



Australian
Human Rights
Commission

The detention of refugees
following visa refusal or
cancellation under section 501
of the *Migration Act 1958* (Cth)

[2022] AusHRC 143

March 2022

The detention of refugees following visa refusal or cancellation under section 501 of the *Migration Act 1958 (Cth)*

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Report into arbitrary detention

Australian Human Rights Commission 2022

Senator the Hon. Michaelia Cash
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 complaints by three refugees, Mr NS, Mr NT and Mr NU, alleging a breach of their human rights by the Department of Home Affairs (Department).

This is a thematic inquiry based on these three complaints into the detention of refugees who have had their visas cancelled or refused on character grounds under s 501 of the *Migration Act 1958* (Cth) (Migration Act).

As a result of this inquiry, I have found that the failure or delay of the Department to refer the complainants' cases to the Minister for consideration of alternative options to closed detention, and decisions of the then Minister not to consider these alternative options, have resulted in the detention of each of the complainants becoming arbitrary in contravention of article 9 of the *International Covenant on Civil and Political Rights*. Further, I am concerned about the high risk that two of the complainants, Mr NT and Mr NU, will be effectively detained indefinitely.

Pursuant to s 29(2)(b) of the AHRC Act, I have included a recommendation in the report regarding Mr NT and Mr NU. This recommendation is that:

- The relevant Home Affairs portfolio Minister indicate to the Department that they will consider a further submission about the exercise of their powers under s 195A and/or s 197AB in relation to Mr NT and Mr NU.
- In the event that the Minister is concerned that Mr NT or Mr NU may pose some risk if allowed to reside in the community (such as a risk of re-offending or to public safety), they direct the Department to prepare a detailed submission, including the following:
 - a. a personalised assessment of the existence and/or extent of any such risk, including a detailed description of the nature of the risk and of the evidence and reasons leading to the assessment

- b. a description of what measures might be implemented to ameliorate any risk in the event Mr NT or Mr NU were allowed to reside in the community
 - c. an assessment of whether any risk, if present, could be satisfactorily addressed by the identified measures.
- The Department prepare a fresh submission to the relevant Home Affairs portfolio Minister about the exercise of their discretionary powers in relation to Mr NT and Mr NU, including (if relevant) any matters referred to in the paragraph above.
 - The relevant Home Affairs portfolio Minister consider the exercise of their discretionary powers in light of the fresh Departmental submission.

On 12 August 2021, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations on this matter. The Department provided its response to my findings and recommendations on 14 October 2021. That response can be found in Part 9 of this Report.

I enclose a copy of my report.

Yours sincerely,



Emeritus Professor Rosalind Croucher AM
President

Australian Human Rights Commission
March 2022

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into the detention of refugees who have had their visas cancelled or refused on character grounds under s 501 of the *Migration Act 1958 (Cth)* (Migration Act).
2. Over the past few years, the Commission has received an increasing number of complaints from refugees who are in immigration detention as a result of having their visa cancelled or refused on character grounds.
3. This is a thematic inquiry based on complaints made by three individuals against the Commonwealth of Australia (Department of Home Affairs, formerly the Department of Immigration and Border Protection) (the Department), alleging a breach of their human rights:
 - a) Mr NS
 - b) Mr NT
 - c) Mr NU (together, the complainants).
4. In this inquiry, a reference to a 'Minister' is to the Minister for Home Affairs or, if appropriate, the Minister at the relevant time (Minister).
5. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986 (Cth)* (AHRC Act) and this report is issued pursuant to s 29(2) of the AHRC Act.
6. As a result of being refugees who have had their visas cancelled or refused under s 501 of the Migration Act, the complainants have each been held in closed immigration detention for between six and seven years. I understand that the detention of Mr NT and Mr NU is ongoing.
7. The character concerns relating to the complainants are varied. In the case of Mr NT and Mr NS, they have committed criminal offences and served custodial sentences. Mr NS spent more time in immigration detention than in prison serving the criminal sentence that triggered his visa refusal. In the case of Mr NU, there appear to be public safety concerns. However, on the information before the Commission, Mr NU has never had a criminal conviction or served a prison sentence.
8. The prolonged length of the complainants' immigration detention raises concerns about their human right to be free from arbitrary detention

under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

9. The Commission has conducted a separate thematic inquiry into 11 human rights complaints made by other individuals, who have experienced, or continue to experience, lengthy immigration detention due to being deemed not to pass the character test under s 501 of the Migration Act (the s 501 Inquiry).¹ However, unlike the current complainants, the complainants in the s 501 Inquiry are not refugees. Therefore, the complainants in this inquiry have an added level of vulnerability as they cannot be returned to their home countries because, having been found to be refugees, they face a well-founded fear of persecution.
10. The s 501 Inquiry found that all 11 complainants had been arbitrarily detained contrary to article 9 of the ICCPR, on the basis that the Department or the then Minister failed to refer for consideration, or to consider, alternative options to closed detention — being community detention or a bridging visa.
11. The fact that detention may be lawful under Australian domestic law does not prevent it from being considered ‘arbitrary’ under international human rights law. For detention to avoid being considered ‘arbitrary’ under international human rights law, the detention must be justified as reasonable, necessary and proportionate on the basis of an individual’s particular circumstances.
12. Furthermore, there is an obligation on the Commonwealth to demonstrate that there is not a less invasive way than closed detention to achieve the ends of its immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention is ‘arbitrary’.
13. To comply with these obligations, the Department needs to conduct an individualised risk assessment to determine whether any risks a person might pose to the community could be mitigated in ways other than closed detention, as well as ongoing reviews to determine whether their detention remains necessary.
14. In the s 501 Inquiry, I considered the Department’s decision-making framework and noted that it does not appear to require individualised risk assessments to consider whether any potential risks that an individual poses could be satisfactorily mitigated if the person were permitted to reside in the community.² I identified the parole system in Australia as a good model of how potential risks posed by convicted criminals can be managed.

15. In the s 501 Inquiry, I also referred to decision-making models used by comparative jurisdictions.³ The United Kingdom, Canada and New Zealand similarly grapple with how to deal with unlawful non-citizens who have committed crimes and are waiting to have their immigration status resolved. These countries adopt policies and practices that may reduce the risk of arbitrary detention. In particular, in the UK and Canada, there is a presumption that individuals will be released from detention with the provision to impose conditions to manage any risk to the community.
16. I refer to and rely on that analysis in this inquiry. A decision-making framework that is consistent with human rights is vital for the particularly vulnerable cohort of detainees who are the subject of this inquiry.
17. As with the s 501 Inquiry, this inquiry does not consider the reasonableness of any specific decision to cancel or refuse a visa. Further, I do not come to a view as to whether any of the complainants should be released into the community. Rather, this inquiry focuses on whether the Commonwealth's decision to continue to detain the complainants is, or was, consistent with their human rights, and in what ways relevant decision-making processes could be made more compatible with human rights in such difficult contexts.
18. As a result of this inquiry, I have formed the view that the failure or delay of the Department to refer the complainants' cases to the Minister for consideration of alternative options to closed detention under ss 195A or 197AB of the Migration Act, and decisions of the then Minister not to consider these alternative options, have resulted in the detention of each of the complainants becoming arbitrary in contravention of article 9 of the ICCPR.
19. More generally, I am concerned about the high risk of Mr NT and Mr NU being effectively detained indefinitely. This is the effect of the operation of the Migration Act as a matter of Australian law as it presently stands. There does not appear to be a durable solution to this unsatisfactory outcome for a cohort of people, namely refugees with character concerns, and this is at odds with international human rights law.
20. The Commission has also previously made a submission to the Commonwealth Parliament's Joint Standing Committee on Migration, noting the high risk of immigration detention becoming arbitrary under article 9 of the ICCPR where refugees are refused visas on character grounds, and making recommendations for reform.⁴

21. I further note the guidance provided by the United Nations Human Rights Committee (UN HR Committee) in General Comment No 35 on article 9 of the ICCPR. It provides that a person who has fully served a criminal sentence should not be subject to further civil detention that is equivalent to penal imprisonment.⁵ It notes that protection of the community, including through general and specific deterrence, has already been carefully considered and addressed through the process of criminal sentencing and imprisonment. It states that the decision to keep a person in any form of administrative detention is also arbitrary if not subject to periodic re-evaluation of the justification for continuing detention.⁶

2 Summary of findings and recommendations

22. As a result of this inquiry, I find that all three complainants have been detained in a manner contrary to article 9 of the ICCPR.
23. At the end of this report, I make the following recommendations aimed at preventing repetition of the acts and/or continuation of the practices that I have found to be inconsistent with Australia's international human rights law obligations:
- The relevant Home Affairs portfolio Minister indicate to the Department that they will consider a further submission about the exercise of their powers under s 195A and/or s 197AB in relation to Mr NT and Mr NU.
 - In the event that the Minister is concerned that Mr NT or Mr NU may pose some risk if allowed to reside in the community (such as a risk of re-offending or to public safety), they direct the Department to prepare a detailed submission, including the following:
 - d. a personalised assessment of the existence and/or extent of any such risk, including a detailed description of the nature of the risk and of the evidence and reasons leading to the assessment
 - e. a description of what measures might be implemented to ameliorate any risk in the event Mr NT or Mr NU were allowed to reside in the community
 - f. an assessment of whether any risk, if present, could be satisfactorily addressed by the identified measures.
 - The Department prepare a fresh submission to the relevant Home Affairs portfolio Minister about the exercise of their discretionary powers in relation to Mr NT and Mr NU, including (if relevant) any matters referred to in the paragraph above.

- The relevant Home Affairs portfolio Minister consider the exercise of their discretionary powers in light of the fresh Departmental submission.

3 Conciliation

24. The Department indicated that it did not wish to participate in conciliation of these matters.

4 Procedural history of this inquiry

25. On 13 November 2019, I issued a preliminary view in this matter and gave both the complainants and the Department the opportunity to respond to my preliminary findings.
26. On 22 February 2020, the Department responded to my preliminary view. I have considered this response in reaching my final views.

5 Background

27. The three complainants have all:
- a) been previously recognised or indicatively recognised by the Commonwealth as persons owed protection obligations under the *Convention and Protocol relating to the Status of Refugees 1951* (the Refugee Convention) or complementary protection criterion
 - b) had visas or visa applications cancelled or refused under s 501 of the Migration Act on character grounds
 - c) been held in closed immigration detention for a period longer than six years
 - d) made human rights complaints to the Commission.

Complainant	Date of arrival in Australia	Date of detention	Length of detention (until March 2021)	Date of release from detention
Mr NS	24 December 2012	24 December 2012	Six years (approx.)	3 December 2018
Mr NU	15 November 2012	4 February 2014	Seven years	Detention ongoing
Mr NT	10 October 2003	1 May 2014	Six years, ten months	Detention ongoing

Figure 1: Key information about the complainants

28. As of 4 March 2021, Mr NT and Mr NU remained in immigration detention. Mr NS was released into the Australian community in December 2018 after the grant of a temporary protection visa (TPV).

6 Legal framework for human rights inquiry

6.1 Functions of the Commission

29. Section 11(1)(f)(i) 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.⁷
30. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
31. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.
32. The terms ‘act’ and ‘practice’ are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
33. 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.
34. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law

to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.⁸

35. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.

6.2 Human rights in detention

36. As a State Party to the ICCPR, Australia has agreed that particular human rights protections must be observed by the government in relation to persons held in detention.

37. Most relevantly, article 9(1) of the ICCPR protects against arbitrary detention, and 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.

38. The fact that detention may be lawful under Australian domestic law does not prevent it from being considered 'arbitrary' under international human rights law.

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

- a) 'detention' includes immigration detention⁹
- b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to a legitimate aim,¹⁰ in this case ensuring the effective operation of Australia's migration system
- c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability¹¹
- d) detention should not continue beyond the period for which a state party can provide appropriate justification,¹² and should be subject to periodic re-evaluation and judicial review.¹³

40. In *Van Alphen v The Netherlands*, the UN HR Committee found detention for a period of two 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.¹⁴

41. Australia has also voluntarily adopted obligations to protect the human rights of refugees and asylum seekers under various international law conventions. For example, under article 33(1) of the Refugee Convention, Australia has an obligation not to forcibly expel, or return, a refugee to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.

6.3 Alternatives to closed detention

42. While the Migration Act requires the detention of unlawful non-citizens, the Minister can exercise discretionary powers under ss 195A or 197AB to detain a person in a less restrictive manner than closed immigration detention or allow the person to live in the community.
43. Section 195A of the Migration Act permits the Minister, where they think that it is in the public interest to do so, to grant a visa to a person detained under s 189 of the Migration Act.
44. Section 197AB of the Migration Act permits the Minister, where they think 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. This is commonly referred to as 'community detention'.
45. Over the years, different guidelines concerning the exercise of these ministerial powers have applied. On 15 August 2011, the Hon Chris Bowen MP, then Minister for Immigration and Citizenship, published guidelines setting out the circumstances in which he might wish to consider exercising his residence determination power under s 197AB of the Migration Act.
46. On 30 May 2013, the Hon Brendan O'Connor MP, then Minister for Immigration and Citizenship, published new guidelines on exercising his residence determination power under s 197AB of the Migration Act.
47. New guidelines were again issued on 18 February 2014 by the Hon Scott Morrison MP, then Minister for Immigration and Border Protection.¹⁵ On 29 March 2015, the Hon Peter Dutton MP, then Minister for Home Affairs, issued replacement guidelines.¹⁶ On 21 October 2017, Minister Dutton again re-issued s 197AB guidelines, which are currently in use by the Department.¹⁷

48. Each of the s 197AB guidelines provides that the Minister would not expect referral of cases under s 197AB where a person does not meet the character test under s 501 of the Migration Act, unless there are extenuating circumstances. In particular, the guidelines state that the Minister will consider cases where there are 'unique or exceptional circumstances'. The phrase 'unique or exceptional circumstances' is not defined in the guidelines.
49. Guidelines have also been published in relation to the exercise of the power under s 195A of the Migration Act to grant a visa to a person in immigration detention. The Hon Chris Bowen MP, then Minister for Immigration and Citizenship, published guidelines on s 195A in March 2012. These guidelines did not explicitly exclude the referral of individuals found not to meet the character test under s 501 of the Migration Act, and also provided for the referral of cases where 'unique and exceptional circumstances' arise.
50. On 18 August 2017, Minister Dutton re-issued s 195A guidelines, which are the current guidelines in use by the Department.¹⁸ These guidelines provide that the Minister would generally not expect referral of cases where a person does not meet the character test under s 501 of the Migration Act. Although there is no exception for unique and exceptional circumstances—unlike the other ministerial intervention guidelines referred to above—under these guidelines the Minister will consider cases where there are 'compelling or compassionate' circumstances.
51. As discussed below, I consider that the complainants' circumstances can properly be characterised as 'unique or exceptional' or 'compelling or compassionate'.
52. I note that people whose visas have been refused or cancelled under s 501 of the Migration Act are not precluded from community detention or being granted bridging visas. In the Statement of Compatibility with Human Rights accompanying the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth), the Commonwealth acknowledged alternatives to closed immigration detention for this cohort as follows:

The Government has processes in place to mitigate any risk of a person's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman Own Motion enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.¹⁹

53. As set out in more detail in the s 501 Inquiry, the Minister has the power to grant a bridging visa or make a residence determination to a person who has had their visa cancelled or refused under s 501 of the Migration Act and attach conditions to it. These conditions may be appropriate to manage risk, real or perceived, that a person poses to the community.²⁰ Examples of these conditions may include a requirement that a person comply with a Code of Behaviour or not engage in criminal conduct, be present at a specified residence during specified hours, report to immigration authorities on a regular basis, notify immigration authorities of the person's movements such as interstate travel, and not associate with certain proscribed entities or organisations.
54. Consideration of alternatives to closed detention, with appropriate risk management, is particularly important for the complainants and other individuals in similar circumstances, who are owed protection obligations and had their visas refused or cancelled under s 501. This is because these individuals cannot be returned to their country of origin.
55. Overall, failing the character test under s 501 of the Migration Act should not be a proxy for continued and indefinite immigration detention. Alternatives to closed detention should be routinely considered for all people who have had their visa refused or cancelled under s 501, with conditions applied to mitigate risks as appropriate. Closed detention should only be used in exceptional circumstances where identified risks cannot be managed through less restrictive means.

7 Findings — arbitrary detention

7.1 Mr NS

56. On 24 December 2012, Mr NS, a Palestinian born in Iraq, arrived at Christmas Island by boat and was detained under s 189(3) of the Migration Act.
57. On 11 January 2013, Mr NS was transferred to offshore detention in Nauru Regional Processing Centre (RPC) under s 198AD of the Migration Act, where he resided for approximately three years.
58. On 17 October 2015, Mr NS was transferred to Brisbane Immigration Transit Accommodation and was detained under s 189(1) of the Migration Act. He was later transferred to and detained at Yongah Hill Immigration Detention Centre (IDC) and Villawood IDC.

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59. On 8 June 2016, Mr NS's case was referred to the Minister under s 195A of the Migration Act as part of a group submission for consideration of intervention to grant a bridging visa.
60. On 23 June 2016, the then Minister declined to consider intervening in Mr NS's case under s 195A of the Act.
61. On 25 August 2016, Mr NS lodged an application for a TPV, following the s 46A bar being lifted by the then Minister.
62. On 29 November 2016, Mr NS was assessed by the Department as 'indicatively' engaging Australia's protection obligations. It was found that removing Mr NS to Iraq would be in breach of Australia's international non-refoulement obligations. While he could be removed to a country other than Iraq, there was no known prospect of removal to a third country.
63. On 2 February 2017, a further s 195A group submission for 'low risk illegal maritime arrivals' was sent to the then Minister's Office for consideration of a grant of a bridging visa for Mr NS.
64. On 19 April 2017, the submission was returned from the Minister's Office unsigned, and a new s 195A referral was initiated. On the information before the Commission, it is not clear why there appears to have been no action taken on the submission.
65. On 21 June 2017, Mr NS was found to meet the s 195A guidelines for referral to the Minister 'pending resolution of his character issues'.²¹
66. On 18 July 2017, Mr NS's application for a TPV was refused under s 501(6)(d)(i) of the Migration Act. The delegate of the Minister made a finding that, on the basis of Mr NS's criminal history, there was an ongoing (albeit low) risk that he would engage in re-offending in Australia and therefore he did not pass the character test.
67. The relevant criminal conduct relates to Mr NS's conviction on 23 October 2014 of two counts of indecent assault. These two separate incidents occurred during his detention at Nauru RPC. Mr NS non-consensually touched the breasts of, and tried to kiss, a local staff member employed at Nauru RPC, causing her distress. Mr NS claimed that he was friends with the victim, that they socialised, and that he mistakenly believed there was a mutual attraction and consent. He was sentenced to 9 months imprisonment and served his sentence in Nauru.

68. As far as the Commission is aware, Mr NS has not been involved in any other major behavioural incidents of concern. While he was charged with unlawful assembly for his involvement in the Nauru riots, the charge was quashed by the Supreme Court of Nauru and no conviction was recorded.

69. Mr NS's positive demeanour was noted by detention service providers, with a Serco note dated 23 May 2016 stating, 'he is always polite and compliant'.

70. In a discussion with his case manager on 16 September 2016, Mr NS stated:

I have respect and treat everybody more carefully now and am more aware of people and circumstances. I respect other people's freedom and now have more understanding of my own freedom. I would like to contribute to society. This charge is my first and will be my last, I no longer wish to be in trouble with the Police or Immigration.

71. Mr NS is a survivor of torture and trauma and has attended specialist counselling for the management of nightmares, increased stress and sleeping difficulties.

72. On 20 July 2017, Mr NS applied for review of the TPV refusal at the Administrative Appeals Tribunal (AAT).

73. On 10 October 2017, the AAT set aside the TPV refusal decision, finding that Mr NS did not fail the character test and the Minister's discretion under s 501(1) should not have been exercised. The AAT Member found that:

... the seriousness of the offending is at the lower end of the scale ...

I am not satisfied on the evidence that this demonstrates a propensity to engage in such conduct. Despite maintaining that there was consent, I am not convinced that this translates to a risk of recidivism, particularly when having regard to the circumstances. He has no prior convictions and has not engaged in similar conduct since that time ...

I find that if the applicant were to remain in Australia, there is not a risk that he would engage in criminal conduct in Australia ...²²

The matter was remitted back to the Department for reconsideration.

74. On 20 December 2017, the then Minister indicated that he wished to consider setting aside the 10 October 2017 decision of the AAT, using his national interest power under s 501A(2) of the Act. This is a power for exclusive use by the Minister. The then Minister requested a submission be referred under s 501A of the Act for his personal consideration. On 16

January 2018, the Department referred a submission under s 501A of the Migration Act to the then Minister.

75. Mr NS's complaint to the Commission dated 15 January 2018 stated that his uncertain immigration status, compounded by the Minister not having made a decision on his visa application since remittal by the AAT (at that time), was causing 'severe mental health problems'.
76. On 16 April 2018, the Department advised the Commission that as Mr NS's character issues had not been resolved, his case would not be referred to the Minister for consideration under s 195A at this time.
77. On 22 November 2018, Mr NS's case was referred to the then Minister under s 501 of the Migration Act.
78. On 30 November 2018, the submission was returned from the then Minister's Office unsigned with advice that the Minister would no longer be considering setting aside the AAT decision under s 501A of the Act.
79. On 3 December 2018, Mr NS was granted a TPV by a delegate of the Minister and released from immigration detention.
80. On the whole, Mr NS spent approximately six years in immigration detention. Approximately two years and nine months were spent in detention offshore, and more than three years in detention onshore.
81. During his three years in onshore immigration detention, Mr NS's case was referred by the Department to the Minister for consideration under s 195A on two occasions.
82. On one occasion the then Minister declined to intervene. On the other occasion, the Ministerial brief was returned unsigned. It appears that Mr NS's case was not referred to the Minister for consideration under s 197AB at any stage.
83. In my preliminary view dated 13 November 2019, I questioned the delay or failure of the Department to refer Mr NS's circumstances to the then Minister for consideration under s 195A and/or s 197AB of the Migration Act after 19 April 2017 when the Ministerial submission was returned unactioned.
84. I also expressed the view that the failure to refer Mr NS's case under either s 195A or s 197AB appeared particularly acute following the remittal of Mr NS's case back to the Department by the AAT on 10

October 2017. This is because the AAT made findings that Mr NS did not pose a risk to the community. This notwithstanding, Mr NS remained in closed detention until 3 December 2018 — a period of approximately 14 months after the decision of the AAT. In my preliminary view, I indicated that during this period of time the then Minister might have considered whether Mr NS could have lived in the community, rather than remaining in closed detention.

85. In its response to my preliminary view dated 22 February 2020, the Department stated that:

On 5 December 2017, following the AAT remittal of the TPV refusal decision to the Department, the Minister advised that he would personally consider Mr NS's TPV application under section 501 of the Act.

On 16 April 2018, the Department advised the AHRC that as Mr NS's character issues were still unresolved, his case would not be referred to the Minister under section 195A.

On 22 November 2018, Mr NS's case was referred to the Minister for consideration under section 501 of the Act. On 3 December 2018, following advice that the Minister would not consider Mr NS's case under section 501 of the Act, a delegate granted Mr NS a TPV.

The Department acknowledges the timeframe between the referral being sent to the Minister and the delegate granting the TPV, and notes that the Minister is not bound by any timeframes with respect to Ministerial Intervention.

...

Following the AAT determination, the Minister did not fail to consider whether Mr NS could live in the community rather than remaining in held detention while he considered Mr NS's TPV, rather Mr NS's case was not referred for the Minister's consideration.

During this time, the Minister informed the Department that he would consider exercising his non-compellable power to personally consider Mr NS's TPV application under section 501 of the Act. On this basis, the Department referred Mr NS's case to the Minister under section 501 of the Act rather than under sections 195A or 197AB. The Minister has indicated he will not consider more than one submission for each case at the same time. On these instructions, the Department did not refer Mr NS's case under sections 195A or 197AB.

The Department refutes that it failed to refer Mr NS to the Minister for consideration under section 197AB. Rather, Mr NS's case was regularly reviewed, and these reviews did not identify any circumstances that warranted referral to the Minister under section 197AB.

86. On 25 March 2021, the Commission sought clarification from the Department about when Mr NS's matter was referred to the then Minister for his consideration under s 501A of the Migration Act. In written correspondence dated 14 April 2021, the Department stated:
- On 20 December 2017, the Minister indicated that he wished to consider setting aside the 10 October 2017 decision of the AAT, using his national interest power under section 501A(2) of the Act. This is a power for exclusive use by the Minister. The Minister requested a submission be referred under section 501A of the Act for his personal consideration. It was this subsequent consideration (under section 501A) that was referred to the Minister for consideration on 16 January 2018.
87. The decisions regarding Mr NS's substantive visa application and the appropriateness of his placement in closed detention are separate decisions. There is an obligation on the Commonwealth to demonstrate that there is not a less invasive way than closed detention to achieve the ends of the immigration policy in order to avoid the conclusion that detention is 'arbitrary', and I cannot be satisfied that this was the case in Mr NS's matter. This is particularly the case following the AAT finding that there was not a risk that Mr NS would engage in criminal conduct in Australia.
88. I acknowledge that Mr NS committed a crime and served a custodial sentence for it. However, it is my view that the significant length of his detention, the compassionate circumstances regarding his poor psychological state of health, the favourable finding by the AAT, that he was not a danger to the community, and the fact that he was owed protection obligations and could not be returned to his country of origin, established scope for his case to fall within the guidelines for referral to the Minister to consider exercising his powers under ss 195A and 197AB. If, as is suggested in the Department's response to my preliminary view, the Department was under Ministerial instructions not to refer Mr NS's matter under ss 195A or 197AB after 16 January 2018 — because this was the date that it had referred a submission to the Minister under s 501A of the Migration Act — this policy appears to be inconsistent with international law. It is also particularly concerning given the 10-month delay of the then Minister in making his decision on the substantive visa matter. In any event, as discussed above, there is an exception in both the relevant ss 195A and 197AB guidelines for referral in 'unique or exceptional' or 'compelling or compassionate' circumstances. In my view, Mr NS's circumstances could be properly characterised as such, particularly by 10 October 2017.

89. In my opinion, the fact that the Department did not refer Mr NS's case to the Minister for consideration of alternatives to closed detention at any time after 2 February 2017, resulted in his detention becoming arbitrary contrary to article 9 of the ICCPR.
90. Further, it is my view that the following acts of the then Minister may have prolonged Mr NS's detention in a manner contrary to article 9 of the ICCPR:
- the failure of the Minister to consider the s 195A submission provided to the Minister's Office on 2 February 2017, which was returned unsigned
 - the delay of the Minister in making his decision to not set aside the decision of the AAT of 10 October 2017 (which determined that Mr NS did not fail the character test) until 30 November 2018.

7.2 Mr NT

91. On 10 October 2003, Mr NT arrived in Australia with his mother and siblings, aged approximately 16 years old.²³ He was granted a Global Special Humanitarian visa subclass XB202 (GSH visa), in recognition of being a dependant of his mother who was subject to persecution in their home country of South Sudan (as it is now known).
92. Mr NT's early life appears to have been marked by hardship, violence and tragedy. His father served as a soldier in the South Sudanese Civil War and was killed when Mr NT was a young child.²⁴ The conflict between the Sudanese Government and the Sudan People's Liberation Army is recognised as one of the most brutal and long running civil wars, marked by gross human rights violations and the deaths and displacement of millions. Mr NT was taken by rebel soldiers to a camp to be trained as a child soldier, where he says that he experienced emotional and physical torment, torture and threats to his life.²⁵
93. Within six months of arriving in Australia, Mr NT has said that he began self-medicating with drugs and alcohol to deal with his traumatic past.²⁶
94. On 8 November 2012, Mr NT's GSH visa was cancelled under s 501(6)(a) of the Migration Act. He was found to have a 'substantial criminal record' pursuant to s 501(7)(c) of the Migration Act, meaning being subject to a term of imprisonment of 12 months or more, and therefore found to have failed the character test.

95. Mr NT has over 40 convictions for offences committed in Australia since 2005, resulting in numerous terms of imprisonment including sentences of 12 months or more. He has been convicted of, inter alia, assault occasioning actual bodily harm, common assault, driving under the influence of alcohol (on a number of occasions, both low and high range intoxication), driving while disqualified, contraventions of apprehended domestic violence orders, larceny, use of an offensive weapon with intent to commit an indictable offence, property destruction, and taking and driving a vehicle without the consent of the owner.
96. Mr NT's criminal record discloses significant, serious and at times violent offending. The AAT noted that, '[o]ver the period from 2006 to 2013, the Applicant has received prison sentences of 13 months, 12 months (multiple), 10 months, 8 months, 6 months, 4 months, 3 months, 2 months, 1 month, and has been fined several thousand dollars'.²⁷ The AAT noted that abuse of alcohol appeared to be a consistent element of Mr NT's criminal conduct.²⁸
97. In a statement of reasons detailing the GSH visa cancellation decision, the decision maker said:
- Having regard to his lengthy criminal history which contains previous violent offences, his numerous past breaches of judicial orders and his untested ability to refrain from substance abuse in the community, I found that [Mr NT] poses an ongoing risk of re-offending.
98. Following a judicial review process, the Full Federal Court upheld the GSH visa cancellation decision.²⁹
99. On 1 May 2014, Mr NT concluded his custodial sentence and was transferred into immigration detention at Villawood IDC. Mr NT has remained in closed immigration detention since that time, and has been transferred between Villawood, Yongah Hill, and Christmas Island IDCs. As of 4 March 2021, Mr NT was being detained at the North West Point Immigration Centre on Christmas Island.
100. Since being held in immigration detention, case review and incident report documents record some incidents of abusive or aggressive behaviour and apparent drinking. One incident was referred to the AFP for investigation, but no criminal charges were laid. More recent case reviews note a behavioural improvement, including Mr NT's active engagement in mental health programs. The most recent case reviews relating to Mr NT are not before the Commission.

101. On 31 May 2014, Mr NT's application for a protection visa (PV) was refused, on the basis that he was not a person to whom Australia owed protection obligations. On 3 July 2014, Mr NT applied for a bridging visa. However, his application was assessed as invalid on account of his previous visa cancellation on character grounds.
102. On 4 July 2014, Mr NT applied to the Refugee Review Tribunal (RRT) — now called the AAT — for review of the PV refusal.
103. On 30 September 2014, the RRT remitted the decision to the then Minister, with the direction that Mr NT did engage Australia's protection obligations. The RRT found that he had a well-founded fear of persecution on a cumulative basis, as a member of two particular social groups, if he returned to his home area of Juba in South Sudan.
104. On 5 August 2016, Mr NT's PV application was refused under s 501(6)(a) of the Migration Act, on the basis that he had a substantial criminal record and did not pass the character test. In the decision record a delegate of the Minister stated (extracted):
 7. Overall, I consider that Mr NT's conduct over a prolonged period must be seen as being of very serious concern.
...
 9. Mr NT is a chronic repeat offender. Alcohol abuse has been a continuing factor in his offending ...
 11. I find that Mr NT's record of succumbing to alcohol or substance abuse and indulging repeatedly in violence, together with the fact that he has not been able to demonstrate his rehabilitation in the community over a sustained period, mean that he must be considered at high likelihood of reoffending.
 12. Should Mr NT reoffend in the future the potential consequences are serious given his demonstrated propensity to indulge in violence when intoxicated.
...
 25. I concluded that Mr NT represents a risk of harm to the Australian community which is unacceptable. I could not be satisfied that the risk of Mr NT re-offending was negligible. I found that there are no sufficient countervailing considerations in this case to warrant the Australian community accepting any level of risk.
105. The delegate also considered Mr NT's risk of indefinite detention, and the likely ongoing adverse impacts:

The statutory effect of a decision to refuse the visa application is also removal of Mr NT from Australia as soon as practicable, and in the

meantime, detention. In making my decision I am aware that while Mr NT will not be removed from Australia if his visa application is refused (notwithstanding s 197C of the Act), he may face the prospect of indefinite immigration detention because of the operation of s 189 and s 196 of the Migration Act. I acknowledge that this is likely to have adverse impacts on his psychological and physical health. I accept that indefinite detention is likely to have an ongoing adverse effect on Mr NT.

106. On 15 August 2016, Mr NT sought merits review of the visa refusal decision. On 31 October 2016, the AAT affirmed the decision to refuse the grant of a PV. The AAT found that there is at least a moderate likelihood, and more likely a significant likelihood, that Mr NT will re-offend. The AAT classified his risk to the Australian community as 'significant'.
107. The AAT noted that there was some evidence that the South Sudanese community in Mr NT's local area were willing and able to guide his conduct and community reintegration if released from detention.
108. Mr NT has also stated that he is in close contact with his family, who reside in New South Wales, including his mother, ex-partner and 10 year old daughter. Mr NT was previously detained more proximately to his family. He stated that being transferred to Christmas Island IDC had a negative impact on his mental health, as he was unable to contact his family as easily and have their support.
109. Mr NT has a history of torture and trauma. He suffers from depression, and has received medical treatment in detention, including for substance abuse, and torture and trauma support. The AAT noted Mr NT's poor mental health and concluded that 'long-term detention is already showing deterioration in the Applicant's mental state', and indefinite immigration detention will cause it to deteriorate further.³⁰
110. During a telephone conversation with staff of the Commonwealth Ombudsman on 17 August 2017, Mr NT stated that his mental health was deteriorating and that he felt 'depressed, highly stressed, does not sleep well, and has been having flashbacks from trauma he experienced in his home country'. He stated that he used to attend specialist counselling every week for the management of a history of torture and trauma, but that he had not seen a counsellor for nearly nine months.
111. In late 2016, it appears that the Department was considering Mr NT's removal from Australia.³¹ An undated case review suggests that at some point Mr NT contemplated voluntary removal. However, he does not hold

any identity or travel documents from South Sudan. Mr NT left South Sudan over 15 years ago, before it obtained independence. He has been advised by the High Commission of Sudan that he cannot acquire identity documents.

112. On 28 February 2017, Mr NT's case was considered by the Department against the s 195A guidelines for possible referral to the Minister. On 24 October 2017, he was found by the Department not to meet the guidelines for referral due to his criminal record.
113. On 24 October 2017, an International Treaties Obligation Assessment (ITOA) was initiated by the Department. The outcome of this process is not before the Commission.
114. In a letter from the Department to the Commission dated 30 November 2018, the Department stated that Mr NT had never been referred to the Minister for consideration for either community detention or the grant of a bridging visa. The letter states:

Mr NT has never been referred to the Minister for his consideration of intervention under section 195A of the Act. Mr NT was assessed against the section 195A guidelines in October 2017, but was found not to meet guidelines for referral to the Minister.

Mr NT's case has not been referred for section 197AB consideration.
115. In its response to my preliminary view dated 22 February 2020, the Department indicated that, in April 2019, the Department referred Mr NT's case to the Minister for his consideration under s 195A and s 197AB of the Migration Act. On 4 July 2019, the then Minister declined to consider intervening in Mr NT's case.
116. I note that Mr NT has exhausted all domestic administrative and legal avenues for release from closed immigration detention. The only remaining avenue is Ministerial intervention under ss 195A or 197AB of the Migration Act.
117. On 5 June 2018, the United Nations Working Group on Arbitrary Detention (the UN Working Group) published Opinion 20/2018 regarding Mr NT's case.³² The UN Working Group found that Mr NT's detention was arbitrary, and in contravention of articles 2, 9, 16 and 26 of the ICCPR.³³
118. The UN Working Group noted its deep concern with respect to Mr NT's prolonged and 'real prospect of indefinite' detention.³⁴ It made the following comments on the international law of arbitrary detention:

The detention of refugees following visa refusal or cancellation under s 501 of the *Migration Act 1958 (Cth)*

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- a) the UN Human Rights Committee has made numerous findings that the impossibility of challenging mandatory immigration detention is a breach of Article 9 of the ICCPR
 - b) detention in the migration setting must be exceptional and in order to ensure this, alternatives to closed detention must be considered
 - c) just because a detention is carried out in conformity with national law, it does not mean that such detention is not arbitrary under international law
 - d) indefinite detention of asylum seekers is arbitrary—their detention must never be unlimited or of excessive length and a maximum period should be imperatively provided by law
 - e) several cases concerning immigration detention in Australia have come before it in the past year, all of which have been found by the Working Group to amount to arbitrary detention.
119. The UN Working Group recommended that Australia ‘take the steps necessary to remedy the situation of Mr NT without delay and bring it into conformity with the standards and principles set forth in the international norms on detention’.³⁵ It considered that Mr NT’s immediate release and affording him an enforceable right to compensation and other reparations was an appropriate remedy.
120. It has been over two and a half years since the UN Working Group issued its opinion and Mr NT remains in closed immigration detention.
121. I acknowledge that Mr NT has a serious and significant criminal history and has been found by the AAT to pose a risk of re-offending. However, he has served his criminal sentences and the issue before me is whether his administrative immigration detention can be considered ‘arbitrary’ under international law.
122. Given the significant and ongoing period of Mr NT’s immigration detention (six years and ten months as of March 2021), the finding by an independent tribunal that he is owed protection obligations, his strong connection to the Australian community having lived in Australia since age 16 with his family who continue to reside in Australia, and having an Australian ex-partner and child, his limited prospects of removal to another country due to circumstances outside his control, his diagnosed mental health condition and history of torture and trauma, his declining mental health, the exhaustion of all domestic avenues, his high risk of indefinite detention and the findings of the UN Working Group of a breach of Australia’s obligations under the ICCPR, I consider that there is scope to bring Mr NT’s case within the guidelines for referral to the

Minister to consider exercising their powers under either ss 195A or 197AB of the Migration Act.

123. For the above reasons, it is my view that the failure of the Department to refer Mr NT's case to the Minister for consideration under ss 195A or 197AB before April 2019 resulted in his detention becoming arbitrary, contrary to article 9 of the ICCPR.
124. In light of the Department's concerns about Mr NT's criminal history, in my view, any future referral to the Minister should include an assessment of whether any risks of harm posed to the community by Mr NT could be mitigated by the imposition of conditions on community detention or a bridging visa.

7.3 Mr NU

125. Mr NU is an asylum seeker of Syrian origin who came to Australia by boat on 15 November 2012. He was granted a bridging visa on 16 January 2013 and released from closed detention.
126. Mr NU has complex mental health needs, having been diagnosed with bipolar affective disorder, adult disturbed behaviour and periods of psychosis. He has a history of torture and trauma and self-harm threats or attempts. He has received psychiatric and other mental health treatment on several occasions, both before and during his detention, including periods of treatment in specialist facilities.
127. On 12 January 2014, Mr NU came to the attention of police on the basis of a civil dispute. Mr NU was receiving a massage treatment for a knee injury, when he received a phone call from his brother in the Syrian Arab Republic, saying that his mother and siblings had been killed in a suicide bomb attack. Mr NU became very distressed and agitated. He requested to stop his massage treatment and for his money to be refunded. When this did not occur, he himself called the police.
128. When the police arrived, Mr NU considers that he tried to explain why he was upset, but could not communicate well in English. A police report stated that Mr NU said he wanted to 'return to Syria to put on a vest and go boom' and 'I don't want to hurt you, only myself'. He considers that the police thought that he was threatening to kill himself using a bomb in Australia, rather than speaking about the way his mother died and wishing to return to Syria to kill himself because of his grief.
129. Mr NU was arrested and subsequently, by police referral, admitted for psychiatric care to St Vincent's Hospital and Bankstown Hospital on the basis of self-harm concerns. He was released from Bankstown Hospital

on 15 January 2014. Notably, Mr NU was never charged with or convicted of any offence in relation to the 12 January 2014 incident, or any other incident. The Commission is also not aware of any other criminal record.

130. During a subsequent interview with the police in relation to the incident, Mr NU made statements which raised concerns about his risk to the Australian community, including that he had met with Al Qaeda members and received training to go back to fight in Syria. However, Mr NU has said that at the conclusion of the interview, he told the police that these statements were all untrue.
131. On 4 February 2014, Mr NU was taken into immigration detention at Villawood IDC. His bridging visa had ceased on 16 June 2013. Mr NU has said that, before this time, he was in contact with the Department to report the pending expiry of his visa and was advised incorrectly that he could stay in the community until he was granted a new bridging visa.
132. Mr NU has remained in immigration detention since 4 February 2014. He has been transferred between various centres, including Christmas Island IDC. As of 5 March 2021, Mr NU was being detained at Yongah Hill IDC.
133. On 23 February 2015, a case officer decided that Mr NU met the s 195A intervention guidelines for referral to the Minister. The assessment stated that there was evidence that his individual needs, as relating to his mental health, could not be properly cared for in closed detention.
134. On 20 April 2015, Mr NU contacted the Department's Global Feedback Unit and stated that if he were sent back to Syria he would 'blow himself up'.
135. On 30 June 2015, following a psychiatric assessment of Mr NU and a decision that a residence determination would be the most appropriate course of action, a submission under s 197AB was referred to the then Minister. The s 195A referral was finalised by the Department administratively.
136. On 21 July 2015, the then Minister agreed to consider intervening under s 197AB of the Migration Act to place Mr NU in community detention after Mr NU's security issues 'were resolved' and 'suitable accommodation had been sourced'.
137. The Ministerial brief stated that Mr NU's case met the s 197AB guidelines due to his poor mental health, and that:

NSW Police advised that Mr NU has made no threats of violence against Australia or Australians and maintains the view that he likes Australia and his only fight remains with Syria ...

Given Mr NU's outstanding security matters, if placed into community detention, the Department could put more stringent reporting conditions on Mr NU ...

Given the health concerns in Mr NU's case and the IHMS advice that his irrational behaviour is directly linked to his return to held immigration detention, it is likely that Mr NU's health condition will deteriorate ...

138. Some behavioural incidents occurred in immigration detention between 2014 and 2015, including Mr NU being involved in physical altercations with other detainees, making threats to harm other detainees and detention staff, and allegedly attempting to recruit other detainees to fight for the Islamic State of Iraq and the Levant (ISIL) in Syria. However, on the information before the Commission, Mr NU has not been involved in any incident of significance in detention since April 2015. A certificate from Australian Border Force dated 22 June 2017 acknowledged his recent good behaviour in detention.
139. On 25 August 2015, Mr NU lodged a TPV application.
140. On 12 July 2016, a qualified security assessment (QSA) was issued for Mr NU. The QSA superseded a previous Adverse Security Assessment. A QSA indicates that the Australian Security Intelligence Organisation (ASIO) has identified potentially prejudicial information relevant to security, but that it does not recommend taking adverse administrative action, in this case to decline a visa application.³⁶ Mr NU's representative has submitted that the QSA indicates that ASIO does not consider that he is a risk to security, either directly or indirectly.
141. On 5 August 2016, a combined ss 195A and 197AB submission was sent to the Minister for consideration. Notably, the Department recommended to the Minister that Mr NU be granted a bridging visa, as follows:

[T]he Department recommends that you intervene under section 195A to grant Mr NU a temporary visa and facilitate his release from held immigration detention. The Department considers the grant of a BVE in association with his ongoing TPV application as the most appropriate option.
142. On 1 September 2016, the then Minister made a decision to decline to intervene under s 195A, and made a decision not to consider intervening under s 197AB.

143. On 27 June 2016, Mr NU withdrew his prior TPV application and lodged a new TPV application. On 29 November 2016, Mr NU was referred for a character assessment under s 501 of the Migration Act.
144. On 16 June 2017, the UN Working Group published Opinion 28/2017 regarding Mr NU's case.³⁷ The UN Working Group found that Mr NU's detention was *prima facie* arbitrary, and in contravention of articles 9, 16 and 26 of the ICCPR.³⁸ Notably, the Government did not provide a response to the complaint within time, so its reply was not accepted or considered by the UN Working Group.
145. The UN Working Group recommended that Australia 'take the steps necessary to remedy the situation of Mr NU without delay and bring it into conformity with the standards and principles set forth in the international norms on detention...'.³⁹ It considered that Mr NU's immediate release and affording him an enforceable right to compensation and other reparations was an appropriate remedy.
146. On 7 August 2017, a Notice of Intention to Consider Refusal (NOICR) of Mr NU's TPV application was issued, inviting Mr NU to comment or provide information on any factors he believed to be relevant to whether he passes the character test or relevant as to why his visa application should not be refused.
147. On 4 September 2017, Mr NU provided a response to the NOICR. The response stated that his conduct during the period of January 2014 to April 2015 was a result of an acute period of his bipolar affective disorder. It stated that incidents in detention were provoked and that Mr NU has never perpetrated any harm or violence against any person.
148. Mr NU has also stated that, in relation to the January 2014 incident, he was 'particularly manic' after hearing that his mother had died, and had experienced hallucinations. He stated that:

During the course of 2014–2015, my mental health was so severe that I was hospitalised on three occasions ... During these periods my behaviour was sometimes religiously themed ... The deterioration in my mental health was due to the extreme stress in my life and was the only time that I had experienced episodes like this. My mental health is now being managed effectively and I have not suffered from any episodes since April 2015'. He stated that he has never had 'links to Al Qaeda, Osama Bin Laden, ISIL or any other religious group or organisation operating in Australia, Syria or any other country.

149. The Department and its service providers, in particular IHMS, are aware of Mr NU's complex mental health needs, including his bipolar affective disorder, and how it has been exacerbated at times by being held in closed detention. During his detention, Mr NU has been admitted to Banks House, a mental health inpatient unit, several times for treatment.
150. On 17 March 2014, an IHMS psychiatrist found that Mr NU's 'irrational behaviour was a result of moving back to the detention centre environment'. On 20 August 2014, an IHMS psychiatrist recommended that the most appropriate placement for Mr NU was a community setting. The IHMS report concludes that Mr NU's irrational behaviour is 'directly linked to his return to held immigration detention'. IHMS advised that 'the detention environment was not appropriate or conducive to Mr NU's major mental health condition'.
151. On 5 November 2014, an IHMS psychiatrist advised that Mr NU may experience some dissociative symptoms due to his 'difficult situation and anxiety'. On 29 January 2015, IHMS stated that Mr NU's health needs could be managed on a bridging visa. In April 2016, IHMS reiterated the recommendation by Mr NU's psychiatrist that he should be placed in community detention.
152. On 1 August 2016, Mr NU's treating psychiatrist advised that should Mr NU be placed in community detention or granted a bridging visa he would require mental health support including a referral to a mental health service, to be assessed by a psychiatrist and to be monitored for depression.
153. I note that, despite this advice from a medical professional, this recommendation does not appear to have been recorded in case reviews by the Department of Mr NU. Rather, a case review dated 25 May 2018 states the contrary that 'Mr NU's ongoing detention remains appropriate ... No stakeholders have raised any health or welfare issues which warrant referral for an alternative placement'.
154. On 28 November 2017, a case officer decided that Mr NU did not meet the s 197AB intervention guidelines for referral to the Minister. However, the assessment also recognised that there were 'unique and exceptional circumstances' and health considerations relevant to the grant of a residence determination.
155. The assessment states that 'Mr NU's case may fall within the scope of [the s 197AB guidelines] criteria ... However, there are issues relating to his case which indicate that his case may also fall within the types of case which the Minister does not wish to have referred'. The three identified issues are that Mr NU may fail the character test (noting that at that time

his TPV application was under consideration), that there was a 'real chance' that he may not comply with conditions specified in a determination or cause harm to the Australian community, and that the UN Working Group provided an opinion that his detention was arbitrary but the Department was 'currently disputing the WGADs opinion and there is also an ongoing consideration of his case under s 501'. The recommendation made was that Mr NU's case did not currently fall within the guidelines, but that the Department would 'monitor and reassess following [the] outcome of [a section] 501 consideration'.

156. On 4 February 2019, the then Minister decided not to grant Mr NU a TPV on the basis that, although he was accepted as a person to whom Australia has *non-refoulement* obligations, the Minister considered that he did not pass the character test under s 501(6)(d)(v).
157. Section 501(6)(d)(v) provides that a person does not pass the character test if, in the event that they were allowed to remain in Australia, there is a risk that the person would 'represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way'.
158. While the Minister accepted that Mr NU's conduct had resulted from his bipolar disorder, that he had not been involved in any incident of significance since April 2015, had been recognised for recent good behaviour in immigration detention, that his threat to the community is low, and that his mental health has improved, the reasons for decision state that a risk remains:

Although I consider there is a low likelihood of Mr NU carrying out his threats, I consider it to be more than a minimal or remote change ...

... I have found that there remains a risk that [the applicant] would represent a danger to the Australian community by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, the Australian community. In coming to this conclusion, I considered that the pattern of behaviour he has exhibited, including his threats to blow himself up in January 2014 and April 2015, his repeated claims of association with extremist groups and the threats he made to other detainees and Serco staff while in detention, are of significant concern. I have found that, even if his claims about his associations with extremist groups are not true, the very fact that [the applicant] has repeatedly made those claims may demonstrate an ideology of security concern, which I take seriously particularly given the

current global context. In this regard, I have also considered the non-disclosable information.

... I found that the Australian community could be exposed to significant harm should Mr NU engage in conduct similar to that threatened. I could not rule out the possibility of Mr NU engaging in serious conduct akin to that threatened. I have found that the potential harm is so great that any likelihood that it would occur represents a significant risk to the Australian community.

The reasons for decision also recognise that 'there is currently no known prospect of removal to any other country' and that Mr NU faces a 'risk of indefinite detention'.

159. Notably, the reasons for decision state that the then Minister relied on 'non-disclosable' information in assessing Mr NU's level of risk. They state that '[t]his information is relevant in considering the application of the "character test" ... and in the exercise of my residual discretion as to whether to refuse the visa'.
160. 'Non-disclosable' information is defined in s 5(1) of the Migration Act to include information or matter whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would prejudice the security, defence or international relations of Australia. Under s 501G(1)(e) of the Migration Act, non-disclosable information is not required to be provided in the reasons for decision.
161. On 4 February 2019, the then Minister also decided not to consider alternative options for Mr NU, such as the grant of a visa under s 195A or placement in a community setting under s 197AB.
162. On 11 March 2019, Mr NU lodged an application for a judicial review of the decision to refuse to grant him a TPV under s 501.
163. On 17 June 2019, the Federal Court dismissed Mr NU's application for judicial review. On 15 July 2019, Mr NU filed an appeal in the Full Federal Court. The outcome of this appeal is not before the Commission.
164. In its response to my preliminary view dated 22 February 2020, the Department indicated that, on 19 August 2019, ASIO advised the Department that Mr NU's security referral had been resolved and that the security concerns raised in the referral were not a barrier to Mr NU's release from detention on a temporary visa. The response advised that, following the advice from ASIO, on 25 November 2019, a request for Ministerial intervention under ss 195A and 197AB was assessed as meeting the guidelines for referral to the Minister and a submission was currently in progress.

165. However, as of 5 March 2021, the Department has confirmed that Mr NU remains in closed detention.
166. In my view, several factors make Mr NU's circumstances strongly 'unique and exceptional' or 'compelling and compassionate', suggesting that his case is suitable for referral and consideration under either the 195A or 197AB guidelines:
- a) the absence of any criminal charge or conviction
 - b) the recognition that Mr NU has a well-founded fear of persecution should he be returned to Syria, and is owed protection obligations by Australia
 - c) the recommendation by the Department to the Minister on or around 5 August 2016 that Mr NU be granted a bridging visa
 - d) advice from psychiatric professionals that the closed detention environment is not appropriate or conducive to Mr NU's complex mental health needs, which are directly and adversely exacerbated by closed detention, and recommendations that he be placed in the community
 - e) the lengthy period of time for which he has been detained — approximately seven years as of March 2021
 - f) the findings of the independent UN Working Group that Mr NU's human rights have been breached through arbitrary detention
 - g) the QSA issued for Mr NU, as opposed to an Adverse Security Assessment
 - h) the 2019 advice from ASIO that the security concerns raised in the referral are not a barrier to Mr NU's release from detention
 - i) that there is currently no known prospect of removal to any other country and a significant risk of indefinite detention.
167. The acts or practices of the Commonwealth that I have considered with respect to Mr NU are:
- a) the delay of the Department in referring Mr NU's case to the Minister for consideration of intervention under s 197AB until 30 June 2015, being a period of about 14 months
 - b) the delay of the Department in referring Mr NU's case to the Minister for consideration of intervention under ss 195A or 197AB again until 5 August 2016, being a period of about 12 months

- c) on 1 September 2016, the decision of the then Minister to not consider intervening under s 197AB to grant community detention
- d) the delay of the Department in referring Mr NU's case to the Minister again for consideration of intervention under ss 195A or 197AB until on or around 4 February 2019, being a period of about 2 years and 5 months
- e) on 4 February 2019, the decision of the then Minister not to consider intervening under ss 195A or 197AB
- f) the delay of the Department in referring Mr NU's case to the Minister for consideration of intervention under ss 195A or 197AB since that time, particularly after receiving advice from ASIO that Mr NU's security concerns were not a barrier to his release from detention.

168. It is also my view that the then Minister's decisions not to consider exercising his discretionary powers under ss 195A or 197AB may have resulted in Mr NU's detention becoming arbitrary contrary to article 9 of the ICCPR. I note that I do not express any view as to what the outcome of any such consideration would be.
169. Further, in my view, the periods of time, in between referrals of Mr NU's case to the Minister for consideration under ss 195A or 197AB, have been unjustifiably prolonged, and may be inconsistent with the article 9 obligation under the ICCPR to afford periodic re-evaluation of the reasonableness, necessity and proportionality of closed detention.
170. I acknowledge that the former Minister considered that Mr NU presents some risk to the community, albeit at a low level. As discussed below, if the Minister had concerns about Mr NU posing a risk to the community, he could have asked the Department to conduct a risk assessment to consider whether any risks could be mitigated, for example through imposing community detention or visa conditions and ensuring the provision of appropriate mental health support.

8 Recommendations

171. 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.⁴⁰ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.⁴¹ The

Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.⁴²

172. In the s 501 Inquiry, I made a number of systemic recommendations aimed at preventing a repetition of the acts or a continuation of the practices that are described in my findings.⁴³ I reiterate and rely upon those general recommendations again here.
173. Below, I also make recommendations for the individual complainants Mr NT and Mr NU.
174. As at March 2021, Mr NT and Mr NU remained in immigration detention and, as a result of this inquiry, I have found their detention to be arbitrary. In Recommendation 1 below, I set out the action that I recommend the Commonwealth take in order to remedy or reduce the loss or damage suffered as a result.

Recommendation 1

175. The relevant Home Affairs portfolio Minister indicate to the Department that they will consider a further submission about the exercise of their powers under ss 195A and/or 197AB in relation to Mr NT and Mr NU.
176. In the event that the relevant Home Affairs portfolio Minister is concerned that Mr NT or Mr NU may pose some risk if allowed to reside in the community (such as a risk of re-offending or to public safety), they direct the Department to prepare a detailed submission including the following:
- a) a personalised assessment of the existence and/or extent of any such risk, including a detailed description of the nature of the risk and of the evidence and reasons leading to the assessment
 - b) a description of what measures might be implemented to ameliorate any risk in the event Mr NT or Mr NU were allowed to reside in the community
 - c) an assessment of whether any risk, if present, could be satisfactorily addressed by the identified measures.
177. The Department prepare a fresh submission to the relevant Home Affairs portfolio Minister about the exercise of their discretionary powers in relation to Mr NT and Mr NU, including (if relevant) any matters referred to in the paragraph above.

178. The relevant Home Affairs portfolio Minister consider the exercise of their discretionary powers in light of the fresh Departmental submission.

9 The Department's response to my findings and recommendations

179. On 12 August 2021, I provided the Department with a notice of my findings and recommendations.
180. On 14 October 2021, the Department provided the following response to my findings and recommendations:

The Department of Home Affairs (the Department) values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings and recommendations made.

The Department notes that this is a thematic inquiry based on specific complaints made by a group of three persons who have been found to be owed protection obligations by Australia but who were detained as a result of the cancellation or refusal of their visas on character grounds under section 501 of the Migration Act 1958 (the Act).

The Department does not agree that the detention of Mr NS, Mr NU or Mr NT was arbitrary for the purposes of article 9 of the International Covenant on Civil and Political Rights (ICCPR). The Department maintains placement in held detention was appropriate, reasonable and justified in the individual circumstances of each case.

The Department notes recommendations 1, 3 and 4 and has previously advised the Commission of the framework of regular reviews, escalations and referral points in place to ensure that people are detained in the most appropriate placement to manage their health and welfare, and the resolution of their immigration status. The Department regularly considers the appropriateness of detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention.

Portfolio Ministers have personal intervention powers under section 195A and section 197AB of the Act, which allow them to grant a visa to a person in immigration detention or to make a residence determination to allow a person to reside in the community at a specified address and under specified conditions, if they think it is in the public interest to do so.

The public interest powers are non-compellable, that is, the Ministers are not required to exercise or consider exercising their power in a particular case. Further, what is in the public interest is a matter for the Ministers to determine.

It is not a legal requirement that a detention case be considered for assessment against Ministerial Intervention guidelines, or be referred to a Portfolio Minister for consideration of their personal intervention powers.
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The Minister's guidelines under sections 195A and 197AB of the Act stipulate that generally persons who present character issues or are of security concern should not be referred to the Minister for consideration.

The Department can advise the Commission that on 25 May 2021, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs signed a first stage submission for Mr NU, indicating he wished to consider intervening under section 195A of the Act. The Department is progressing a second stage submission for the Minister's consideration under section 195A of the Act.

Mr NT's case will continue to be regularly reviewed by the Department, and should such reviews identify any exceptional circumstances or vulnerabilities that have not been considered by a Minister, his case may be referred for further consideration under the Ministerial Intervention powers.

The Department notes recommendation 2 and has previously advised the Commission of the use of the Community Protection Assessment Tool (CPAT), which is a decision support tool to assist the Department in assessing the most appropriate placement of a non-citizen while status resolution is pursued. In this context, placement refers to whether the non-citizen should reside in the community or in held immigration detention. The CPAT provides a placement recommendation based on a point in time assessment of the level of risk a person poses to the community, through a set of defined parameters. The CPAT also enables Status Resolution Officers to recommend an alternative placement for a non-citizen on consideration of additional information outside the CPAT parameters.

The Department is reviewing the CPAT and will explore how the CPAT could give greater consideration to the nature of a detainee's criminal history when assessing community risk including an individual's strengths and vulnerabilities and how these factors may affect placement.



Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission
March 2022

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- ¹ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under s 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141.
- ² Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under s 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141 [13].
- ³ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under s 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, Part 4.3.
- ⁴ Australian Human Rights Commission, Submission No. 11 to the Joint Standing Committee on Migration, *Review processes associated with visa cancellations made on criminal grounds*, (27 April 2018).
- ⁵ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/ GC/35 (16 December 2014) [21].
- ⁶ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/ GC/35 (16 December 2014) [18].
- ⁷ From 13 April 2017, the Commission's power to report to the Minister on acts or practices that are inconsistent with human rights is discretionary rather than mandatory. The complainants' complaints to the Commission were all made after this date and are discretionarily being reported on by the Commission.
- ⁸ 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]-[213] and [214]-[215].
- ⁹ Human Rights Committee, *General Comment No. 8: Article 9 (Right to liberty and security of persons)* (replaced by General Comment No. 35) 16th sess, (30 June 1982). See also: Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997), (*A v Australia*); Human Rights Committee, *Views: Communication No. 900/1999*, 77th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002), (*C v Australia*); Human Rights Committee, *Views: Communication No. 1014/2001*, 68th sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003), (*Baban v Australia*).
- ¹⁰ Human Rights Committee, *General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/21/Rev.1/Add.13 (26 May 2004), [6]. See also Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights Cases, Materials and Commentary*, (Oxford University Press, 2nd ed, 2004) 308 at [11.10].
- ¹¹ *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee in *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; Human Rights Committee, *Views: Communication No. 631/1995*, UN Doc CCPR/C/67/D/631/1995, (20 March 1997) (*Spakmo v Norway*).
- ¹² *A v Australia*, UN Doc CCPR/C/76/D/900/1993 (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.

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- ¹³ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/ GC/35 (16 December 2014), [18] footnotes omitted.
- ¹⁴ *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- ¹⁵ The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 18 February 2014. The guidelines are incorporated into the Department's Procedures Advice Manual.
- ¹⁶ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the Department's Procedures Advice Manual.
- ¹⁷ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 21 October 2017. The guidelines are incorporated into the Department's Procedures Advice Manual.
- ¹⁸ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Guidelines on Minister's detention intervention power under s 195A of the Migration Act 1958*, 18 August 2017. The guidelines are incorporated into the Department's Procedures Advice Manual.
- ¹⁹ Explanatory Memorandum, Statement for Compatibility with Human Rights, Migration Amendment (Character and General Visa Cancellation) Bill 2014, Attachment A [6].
- ²⁰ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under s 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, Part 5.2.
- ²¹ Letter from the Department to the Commission dated 27 April 2018.
- ²² *PHNR and Minister for Immigration and Border Protection (Migration)* [2017] AATA 1742 (10 October 2017) at [28] and [33].
- ²³ I note that his age varies in different sources of information, with some stating that he was 19 years old upon arriving in Australia.
- ²⁴ *HYPR v Minister for Immigration and Border Protection* [2016] AATA 864 [10].
- ²⁵ *HYPR v Minister for Immigration and Border Protection* [2016] AATA 864 [9].
- ²⁶ Questionnaire addressed to the UN Working Group of Arbitrary Detention completed by Mr NT's legal representative on his behalf, dated 16 August 2017.
- ²⁷ *HYPR v Minister for Immigration and Border Protection* [2016] AATA 864 [17].
- ²⁸ *HYPR v Minister for Immigration and Border Protection* [2016] AATA 864 [30].
- ²⁹ *AZAFQ v MIBP* [2016] FCAFC 105.
- ³⁰ *HYPR v Minister for Immigration and Border Protection* [2016] AATA 864 [53].
- ³¹ In an undated case report (date redacted), there is a note that on 29 December 2016, Mr NT's case was 'referred to WA removals – Invol'.
- ³² Human Rights Council, *Report of the Working Group on Arbitrary Detention: Opinion No. 20/2018*, UN Doc A/HRC/WGAD/2018/20, (20 June 2018).
- ³³ Human Rights Council, *Report of the Working Group on Arbitrary Detention: Opinion No. 20/2018*, UN Doc A/HRC/WGAD/2018/20, (20 June 2018) [71].
- ³⁴ Human Rights Council, *Report of the Working Group on Arbitrary Detention: Opinion No. 20/2018*, UN Doc A/HRC/WGAD/2018/20, (20 June 2018) [68].
- ³⁵ Human Rights Council, *Report of the Working Group on Arbitrary Detention: Opinion No. 20/2018*, UN Doc A/HRC/WGAD/2018/20, (20 June 2018) [72-73].

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- ³⁶ Australian Security Intelligence Organisation, *ASIO Annual report 2017-18* (Report, 28 September 2018) 126. See also the definition of 'qualified security assessment' in the *Australian Security Intelligence Organisation Act 1979* (Cth) s 35.
- ³⁷ Human Rights Council, *Report of the Working Group on Arbitrary Detention: Opinion No. 28/2017*, UN Doc A/HRC/WGAD/2017/28, (16 June 2017).
- ³⁸ Human Rights Council, *Report of the Working Group on Arbitrary Detention: Opinion No. 28/2017*, UN Doc A/HRC/WGAD/2017/28, (16 June 2017) [41].
- ³⁹ Human Rights Council, *Report of the Working Group on Arbitrary Detention: Opinion No. 28/2017*, UN Doc A/HRC/WGAD/2017/28, (16 June 2017) [42-43].
- ⁴⁰ *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- ⁴¹ *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- ⁴² *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
- ⁴³ See Recommendations 1 – 6, Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under s 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141.