a facility closer to his family.
195. In response to my preliminary view, the Department provided the following information:

There is finite capacity at each IDF and detainee transfers are required to ensure IDFs are managed at safe operating capacity and appropriate amenity for detainees can be provided. As such, requests for placement in particular locations cannot always be accommodated, as was in the case for Mr [OA]. As an example, records provided by the Department to the AHRC demonstrate that the Melbourne Immigration Transit Accommodation (MITA) was operating above operational capacity (115%) on 18 February 2019.

Further, COVID-19 and subsequent international border restrictions led to a substantial decrease in the number of detainees being removed from Australia and as a result, the detention population across the IDN increased. The Department faced significant challenges transferring detainees throughout the IDN, including IDFs in Victoria, due to regularly changing COVID-19 complexities, including State border closures.

Where possible, the Department does not transfer a detainee where family or community links can be evidenced, however these links need to be weighed against operational considerations. Detainees who receive regular visits from immediate family are prioritised to ensure that visits can continue. All detainees, including Mr [OA], are advised of personal visitor arrangements and the communication services available to them and how to access such services.

While Mr [OA] was accommodated at Maribyrnong IDC and Melbourne ITA, it is noted that Mr [OA]'s partner (Ms [OD]) and children did not make any requests to visit Mr [OA]. Further to this, by Ms [OD]'s own admission, she did not meet the Conditions of Entry to be able to visit Mr [OA] during this time. Although Mr [OA] did not receive any visits from his family, the Department maintains that Mr [OA]'s family, including his children were

considered when placement decisions were being made as demonstrated by detention placement records provided to the Commission on 23 March 2023 at Question 5.

In 2020 and 2021, in response to the COVID-19 pandemic, Melbourne experienced lengthy lockdowns imposed by the Victorian State government. Beyond State-imposed lockdowns, in-person visits to IDFs in Victoria, including the MITA, were temporarily suspended at various times in 2020-2022 in line with public health advice.

196. As set out above at paragraph 103, I consider that the Department's response to the COVID-19 pandemic more appropriately should have prioritised releasing people from immigration detention. The pandemic also does not explain why Mr OA was not prioritised for a placement in Victoria between July 2017 and March 2020.
197. The documents which indicate that Mr OA needed to be held in high security do not demonstrate an individualised risk assessment and contain incorrect and outdated information. Even if Mr OA was required to be detained in a high security facility, suitable facilities (in line with the Category A placement assessment) were stated to include Maribyrnong IDC and MITA. Moreover, it is unclear how these placement assessments can be reconciled with his CPAT assessments that recommend placement in the community and a Bridging E visa.
198. There were strong compassionate grounds arising from the separation of Mr OA from his family and Australian citizen children which should have been given greater consideration by the Department and ABF in line with Departmental policy. It appears that family unity and the impact of Mr OA's detention placement on Australian citizen children were given minimal attention.
199. For the above reasons, I find that the Department's failure to give adequate consideration to holding Mr OA in a facility closer to his family, was inconsistent with the Commonwealth's obligations under article 17(1) and article 23(1) of the ICCPR and article 16(1) of the CRC.

6 Best interests of the child

200. Article 3(1) of the CRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

201. The phrase 'concerning children' has been interpreted by the High Court as having 'a wide-ranging application' in light of the objects of the CRC, and that a decision relating to a child's parent also concerned the child

when the consequence of the decision was separation.³¹

202. The United Nations Children’s Fund (UNICEF) Implementation Handbook for the CRC provides the following guidance on article 3:

The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests...

The child’s interests, however, must be the subject of active consideration; it needs to be demonstrated that children’s interests have been explored and taken into account as a primary consideration.³²

203. Miss OB and Master OC were children at the time Mr OA was detained and for the entire period of his detention. Their best interests should have been the subject of active consideration by the Department in making relevant decisions. However, their best interests may be balanced with other considerations, such as the need to uphold the integrity of Australia’s migration system.
204. The starting point is to identify what the best interests of the child indicate that the decision maker should decide.³³ This requires an examination of each child’s best interests, bearing in mind their individual circumstances.³⁴
205. The Committee on the Rights of the Child recommends that State parties draw up a ‘list of elements’ to be included in an assessment by a decision-maker who is determining a child’s best interests. Such list, the Committee recommends, should include:
- the child’s views
 - the child’s identity
 - preservation of the family environment and maintaining relations
 - care, protection and safety of the child
 - situation of vulnerability
 - the child’s right to health
 - the child’s right to education.³⁵
206. On the subject of preservation of the family environment, and while the specifics of this case are not envisaged in the Committee’s comments, it remains clear that in making decisions which impact a family, an

assessment is to take place regarding what the child's best interests are, and ensuring that prior to separation occurring, 'no other option can fulfil the child's best interests'.³⁶

207. Australia's interpretation of the phrase 'best interests of the child' is set out in the *Family Law Act 1975* (Cth) at section 60CC. A primary consideration contained therein is 'the benefit to the child of having a meaningful relationship with both of the child's parents'.

208. Additional considerations included at section 60CC(3) include:

(a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;

(b) the nature of the relationship of the child with:

(i) each of the child's parents; ...

(c) the extent to which each of the child's parents has taken, or failed to take, the opportunity:

(i) to participate in making decisions about major long-term issues in relation to the child; and

(ii) to spend time with the child; and

(iii) to communicate with the child;

(ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;

(d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; ...

(e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(f) the capacity of:

(i) each of the child's parents; ...

to provide for the needs of the child, including emotional and intellectual needs;

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

209. I note that the Minister's own guidelines on the section 195A power to

grant a visa include the following description of cases which are appropriate to refer to the Minister:

there are strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or permanent resident), or there is an impact on the best interests of a child in Australia.³⁷

6.1 Consideration

210. The young ages of the children at the time of detention (one year and 8 months, and 4 months), meant that the children (and particularly Master OC) were not able to meaningfully engage or communicate with their father in the same way as they had previously. Significant effort was made by the children's mother to maintain this relationship, and she has clearly suffered, as have the complainants.
211. Ms OD states that she called Mr OA 2 or 3 times per day, including by way of a video call so that the children could see him. She describes being a support person for Mr OA, ensuring each day that he was okay. She expressed concern for his mental health from around September 2019, and how this placed great pressure on her to try to keep his spirits high.
212. I note that an intervention order was apparently made protecting Ms OD and the 2 children in October 2017 and then withdrawn in December 2017 or January 2018. Mr OA was in detention at this time and I do not have any information before me about the grounds on which the order was made. Ms OD raised no concerns about her own or the children's safety in her communications regarding the complaint.
213. I consider it was in the best interests of Mr OA's children to be able to spend time with him, to communicate with him in a manner suited to their young ages, to have him freely able to participate in decisions being made about them, and to minimise the difficulty and expense involved in their being able to see and maintain relations with him. Their best interests would have been served by their father remaining in the community, or in the alternative, being detained at a location closer to them.
214. This does not determine, however, that there was therefore a breach of the CRC.
215. Had cogent reasons existed for the Department to continue to detain Mr OA in closed detention facilities, or to keep him in locations outside

Melbourne, then it may have been that even balancing the best interests of his children, no breach occurred in the ultimate decision to separate them from their father.

216. However, as set out above, in my view the Department has failed to provide adequate justification that the detention of Mr OA in closed facilities was reasonable, necessary and proportionate on the basis of individual reasons specific to him and in light of the available alternatives to closed detention. Additionally, as set above, in my view, the Department has failed to provide adequate justification for its decisions to detain Mr OA in facilities outside Melbourne, and to refuse his requests to be transferred to facilities closer to his family.
217. I am of the view that the materials before me do not show that the Department viewed the best interests of Mr OA's children as a primary consideration. Ambiguity and uncertainty surrounding the status of his relationship with Ms OD appears throughout the documentation, and speculation regarding his ongoing relationship with his children.
218. Had these been properly identified as crucial factual issues requiring certainty for decision-making purposes, the Department could easily have clarified the information with Mr OA, as was done in August 2019. Upon receiving the corrected information from him, the Department should have ensured that all records on their system were updated accordingly, to ensure that any person making a decision which impacted upon Mr OA and his 2 children were fully cognisant of the family unit. I note that in his interview in July 2017 at the time he was detained, Mr OA informed the Department that he had 2 children.
219. The submission referring Mr OA's case to the Minister for consideration of a Bridging visa in October 2018 did not identify his children as a key reason for referral. The information was included in the submission, but not highlighted as a primary consideration. Additionally, the assessments conducted by the Department that preceded his detention transfers did not identify his separation from his children as a primary consideration in these placement decisions.
220. I find that, in making decisions about Mr OA's detention, the Department did not consider the best interests of Miss OB and Master OC and that the acts or practices identified in sections 4.2 and 5.2 of this inquiry may also be considered contrary to the Commonwealth's obligations under article 3(1) of the CRC.

7 Recommendations

221. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the

respondent setting out its findings and reasons for those findings.³⁸ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.³⁹ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.⁴⁰

7.1 Documenting best interests assessments and relationship status

222. At paragraphs 217 and 218, I express concern that the Department's records regarding Mr OA's relationship with Ms OD, and his relationship with his children Miss OB and Master OC were ambiguous, and were not updated in a timely manner. Sufficient material was released to the Commission to indicate that the Department had knowledge that the relationship between Mr OA and Ms OD had recommenced, but this was not updated on their system. Accordingly, Mr OA's relationship status was recorded as 'Nev Mar/Defacto' throughout his case reviews.
223. Similarly, the records show speculation about Mr OA's relationship with his children. Unlike his relationship status, which did not have any real impact on the decisions that were made regarding his detention, it appears that this uncertainty may have impacted the placement decisions made by the Department.
224. The decision to detain Mr OA, and decisions made with respect to his placement, do not show the Department making an assessment of Miss OB and Master OC's best interests. In this respect, the Committee on the Rights of the Child has stated:

Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.⁴¹

225. The Department's policy manual available on LEGENDcom does not appear to require officers to document their assessments of a child's best interests, outside of decisions to grant a child a visa⁴² or in visa cancellation decisions.⁴³ As can be seen from this inquiry, there are other

scenarios where decisions are made that can affect individual children, when decisions are made about their parents or other family members.

226. I also draw the Department's attention to the Commission's report *Safeguarding Children: Using a child rights impact assessment to improve our laws and policies* which similarly highlights the importance of developing child rights impact assessments measuring the 'anticipated impacts' that administrative decisions may have on children's rights and interests.⁴⁴

Recommendation 1

The Commission recommends that a Departmental policy is created to require Departmental officers to document their assessment of a child's best interests with respect to all decisions which may affect a child but where the decision does not involve granting a visa to the child, or cancelling a visa. Such scenarios would include decisions to detain a child's parent, decisions not to refer a case to the Minister, or decisions with respect to placement within the immigration detention network.

Recommendation 2

The Commission recommends that training is provided to Departmental officers upon implementation of the policy to ensure that best interests assessments are properly conducted and documented.

Recommendation 3

The Commission recommends that the Department ensure that detainees' personal information is checked regularly and that any updated information regarding relationship and/or familial status is recorded appropriately and promptly.

7.2 Detention placement assessments

227. A number of errors and concerns were identified in the detention placement assessments conducted with respect to Mr OA as set out in my preliminary view and above at paragraph 173 onwards. The Department did not provide any response or explanation for the concerns raised.
228. The Commission is concerned that the Department's records of decisions made regarding the placement of Mr OA do not reflect individualised assessments of any risk that he may have posed.
229. These documents, while mentioning the fact that Mr OA had a partner and 2 children, also do not reflect any best interests assessments being conducted (which is the subject of recommendation 1).

Recommendation 4

The Commission recommends that the Department review current policy

and procedures with respect to the completion of detention placement assessments in light of the concerns raised in this inquiry, including requiring Departmental officers to ensure that:

- information is correctly recorded
- information that is no longer relevant is removed, for example when a police investigation has concluded, rather than being carried forward in all subsequent assessments
- consideration be given to whether it is necessary to include incidents that occurred many years ago, and if it is necessary the date the incident occurred also be included
- the best interests of any minor children affected by the decision are considered and recorded

to ensure that detainees are not inappropriately assigned a high risk profile which may affect their placement within the immigration detention network.

8 The Department's response to my findings and recommendations

230. On 21 November 2023, I provided the Department with a notice of my findings and recommendations.

231. On 27 February 2024, the Department provided the following response to my findings and recommendations:

The Department does not accept the finding of the Australian Human Rights Commission (the Commission) that the following acts of the Commonwealth are inconsistent with, or contrary to, articles 9(1), 17(1) and 23(1) of the ICCPR and articles 3(1) and 16(1) of the CRC:

- *the failure of the Department to refer the case to the Minister in order to assess whether to exercise his discretionary powers under section 195A of the Migration Act 1958 (Cth) (the Act) prior to October 2018, or again thereafter*
- *the failure of the Department to refer the case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under section 197AB of the Act at any time*
- *the delay of the Department in referring to the Minister a section 46A submission between July 2018 and July 2020.*

The Department maintains that Mr OA's placement in held detention was reasonable, necessary and proportionate. During Mr OA's time in detention, he was lawfully detained as an unlawful non-citizen under section 189 of the Act. At no point in time did Mr OA's detention become arbitrary.

The Department undertakes regular reviews to consider the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention. Escalations and referrals are used to ensure people are detained in the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status.

Portfolio Ministers' personal intervention powers under the Act allow them to grant a visa to a person in immigration detention or to make a residence determination if they think it is in the public interest to do so. The Minister's powers are non-compellable and what is in the public interest is a matter for the Minister to determine.

The Minister accepts that, because of the resulting High Court judgment in *Davis v Minister for Immigration and DCM20 v Secretary of Department of Home Affairs* (Davis), the decision not to refer to the Minister the request for Ministerial intervention was made in excess of the executive power of the Commonwealth.

The Minister is currently considering the implications of *Davis* on requests for him to exercise his personal intervention powers, including in relation to requests that have already been made. Further information about the Department's approach will be made available in due course.

The Department acknowledges the time taken to refer a submission to the Minister under section 46A of the Act. As noted in our responses throughout the process of this inquiry, the Department was considering the Afghanistan cohort in a holistic manner due to the rapidly changing country information and volatile security environment.

It is also noted that considerations in relation to family ties in Australia do not fall within the scope of a section 46A assessment.

Recommendation 1 – Agree and already implemented

The Commission recommends that a Departmental policy is created to require Departmental officers to document their assessment of a child's best interests with respect to all decisions which may affect a child but where the decision does not involve granting a visa to the child, or cancelling a visa. Such scenarios would include decisions to detain a child's parent, decisions not to refer a case to the Minister, or decisions with respect to placement within the immigration detention network.

The Department's child safeguarding policy statement, the Child Safeguarding Framework (CSF), sets out the Department's strong

commitment to ensuring departmental programs, activities and environments promote child safety and wellbeing. Compliance with the Framework and its associated policies and procedures is mandatory.

The Framework is informed by Australia's domestic and legal framework and Australia's international obligations and is reviewed regularly to ensure it stays current with legal developments and best practice. The Framework recognises it is everyone's responsibility to safeguard the wellbeing of children and all staff must consider it a professional responsibility to know what is in the best interests of children in any operational environment, to promote their welfare and to keep them safe from abuse, injury or neglect. The Framework states all staff must consider the best interests of children in immigration programs as a primary consideration in all decisions made and actions taken, where there is scope to do so.

The Framework is supported by child-related policy and procedural documents, to inform business areas on what they need to include in their own procedural documents. This includes the Best Interest of the Child - Policy Statement (DM-5721), which provides direction on the consideration of children's best interests as a primary consideration in all aspects of the Department's work, where there is scope to do so, to ensure the Department treats children with dignity and respect and safeguards their wellbeing. The Policy Statement includes the requirement for all staff and contracted services providers to record the consideration of a child's best interests as part of the rationale supporting any decision making or action taken that directly or indirectly affects that child.

The Status Resolution Officer Procedural Instruction (VM-6363) outlines the requirement for Status Resolution Officers (SROs) to record considerations of a child's best interest as part of the rationale supporting any decision-making or action taken that directly or indirectly affects them. SROs must consider the best interests of a child during all discretionary decision-making that may have an impact on a child in Australia.

Detention Services Manual – Procedural Instruction – Detainee placement - Assessment and placement of detainees in an immigration detention facility (DM-5126) is currently under review by the Department under the Policy and Procedure Framework. As part of this review, consideration is being given to providing enhanced policy guidance and supporting material to support decision makers in their consideration of the best interests of the child in respect to detainee placement decisions.

Recommendation 2 – Agree and already implemented

The Commission recommends that training is provided to Departmental officers upon implementation of the policy to ensure that best interests assessments are properly conducted and documented.

The Department has committed to providing child safeguarding learning and development for all staff to ensure that the best interests of the child are treated as a primary consideration, where appropriate. This learning and development focuses on helping staff increase their capacity to respond effectively to child protection concerns and to safeguard children in immigration programs. Staff in designated child-related roles must complete the Department's Child Safeguarding eLearning before commencing their role.

It is a mandatory requirement that SRO's complete the Child Safeguarding Essentials eLearning training. This training includes the requirement for officers to record how they have taken children's wellbeing into account in their decision making processes.

Further to this, business areas can request bespoke training on child safeguarding and considering the best interests of children, which is provided by the department's Child Wellbeing Officers, who are professionally trained social workers.

Recommendation 3 – Agree and already implemented

The Commission recommends that the Department ensure that detainees' personal information is checked regularly and that any updated information regarding relationship and/or familial status is recorded appropriately and promptly.

The Department is committed to ensuring detainee records are kept up to date and in line with good record keeping practices. The Status Resolution Officer Procedural Instruction (VM-6363) outlines the requirement for SROs to use every opportunity to collect and confirm information about a person's identity and citizenship. This also includes gathering as much information as possible regarding a detainee's circumstances, such as relationship status and their family details, and ensuring this information is recorded appropriately and promptly.

It is also a mandatory requirement that all Departmental staff, including SROs, complete the Record Essentials e-learning training every 12 months to understand their record management and record keeping responsibilities.

Recommendation 4 – Agree

The Commission recommends that the Department review current policy and procedures with respect to the completion of detention placement assessments

in light of the concerns raised in this inquiry, including requiring Departmental officers to ensure that:

- *information is correctly recorded*
- *information that is no longer relevant is removed, for example when a police investigation has concluded, rather than being carried forward in all subsequent assessments*
- *consideration be given to whether it is necessary to include incidents that occurred many years ago, and if it is necessary the date the incident occurred also be included*
- *the best interests of any minor children affected by the decision are considered and recorded*

to ensure that detainees are not inappropriately assigned a high risk profile which may affect their placement within the immigration detention network.

The Department accepts recommendation four to the extent that it maintains its advice provided in its response to the Commission's s 27 preliminary findings dated 29 September 2023. Detention Services Manual – Procedural Instruction – Detainee placement - Assessment and placement of detainees in an immigration detention facility (DM-5126) is currently under review by the Department under the Policy and Procedure Framework. The Department agrees to consider Recommendation 4 as part of this review.

232. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

April 2024

Endnotes

- ¹ Including Department of Immigration and Border Protection prior to December 2017.
- ² *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154.
- ³ Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, August 2016, p 52, at <https://www.homeaffairs.gov.au/reports-and-pubs/files/dcr-final-report.pdf>.
- ⁴ See Secretary, Department of Defence v HREOC, *Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Note in particular 212–3 and 214–5.
- ⁵ UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, *Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); UN Human Rights Committee, *Communication No 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) (*C v Australia*); UN Human Rights Committee, *Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (2003) (*Baban v Australia*).
- ⁶ UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014) [18]; UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).
- ⁷ *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee, *Communication No 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) (*Van Alphen v The Netherlands*); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Communication No 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) (*Spakmo v Norway*).
- ⁸ UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- ⁹ *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- ¹⁰ *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communication No 1255,1256,1259,1260,1266,1268,1270,1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (2007) (*Shams & Ors v Australia*); *Baban v Australia*, CCPR/C/78/D/1014/2001; UN Human Rights Committee, *Communication No 1050/2002*, 87th sess, CCPR/C/87/D/1050/2002 (2006) (*D and E and their two children v Australia*).
- ¹¹ Human Rights Committee, *General Comment 35 (2014), Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].
- ¹² Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].
- ¹³ UN Human Rights Committee, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons)*, 60th sess, UN Doc HRI/GEN/1/Rev.1 (1982) [4]. See also UN Commission on Human Rights, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc E/CN.4/826/Rev.1 (1962) [783]–[787].

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- ¹⁴ UN Human Rights Committee, *Communication No 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (2004) ('Mansour Ahani v Canada') [10.2].
- ¹⁵ UN Human Rights Committee, *Communication No 794/1998*, 74th sess, UN Doc CCPR/C/74/D/794/1998 (2002) ('Jalloh v the Netherlands'); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001.
- ¹⁶ UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993, *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- ¹⁷ Australian Human Rights Commission, 'Management of COVID-19 risks in immigration detention: review' (Report, June 2021), https://humanrights.gov.au/sites/default/files/document/publication/ahrc_covid-19_immigration_detention_2021.pdf, 15-18.
- ¹⁸ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.
- ¹⁹ [2007] AusHRC 39 at [80]-[88].
- ²⁰ UN Human Rights Committee, *General Comment 16* (Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)
- ²¹ See, eg, UN Human Rights Committee, *General Comment No 16: Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)*, 32nd sess, UN Doc HRI/GEN/1/Rev.1 (8 April 1988) 21 [5]; UN Human Rights Committee, *General Comment 19 (Article 23: Protection of the Family, the Right to Marriage and Equality of the Spouses)*, 39th sess, UN Doc HRI/GEN/1/Rev.1 (27 July 1990) 28 [2].
- ²² UN Human Rights Committee, *General Comment 19 (Article 23: Protection of the Family, the Right to Marriage and Equality of the Spouses)*, 39th sess, UN Doc HRI/GEN/1/Rev.1 (27 July 1990) 28 [2].
- ²³ Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2004), 589.
- ²⁴ UN Human Rights Committee, *Views: Communication No 417/1990*, 51st sess, UN Doc CCPR/C/51/D/417/1990 (15 July 1994) ('Balaguer Santacana v Spain').
- ²⁵ *Ibid* [10.2]. See also *AS v Canada, Communication No 68/1980*, UN Doc CCPR/C/OP/1, 27 (1985), where the UN Human Rights Committee did not accept that the author and her adopted daughter met the definition of 'family' because they had not lived together as a family except for a period of 2 years approximately 17 years prior.
- ²⁶ UN Human Rights Committee, *Views: Communication No 35/1978*, 12th sess, UN Doc CCPR/C/OP/1, 67 [9.2(b)] (9 April 1981) ('*Mauritian Women v Mauritius*') [9.2(b)].
- ²⁷ UN Human Rights Committee, *General Comment 16* (1988) [4].
- ²⁸ Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2004), 482-3.
- ²⁹ UN Human Rights Committee, *Views: Communication No 488 of 1992*, 50th sess, UN Doc CCPR/C/D/488/1992 (31 March 1994) [8.3].
- ³⁰ Department of Home Affairs (Cth), Detention Health > Placements and Transfers [Policy Statement], issued 1 October 2019, [3], accessed through LEGENDcom.
- ³¹ *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 289.
- ³² R Hodgkin and P Newell, *UNICEF Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, 2007) 38.
- ³³ *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133, [26].

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- ³⁴ United Nations Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 62nd session, UN Doc CRC/C/GC/14 (2013) 9 [32].
- ³⁵ United Nations Committee on the Rights of the Child, *General Comment No 14*, 13 – 17.
- ³⁶ United Nations Committee on the Rights of the Child, *General Comment No 14*, 15 [64].
- ³⁷ Department of Home Affairs, PAM3: Act – Compliance and Case Resolution – Case resolution – Minister’s powers – Minister’s detention intervention power, reissued 18 August 2017, [3].
- ³⁸ AHRC Act, s 29(2)(a).
- ³⁹ AHRC Act, s 29(2)(b).
- ⁴⁰ AHRC Act, s 29(2)(c).
- ⁴¹ United Nations Committee on the Rights of the Child, *General Comment No 14*, [6].
- ⁴² Department of Home Affairs, PAM3: Migration Act – Act-defined terms – s5G – Relationships and family members – Best interests of minor children, 19 November 2016.
- ⁴³ See for example Department of Home Affairs, PAM3: Visa cancellation instructions – General visa cancellation powers (s109, s116, s128, s134B and s140), reissued 30 October 2022.
- ⁴⁴ Australian Human Rights Commission, *Safeguarding Children: A child rights impact assessment tool* (2023), <https://humanrights.gov.au/our-work/childrens-rights/publications/safeguarding-children>, p 11-12.