



Australian
Human Rights
Commission

Immigration detainees in prolonged or indefinite detention v

Commonwealth of Australia (Department of Home Affairs

and Minister for Immigration and Multicultural Affairs)

[2024] AusHRC 174

December 2024

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Dear Attorney

Pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), I attach a report of the inquiry by the former President of the Australian Human Rights Commission, Emeritus Professor Rosalind Croucher AM, into complaints made by 10 former and current detainees against the Commonwealth of Australia – specifically, against the Department of Home Affairs (Department) and its previous iterations, and Ministers holding responsibility for the immigration portfolios.

This is a thematic inquiry highlighting the grave and systemic issue of prolonged administrative detention in Australia of unlawful non-citizens. The Australian Human Rights Commission (and previously as the Human Rights and Equal Opportunity Commission) has been reporting on human rights complaints relating to the mandatory detention of unlawful non-citizens since 1997. Since then, repeated calls to amend the *Migration Act 1958* (Cth) to address this issue have been made, and ignored.

On average, the 10 men considered in this inquiry spent over 10 years in immigration detention. Their stories demonstrate the serious mental and physical impact that deprivation of liberty has had on each of them. Each of the complainants complained that their detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

Since commencing this inquiry, most of the complainants have been released from immigration detention, which is a welcome outcome. Each complainant requested that the Commission continues its inquiry despite their release, and for these former detainees, it is crucial to report into the failure to act sooner to end their detention. One complainant remains in detention, after 8 years.

Professor Croucher found that the Commonwealth has breached the human rights of each of the complainants pursuant to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

In the time between the issuing of the notice making findings in this matter, and the preparation of this report, I assumed the role of President at the Australian

Human Rights Commission. As a result, I received the Department's response to Professor Croucher's findings and recommendations in this matter by letter dated 16 August 2024. I have set out the response of the Department in its entirety in part 12 of the report.

This thematic report is an important record of Australia's continued non-compliance with its international obligations under the ICCPR. The recommendations made by Professor Croucher include calling for a parliamentary inquiry into arbitrary detention, and I urge you to consider doing so as a priority.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'H. de Kretser', with a long horizontal line extending to the right.

Hugh de Kretser

President

Australian Human Rights Commission

December 2024

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1 Introduction

1. The Australian Human Rights Commission (Commission) has conducted a thematic inquiry into the prolonged and potentially indefinite detention of persons subject to immigration detention in Australia.
2. The inquiry is based on 10 complaints made to the Commission against the Commonwealth of Australia (Department of Home Affairs and Minister for Immigration and Multicultural Affairs). The complainants allege they have been subject to arbitrary detention contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
3. Since the time they made their complaints, 8 of the complainants have been released from detention and reside in the community either on a bridging visa, or in community detention. One complainant has been removed from Australia. One remains in detention at the time of the Commission issuing this report.
4. The 10 complainants have been or were, on average, detained for over 10 years. The longest period was almost 13 years.¹
5. This inquiry has highlighted the prolonged detention faced by immigration detainees and the risk of arbitrary and indefinite detention. This issue is particularly acute for detainees subject to removal from Australia but where their removal has not been able to take place, often due to factors outside their control. The lack of safeguards against indefinite detention and adequate consideration of alternatives to closed detention are key concerns for this cohort.
6. All of the complainants have exhausted the visa application process and are liable to be removed from Australia. Nine complainants have not been able to be involuntarily removed from Australia due to circumstances outside their control. This includes instability and conflict in the proposed receiving country, delays in obtaining travel documents, or a country's policy of not accepting involuntary removals. Their detention has been prolonged by their protracted removal situations, and their detention has continued despite there being no real prospects of removal within a reasonable timeframe. Without adequate consideration of alternatives to

closed detention, they face a significant risk of indefinite and arbitrary detention under international law.

7. Their lengthy periods of detention have also been compounded by the prohibition against sea arrivals from applying for a visa. After an average period of 2 and a half years, the prohibition was lifted and the complainants were able to lodge a protection visa application. It then took several years for reviews of visa decisions to reach determination. All complainants remained detained during these processes.
8. Detention that is lawful under Australian law, including detention of unlawful non-citizens prescribed under the *Migration Act 1958* (Cth) (Migration Act), does not prevent it being considered arbitrary under international human rights law. In order to avoid detention being considered 'arbitrary', the detention must be justified as reasonable, necessary and proportionate on the basis of the individual's particular circumstances.
9. There is an obligation on the Commonwealth to demonstrate that there were no less invasive means than closed detention to achieve the ends of the immigration policy (for example the imposition of reporting obligations, sureties, or other conditions on release) to safeguard against arbitrary detention.
10. To comply with these obligations, the Commonwealth would need to conduct an individualised risk assessment to determine whether any risks an individual may pose to the community could be mitigated, and ongoing reviews to determine whether their detention continues to be necessary.
11. This inquiry focuses on whether the Commonwealth's decision to continue to detain the complainants was consistent with their human rights and steps that could be taken to ensure their detention would be compatible with human rights standards. This inquiry does not consider the merits of any visa decisions.
12. In preparing this report, the Commission has also reviewed approaches taken by Canada, Germany, New Zealand, the United Kingdom and the United States to reduce the risk of arbitrary detention in immigration detention, particularly in protracted removal situations.

References

13. In this document, references to the ‘Minister’ or ‘Assistant Minister’ refer to the relevant Minister or Assistant Minister with responsibility for immigration matters at the relevant time.
14. References to the ‘Department’ refer to the relevant government entity with primary responsibility for immigration policy functions, including:
 - the Department of Home Affairs, after December 2017
 - the Department of Immigration and Border Protection, between September 2013 and December 2017
 - the Department of Immigration and Citizenship, prior to 2013.
15. References to time periods, including periods of detention and complainants’ ages, are given as at 31 March 2024.

2 Summary of findings and recommendations

16. As a result of this inquiry, the previous President of the Commission, Emeritus Professor Rosalind Croucher found that:
 - a) the failure of, or delay by, the Department to refer **all of the complainants’ cases** to the Minister for consideration of alternative options to closed detention under ss 195A and/or 197AB of the Migration Act; and
 - b) decisions of the Minister not to consider these alternative options may have resulted in the complainants’ detention becoming arbitrary in contravention of article 9 of the ICCPR.
17. Based on those findings, Professor Croucher made the following recommendations:

Recommendation 1

The Commission recommends that the Department progress the Alternatives to Held Detention program including:

- revised risk assessment tools

- the Independent Assessment Capability
- increased community placements
- a 'step-down' model.

The Department should ensure that it does not adopt an overly narrow approach to detainees eligible for the program, but rather aim to adopt the approach that all unlawful non-citizens are to be considered for an alternative to held detention, unless their removal is imminent, or their individual circumstances indicate that only held detention is appropriate.

Recommendation 2

The Commission recommends that the Minister's s 195A and s 197AB guidelines be amended to provide that:

- all people in closed immigration detention are eligible for referral under s 195A and s 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period, regardless of whether they have had a visa cancelled or refused
- in the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility, the Department include in any submission to the Minister:
 - a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment
 - an assessment of whether an identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment.
- in the event that the Minister decides not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every 6 months and re-

refer the case to the Minister to ensure that detention does not become protracted.

Recommendation 3

The Commission recommends that the CPAT be amended to not automatically recommend Tier 3 – Held Detention for individuals who have had their visa refused or cancelled under s 501 of the Migration Act.

Recommendation 4

The Commission recommends that the CPAT be amended to include an assessment of whether any risks to the community identified can be mitigated by conditions, including but not limited to:

- adhere to a curfew
- reside at a specified place
- report to a specified place at specified periods or times in a specified manner
- provide a guarantor who is responsible for the person's compliance with any agreed requirements and for reporting any failure by the person to comply with the requirements
- not violate any law
- be of good behaviour
- not associate or contact a specified person or organisation
- not possess or use a firearm or other weapon
- wear an electronic monitoring device.

Recommendation 5

The Commission recommends that the monthly case reviews be amended to require the departmental case manager to review the necessity for an individual's continued detention and whether any risk factors could be mitigated in the community.

Recommendation 6

The Commission recommends that a review of the Migration Act be conducted to consider the following principles and processes, many of which are common across the jurisdictions considered in the Commission's report, and the way these have been embedded into the legislative schemes of Canada, Germany, New Zealand, the United Kingdom or the United States of America:

- a presumption against detention whereby a person must be released unless a specified ground not to do so exists
- alternatives to detention, such as residence determination or bridging visas, must be considered prior to consideration of held detention
- for any person who is considered by the Minister to warrant being held in immigration detention, an application should be required to be made to a competent authority who is tasked with balancing the risk to the community and/or the likelihood that the person will not comply with efforts towards their removal, against the impact on the individual to be detained
- decisions to detain, or to continue to detain, must be subject to merits and/or judicial review
- grounds for detention must continue to be balanced against the overall length of the person's detention to ensure that detention does not become prolonged or disproportionate to the reason behind the detention
- detention for the purpose of removal can only take place where removal is practicable in the reasonably foreseeable future, and where arrangements are in progress and being executed with due diligence
- a maximum time limit on detention
- any person held in immigration detention must have their detention reviewed at regular intervals.

Recommendation 7

The Commission recommends that the Commonwealth provide a written apology to each of the complainants for the delays and failures to act identified in this report with respect to each.

Recommendation 8

The Commission recommends that the Department refer Mr WA's case as a priority to the Minister, for the Minister to consider intervening under ss 46A and 48B of the Migration Act.

Recommendation 9

The Commission recommends that the Minister consider the exercise of his personal powers under s 195A of the Migration Act in relation to Mr WG as a priority.

3 Procedural history of report

18. On 19 May 2023, Professor Croucher provided the Secretary of the Department, the then Minister, and the complainants, with her preliminary view of the complaints.
19. The Department responded to Professor Croucher's preliminary view on 18 January 2024.
20. Professor Croucher issued a notice of findings and recommendations on 12 April 2024, to which the Department responded on 16 August 2024.
21. No response was received from the Minister to either the preliminary view or the notice.
22. The Commonwealth has not participated in any conciliation of the complaints.

4 Background

23. The individuals listed in the table below have made complaints to the Commission alleging they have been subject to arbitrary detention contrary to article 9 of the ICCPR.

24. On average, the complainants were detained for over 10 years. The shortest period was 7 years and 5 months and the longest period 12 years and 11 months.²
25. One of the complainants, **Mr WG**, remains detained. Eight complainants have been released from closed immigration detention and the Commission’s inquiry relates only to the period in which they were in held detention. **Mr Pjetri** was removed from Australia in September 2021, after 8 years in detention. **Mr WJ** was given a community detention placement after 11 years and 11 months in detention, as was **Mr WH**, after 9 years and 9 months, Mr **WA** after 11 years and 6 months, and Mr **WE** after 12 years and 11 months. **Mr WC**, **Mr WI**, **Mr WD** and **Mr WB** were all given Bridging E visas towards the end of 2022.
26. At the time they lodged their complaints, the complainants did not hold visas, and all except **Mr WJ** did not have any outstanding determinations concerning their visa applications. Nine of the complainants were on a removal pathway. All did not agree to their removal (considered ‘involuntary removal’).
27. All of the complainants arrived in Australia by sea without visas and were immediately detained. All but **Mr WG** then remained in detention for prolonged periods without release. **Mr WG** was initially released from detention on a Bridging E visa, but had his visa cancelled. Two of the complainants, **Mr WH** and **Mr WI**, were initially transferred to Nauru for offshore processing, but were transferred back to Australia.
28. Protection obligations were found to be owed to **Mr WA**, **Mr WE** and **Mr WJ**, however subsequent assessments of **Mr WA** and **Mr WE’s** cases over the course of their detention found that they were not owed protection. More recently, Mr **WA** has again been found to be in need of protection, and a submission has been made to the Minister to allow him to reapply for a visa.

Complainant	Date of detention	Length of detention ³	Owed protection obligations
Mr WA Country of birth: Afghanistan	11 August 2011	11 years and 6 months (released 9 February 2023)	Yes – 26 April 2012 assessment No – 11 September 2014 assessment

			Yes – by at least August 2023
Mr WB Country of birth: Bangladesh	12 November 2012	10 years (released 10 November 2022)	No
Mr WC Country of birth: Bangladesh	12 November 2012	10 years (released 11 November 2022)	No
Mr WD Country of birth: Bangladesh	25 February 2013	9 years and 8 months (released 10 November 2022)	No
Mr WE (aka Mr WF) Country of birth: Iraq/Iran	1 May 2010	12 years and 11 months (released 28 March 2023)	Yes – 4 May 2012 assessment No – 26 August 2015 assessment
Mr WG Country of birth: Iran	26 August 2016	7 years and 7 months	No
Mr WH Country of birth: Iran	18 March 2013	9 years and 9 months (released 20 December 2022)	No
Mr WI Country of birth: Iraq	18 August 2013	8 years and 11 months (released 3 August 2022)	No
Mr WJ Country of birth: Sri Lanka	10 December 2009	12 years and 3 months	Yes

		(released 23 November 2021)	
Mirand Pjetri Country of birth: Albania	16 September 2013	8 years (removed 21 September 2021)	No

5 The Commission's role

5.1 Functions of the Commission

29. The relevant functions and powers of the Commission are contained in the AHRC Act. 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.⁴
30. 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.
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 term 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
33. President Croucher made a direction under s 14(2) of the AHRC Act prohibiting the disclosure of the identities of each of the complainants, except where the Commission received instructions that they do not want a pseudonym assigned to them. For this reason, case law citations have been omitted where the name of the complainant may be identified from the citation.

5.2 Scope of 'act' and 'practice'

34. 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.

35. 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.
36. 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, its officers or agents.⁵

6 Legal framework

6.1 Prohibition against arbitrary detention

37. The prohibition against arbitrary detention is set out in article 9(1) of the ICCPR:

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. International human rights jurisprudence has provided the following set of principles in relation to article 9(1):

- ‘detention’ includes immigration detention⁶
- ‘arbitrariness’ is not to be equated with ‘against the law’; it must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability⁷
- detention should not continue beyond the period for which a State Party can provide appropriate justification.⁸

39. While the ICCPR itself does not define the term ‘arbitrary’, the UN Human Rights Committee (UNHRC) has emphasised the following:

- detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention
- detention for the purposes of immigration control is not per se arbitrary, but must be justified as reasonable, necessary and

proportionate in the light of the circumstances and reassessed as it extends in time

- less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding, must be taken into account
- the inability of a State Party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.⁹

40. The UN Working Group on Arbitrary Detention has stated that any form of detention in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose.¹⁰

41. Under international law, the guiding standard for restricting rights is 'proportionality', which means that a deprivation of liberty – in this case, continuing immigration detention – must be necessary and proportionate to a legitimate aim of the State Party, and must be in the least restrictive form and for the shortest time possible in order to avoid being 'arbitrary'.¹¹

42. It is therefore necessary to consider whether the detention of these 10 complainants in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to each individual, and in light of the available alternatives to closed detention, to determine whether their detention was arbitrary under article 9(1) of the ICCPR.

6.2 Mandatory detention

43. Under the Migration Act, detention is mandatory for all non-citizens who enter Australia and do not hold a visa, referred to as 'unlawful non-citizens'.¹² Once detained, unlawful non-citizens must remain in detention until they are either granted a visa or removed from Australia. There is no legislated limit on the length of time an individual can be held in immigration detention.

44. Detainees cannot seek judicial review of whether their detention is arbitrary, and while a writ of *habeas corpus* may lie where detention is unlawful, the same cannot be said with respect to the arbitrariness of that detention.

45. Prior to November 2023, it was settled law in Australia that potentially indefinite administrative detention for the purposes of removing a person from Australia was lawful.¹³ This was the case even when circumstances prevented removal, such as where the country to which the person was intended to be removed refused to accept them, or where the person was stateless.
46. This position changed when the High Court ordered the release of the plaintiff in the case of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 (*NZYQ*). In doing so, the High Court reversed its earlier position, and made clear that there is a constitutional limit on the ability of the Australian Government to detain a person for the purpose of removal in circumstances where there is no real prospect of removal becoming practicable in the reasonably foreseeable future.¹⁴
47. People who enter Australia by sea without a visa are referred to as 'unauthorised maritime arrivals'. They are prohibited from making a visa application unless the Minister personally makes a determination that the bar does not apply to them (colloquially referred to as 'lifting the bar').¹⁵ Individuals are usually detained until the prohibition is lifted, and often remain in detention while their visa applications are processed. For these individuals, they were not able to take any steps to seek a visa to end their closed detention. The Commission has discussed this issue in detail in the report, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'*.¹⁶
48. UN bodies have consistently expressed concerns with Australia's mandatory detention regime. In its 2017 Concluding Observations, the UNHRC stated:

The Committee remains concerned ... that the rigid mandatory detention scheme under the Migration Act 1958 does not meet the legal standards under article 9 of the Covenant due to the lengthy periods of migrant detention it allows and the indefinite detention of refugees and asylum seekers who have received adverse security assessments from the Australian Security Intelligence Organisation, without adequate procedural safeguards to meaningfully challenge their detention.¹⁷
49. The Committee has made multiple recommendations regarding the detention regime, including asking Australia to reduce the period of initial mandatory detention, to use alternatives to detention more frequently, to

ensure detention is subject to judicial review and to introduce a time limit on the overall duration of immigration detention.¹⁸

6.3 Alternatives to closed detention

50. In determining the reasonableness, necessity, and proportionality of the detention, alternatives to closed detention must be available and detainees must be routinely considered for such alternatives, particularly as their detention extends over time.

51. Under the Migration Act, a detainee subject to the s 46A bar can only be released from closed detention, while their immigration status is being resolved, if the Minister exercises personal, non-compellable, discretionary, public interest powers (known as Ministerial Intervention powers) to:

- issue a visa under s 195A of the Migration Act
- make a 'residence determination' under s 197AB of the Migration Act that a person is to reside in a specified place rather than being held in a detention facility, also known as community detention or community placement.¹⁹

52. To assist in determining the most appropriate placement for a detainee, the Department has advised that it uses a decision support tool called a Community Protection Assessment Tool (CPAT), which provides a recommendation of placement based on the level of risk a person poses to the community. It has advised that there are 4 placement recommendations:

Tier 1 – Community Placement either through grant of a Bridging Visa E (subclass 050) visa (BVE), or a BVE with conditions, or referral for consideration of community placement under residence determination arrangements

Tier 2 – Continued placement in held detention, pending removal

Tier 3 – Held Detention

Tier 4 – Specialised Detention

A CPAT is a point in time assessment. It is possible for a detainee's CPAT recommendation to change over time depending on their circumstances. In addition, the CPAT parameters are regularly reviewed and may be adjusted depending on government policy and other operational requirements.²⁰

53. Tiers 2 to 4 are forms of closed detention. In this report, Immigration Detention Centres (IDC) and Immigration Transit Accommodation (ITA)²¹ are included as places of 'held detention' (tiers 2 and 3). While Tier 4 – Specialised Detention, is still technically detention, the locations can be varied. A section about this can be found at 6.3(d).

(a) Community detention

54. In making a residence determination under s 197AB, the Minister must specify conditions to be complied with by the person who is the subject of the residence determination.²²

55. Generally speaking, conditions that attach to a residence determination can include a requirement that the person:

- be of good behaviour, including by abiding by all Commonwealth, State or Territory laws that apply and following all reasonable and lawful directions of the Department of Home Affairs
- not engage in any paid work or receive a salary while in detention
- attend school or participate in other educational activities.

56. However, other than a requirement that the person reside at a specified place, there are no other prescribed conditions that attach to a residence determination. As the Explanatory Memorandum to the Migration Amendment (Detention Arrangements) Bill 2005 (Cth) makes clear, conditions should be imposed on a residence determination that are suited to the person's individual circumstances.²³

57. The Minister has the power to grant a residence determination to an unlawful non-citizen detained under s 189 of the Migration Act. This includes a person who does not have a visa application pending, whose visa applications (and any appeals) have been refused, a person on a removal pathway or a person who has had their visa cancelled or refused under s 501 of the Migration Act. The Minister may attach any conditions considered appropriate to manage any risk, real or perceived, that a person poses to the community.

58. As discussed in the Commission's February 2021 report, *Immigration detention following visa refusal or cancellation under section 501 of the*

Migration Act 1958 (Cth),²⁴ there are several other conditions that can be imposed on various visas under immigration legislation in Australia. For example, the *Migration Regulations 1994 (Cth)*²⁵ (the Migration Regulations) prescribe a number of conditions applicable to particular visas. In addition to compulsory conditions for particular visas, the type and number of conditions can also be tailored to the particular visa recipient. As a residence determination is not attached to a visa, there are no visa conditions prescribed for such purposes.

59. The Commission considers that there are a number of existing conditions prescribed for the purposes of visas granted under the Migration Act that could appropriately be applied to a person issued with a residence determination. These are illustrative of the types of conditions that could be imposed to manage any risk, real or perceived, to the community and are not exhaustive:

- be limited to a prescribed type and amount of work (conditions 8102–8110)
- obtain approval from the Department to take up specified employment (condition 8551)
- does not work (conditions 8116–8118)
- be of good behaviour (condition 8303) and not engage in criminal conduct (condition 8564)
- not associate or communicate with certain entities or prescribed organisations (condition 8556)
- report within a specified time and place (conditions 8401–8402)
- notify the Department of the person’s residential address (condition 8513) or any change in that address (condition 8565)
- be required to leave Australia by a specified date (condition 8512).

(b) Bridging visas

60. In granting a visa under s 195A of the Migration Act, the Minister is not bound by the Migration Regulations and is at liberty to apply any condition the Minister sees fit. It is noted that a person may be re-detained for the purposes of removal from Australia once the bridging visa ceases.

61. To give some context to how persons in the community on a bridging visa are managed, the Commission has considered the types of conditions that

can be imposed on a bridging visa granted under Subdivision AF of Division 3 of Part 2 of the Migration Act.

62. The conditions that can be imposed on a bridging visa granted under s 73 of the Migration Act are varied,²⁶ but can include a requirement that the person:
- not undertake any paid work (condition 8103)
 - be limited to a prescribed type and amount of work (condition 8104)
 - not work for the same employer for more than 3 months without Departmental approval (condition 8108)
 - not perform work that an Australian citizen or permanent resident could do (condition 8112)
 - maintain adequate arrangements for health insurance (condition 8501)
 - live, study and work only in a designated area of Australia (condition 8549).
63. Further, there are a number of other conditions imposable on visas other than bridging visas granted under s 73, which are also instructive. As set out above, there are a range of conditions that can be imposed on visas.
64. The Commission considers that existing visa conditions could be applied to manage potential risks to the community posed by a person.
65. In addition, while they serve different purposes, the parole decision-making framework and the conditions imposed as part of parole may be instructive when considering how to manage any risk, real or perceived, that an immigration detainee may pose to the community.
66. In granting a bridging visa under s 195A or making a residence determination under s 197AB, the Minister can mitigate any risks, real or perceived, posed by a person by imposing conditions specifically designed to address such risks.
67. Some of the reasons that conditions are imposed on persons released on parole are to manage such risks that the person may pose to the

community. Some of the conditions imposed on release on parole of a post-custodial offender could be appropriately imposed on a person's release into the community following immigration detention, such as adhering to a curfew, participate in a rehabilitation program or receive treatment and not associate with particular persons. These are elaborated further in the Commission's 2021 report, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*.²⁷

68. Since November 2023, the Minister has also utilised the Bridging (Removal Pending) visa in order to release detainees whose removal from Australia is not practicable in the reasonably foreseeable future.
69. A number of conditions are mandatory for the grant of a Bridging (Removal Pending) visa.²⁸

(c) Ministerial guidelines

70. Ministers have published guidelines to explain the circumstances under which they may consider exercising their powers under ss 195A and 197AB of the Migration Act and to inform Departmental officers when to refer a case to the Minister to consider exercising these powers. Set out below are the guidelines relevant to the 10 complainants over the course of their detention.
71. The guidelines must be now viewed in light of the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs* (2023) 97 ALJR 214 (*Davis*), which determined that an equivalent set of guidelines (considering the power of the Minister to intervene under ss 351, 417 or 501J of the Migration Act) went beyond the scope of the powers vested personally in the Minister by requiring officers of the Department to assess what was in the public interest. Both sets of guidelines (s 195A and s 197AB) on their face require officers of the Department to make an assessment of whether cases exhibit 'compelling or compassionate circumstances' (195A guidelines) or 'unique or exceptional circumstances' (197AB guidelines) which may fall within the public interest for the Minister to intervene. The Department acknowledged this issue in its response to Professor Croucher's preliminary view:

The Minister accepts that, because of the resulting High Court judgement in *Davis v Minister for Immigration; DCM20 v Secretary of Department of Home Affairs*, the decision not to refer the request for Ministerial intervention to the Minister 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.

(i) Section 197AB guidelines

72. On 1 September 2009, the Hon Chris Evans MP, then Minister for Immigration and Citizenship, published guidelines relating to s 197AB (the 2009 Guidelines). The Minister specified that priority would be given in certain circumstances including:
- persons with significant physical or mental health problems
 - persons who may have experienced torture or trauma
 - cases which will take a considerable period to substantively resolve
 - other cases with unique or exceptional characteristics.
73. Notably, the Minister stated that the Department should also consider referring cases under s 195A where it is in the public interest to issue a visa and, 'if in doubt, the Department should provide me a submission covering the full range of possible intervention options'.
74. The 2009 Guidelines also note the risk associated with ongoing detention and state that the Department should note that 'detention which is arbitrary or indefinite is not acceptable'.
75. New guidelines were issued on 30 May 2013 by the Hon Brendan O'Connor MP, then Minister for Immigration and Citizenship (the 2013 Guidelines). The Minister specified certain cases that should be referred including:
- adults with ongoing illnesses requiring significant and ongoing medical intervention
 - adults with diagnosed mental illness
 - where there are unique or exceptional characteristics.
76. New guidelines were issued in February 2014 by the Hon Scott Morrison MP, then Minister for Immigration and Border Protection (the 2014 Guidelines).²⁹ In March 2015, the Hon Peter Dutton MP, Minister for Home

Affairs, issued replacement guidelines (the 2015 Guidelines).³⁰ In October 2017, Minister Dutton again re-issued these guidelines which are currently in use by the Department (the 2017 Guidelines).³¹

77. These guidelines provide that the Ministers would consider referrals in certain cases, including where:
- single adults who have 'ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention'
 - there are 'unique or exceptional circumstances'.
78. In exercising their powers, the Ministers would take into account the circumstances of each case, including:
- the person's health and well-being
 - the person's conduct while in detention including any previous warnings from the Department about their behaviour
 - the person's character concerns (if any) and any related criminal court proceedings
 - any other significant issues concerning the person, including, but not limited to, unique family circumstances or health issues
 - their cooperation with immigration processes.
79. The phrase 'unique or exceptional circumstances' was not defined in the guidelines, but it was defined in similar guidelines relating to the Minister's power to grant visas in the public interest.³² In these guidelines, factors relevant to an assessment of unique or exceptional circumstances included:
- circumstances that may bring Australia's obligations as a party to the ICCPR into consideration
 - the length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community
 - compassionate circumstances regarding the age and/or health and/or psychological state of the person, such that a failure to recognise them would result in irreparable harm and continuing hardship to the person

- where the Department has determined that the person, through circumstances outside their control, is unable to be returned to their country/countries of citizenship or usual residence.

(ii) Section 195A guidelines

80. The Hon Chris Bowen MP, then Minister for Immigration and Citizenship, published guidelines on s 195A in March 2012 (the 2012 Guidelines). The 2012 Guidelines provided that the public interest is served through 'ensuring that no person is held in immigration detention for longer than is necessary'.
81. On 29 April 2016 and again in November 2016 (with minor additions), Minister Dutton re-issued s 195A guidelines, which are the current guidelines in use by the Department (the 2016 Guidelines).
82. The 2016 Guidelines provide that cases should be referred to the Minister where:
 - the person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department
 - 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
 - the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable
 - there are other compelling or compassionate circumstances which justify the consideration of the use of the Minister's public interest powers and there is no other intervention power available to grant a visa to the person
 - (contained in only the 2012 Guidelines) there are unique and exceptional circumstances

- (contained in only the 2012 Guidelines) the person presents well-founded non-refoulement claims ... but has had a Protection visa (PV) application refused.

83. The 2016 Guidelines do not provide for 'unique and exceptional circumstances' as the basis for referral – unlike the other guidelines referred to above – however, the Minister will consider cases where there are 'compelling or compassionate circumstances'. 'Compelling or compassionate' circumstances are not defined in the guidelines, however a person does not need to satisfy both (compelling *and* compassionate).

84. All of the guidelines (except the 2009 Guidelines) explicitly provide that a case may be re-referred to the Minister for consideration where there is new information or where there is a significant change in the person's conduct or circumstances.

(d) Alternative places of detention

85. The definition of immigration detention within s 5(1) of the Migration Act includes:

(b) being held by, or on behalf of, an officer ...

(v) in another place approved by the Minister in writing

86. Places approved by the Minister in writing are known as 'alternative places of detention' (APODs).

87. In 2002, the Department introduced the framework for the use of APODs through the issuance of a Migration Series Instruction (MSI 371). MSI 371 explains that the Minister may approve new places of detention as necessary.

88. APODs can be used to hold people with specific needs unable to be met within the held-detention framework. This can include aged care facilities, hospitals, or mental health inpatient facilities.³³

(e) Reviews of detention

89. The Department advised that monthly reviews are conducted of persons in detention. The purpose of these reviews is to ensure that:

- the detention remains lawful and reasonable
- the location of detention remains appropriate to their individual circumstances and conducive to status resolution

- their case is progressing to ensure an outcome
 - appropriate services are being provided in an effective and cost-efficient manner.
90. These reviews usually focus on whether there is any need for an individual to be released from detention, rather than whether it is necessary to continue to detain the individual.
91. Under s 486N of the Migration Act, the Department is required to report to the Commonwealth Ombudsman (Ombudsman) on individuals in immigration detention for a cumulative period of 2 years and every 6 months thereafter. The Ombudsman prepares independent assessments and provides the Minister with a report under s 486O of the Migration Act. The Ombudsman may make recommendations to the Minister.
92. The Department has advised that a detainee's risk rating or risk profile is assessed using the Security Risk Assessment Tool (SRAT), which provides information regarding criminal history, incidents in detention, behaviour in corrections, immigration pathways, and intel holdings.³⁴
- (f) Prolonged detention and removal pathways**
93. Under the Migration Act, unlawful non-citizens must be detained until they are either removed from Australia or granted a visa.³⁵
94. There is no legislated limit on the length of time an individual can be held in Australian immigration detention. The UN has recommended that Australia legislate a maximum period of detention.³⁶
95. In a 2016 Detention Capacity Review, the Department stated that 'accommodation in immigration detention facilities is to be used based on risk and for as short a period as possible to facilitate timely status resolution'.³⁷
96. Over half (61%) of the Australian detention population are individuals detained following cancellation of their visas under s 501 of the Migration Act and around an eighth (13%) are unauthorised maritime arrivals.³⁸
97. The effect of *NZYQ* on the number of people in immigration detention has been notable. More than 100 people were released from detention as a

result of the decision, and now reside in the community on 'removal pending' bridging visas. The average length of detention now stands at 496 days – or less than 2 years – at October 2024.³⁹ This number in October 2023 was 719 days.⁴⁰ In mid-2015, the average was around 400 days, in 2018 and 2019 it reached over 500 days and in 2020, it was over 580 days.⁴¹

98. In comparison, in Canada the average length of detention was 16.8 days from April 2022 to March 2023.⁴² In Germany, between 2018 and the first quarter of 2021, the average duration of immigration detention was 22.1 days.⁴³ In the United Kingdom, over 95% of those who left detention between September 2022 and September 2023 were detained for less than 6 months.⁴⁴
99. The Australian Government has recognised the risks associated with ongoing closed detention and stated that the 'public interest' is served through ensuring that 'no person is held in immigration detention for longer than is necessary'.⁴⁵ It has also stated that detention which is arbitrary or indefinite is not acceptable.⁴⁶
100. A person who is liable for removal – usually when their visa application has been finally determined and refused, and regardless of whether they are unwilling to depart voluntarily – must be removed from Australia as soon as reasonably practicable.⁴⁷ The term 'as soon as reasonably practicable' is not defined.
101. The High Court has recognised that removal of a non-citizen from Australia will ordinarily require the cooperation of other countries. There may be delays or obstacles to the timely removal of a detainee caused by circumstances beyond the control of Australia which bring about inaction or cause the absence of active steps to progress removal.⁴⁸
102. In *Commonwealth v AJL20* (2021) 273 CLR 43, the High Court found that the Migration Act authorised and required the detention of an unlawful non-citizen until they were *actually* removed from Australia or granted a visa. The Court noted that the authority and obligation to detain was 'hedged about by enforceable duties', including the duty in s 198(6) to remove an unlawful non-citizen from Australia 'as soon as reasonably practicable'.⁴⁹ However, the fact that one of these duties was not complied with (for example, a failure to remove a person from Australia as soon as reasonably practicable), did not result in an obligation to release the person from closed immigration detention. In those cases, the remedy for

failure to comply with a duty was a writ of mandamus, compelling the executive to perform the duty.

103. This position, however, was reversed in *NZYQ*. In that case, the High Court identified that detention under the Migration Act must be for the stated purpose of removal in order to be permitted by Chapter III of the Australian Constitution – and that when removal was not practicable, the detention was no longer for the stated purpose. Detention thereafter became solely for the purpose of separating the detainee from the Australian community, which is not permissible other than when ordered by a court.⁵⁰
104. For those detainees released following the *NZYQ* decision, the reason their removal was not considered practicable in the reasonably foreseeable future was because they had been identified as persons who were either stateless, and/or they had been found to be in need of protection from their country of nationality or former habitual residence. The Australian Government had determined, according to the processes set up under the Migration Act, that, to return them to their countries of origin, would constitute *refoulement*, under either the *1951 Convention Relating to the Status of Refugees* and its 1967 Protocol, the ICCPR, or the *Convention against Torture*.
105. The effect of s 197C of the Migration Act (as amended with effect from 25 May 2021) is that removal to a country is not required if *refoulement* obligations arise in relation to that country. The implications of this amendment have been criticised for increasing the risk of indefinite detention.⁵¹
106. There are other groups of people within the detention population, however, who have not been identified as falling within the scope of *NZYQ*. This includes people whose removal *is* reasonably practicable in the future, but removal has become protracted due to circumstances outside of their control. Another group includes those whose removal would be possible but for their own refusal to cooperate with the processes necessary for removal to occur. The High Court has since ruled that continuing to detain a person in this latter category remains lawful where they hold the capacity to cooperate with efforts to remove them, and choose not to do so.⁵² Recent legislation enables the Minister to direct

certain non-citizens to take steps to facilitate their removal from Australia.⁵³

107. Since at least 2012, Ministers have set out in the s 195A guidelines that a case should be referred if removal is not reasonably practicable. Furthermore, removal prospects, the level of cooperation with immigration and removal processes, any character concerns and the likelihood of compliance with visa conditions, are specified as circumstances to be taken into account when referring a case to the Minister. The 2012 Guidelines specifically noted that factors relevant to the public interest included concerns about continued detention and the length of detention, but these were omitted from the 2016 Guidelines.
108. The Government has recognised that removal may not be reasonably practical, and a case would usually meet the criteria for referral under s 195A due to reasons such as (set out in at least the 2012 and 2016 Guidelines):
 - the person's identity or nationality has not been positively established
 - the person's country of origin refuses to recognise the person as a national
 - the person's country of origin refuses to accept their return or to issue a travel document to facilitate their return
 - it is not possible to return the person to their country of origin because of ongoing conflict and/or policy regarding involuntary removals.
109. Several guidelines provide that the Ministers would not expect a case to be referred where a removal was imminent, that is, within 3 months.⁵⁴ Several guidelines also confirm that removal obligations are not affected by referrals under ss 195A or 197AB.
110. The UN Working Group on Arbitrary Detention has stated that any form of administrative detention or custody must be applied as an exceptional measure of last resort, for the shortest possible period with a maximum detention period set by legislation and only if justified by a legitimate purpose.⁵⁵ It has emphasised that indefinite detention of individuals, in the course of migration proceedings, cannot be justified and is arbitrary. Any form of detention that is mandatory, indefinite and without automatic and regular periodic review before a judicial authority is also arbitrary.⁵⁶

111. The UN Working Group on Arbitrary Detention has cautioned against arbitrary detention where there may be obstacles to removal, stating:

there may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them – including non-cooperation of the consular representation of the country of origin, the principle of non-refoulement or the unavailability of means of transportation – thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.⁵⁷

112. In numerous UN Working Group on Arbitrary Detention Opinions, the Australian Government has submitted that ‘the determining factor [for arbitrary detention] is not the length of the detention, but whether the grounds for the detention are justifiable’.⁵⁸

113. The UN Working Group on Arbitrary Detention has rejected this argument and stated it would mean accepting that individuals could be ‘caught up in an endless cycle of periodic reviews of their detention without any prospect of actual release. This is a situation akin to indefinite detention which cannot be remedied even by the most meaningful review of detention on an ongoing basis.’⁵⁹

7 Safeguards against prolonged and indefinite immigration detention – Canada, Germany, New Zealand, United Kingdom, United States

114. In undertaking this report, the Commission reviewed the immigration detention frameworks of Canada, Germany, New Zealand and the UK and how they manage the risk of prolonged and indefinite detention of individuals in immigration detention. The Commission also reviewed how the US manages this risk in removal situations.

7.1 Canada

115. Canadian laws, including the *Immigration and Refugee Protection Act 2001* and its accompanying Regulations, contain a number of safeguards against indefinite detention.⁶⁰ The Federal Court has also confirmed that a

person cannot be held indefinitely under the *Immigration and Refugee Protection Act 2001*.⁶¹

116. The Immigration and Refugee Board (an administrative tribunal) must review an individual's detention every 30-day period to examine the circumstances of the detention, whether it is lawful, and whether it should be continued.⁶² As part of the review, the government must demonstrate why alternatives to detention are not appropriate.
117. The assessment is a two-step process. First, the Immigration and Refugee Board must release the person from detention unless they are satisfied that one of the following grounds for detention exists:
 - they constitute a danger to the public
 - they are unlikely to appear for examination, hearings or removal from Canada
 - the Minister is taking necessary steps to inquire into a reasonable suspicion they are inadmissible on grounds of security, human rights violations, or serious or organised criminality
 - the identity of the person has not been established.⁶³
118. Secondly, to mitigate against indefinite detention, if one of the above grounds for detention exists, the following factors must also be considered:
 - the length of time the person has spent in detention and the length of time detention will likely continue, and whether there is a possibility of it becoming indefinite
 - any unexplained delays or lack of diligence at the fault of one of the parties
 - the availability, effectiveness and appropriateness of alternatives to detention.⁶⁴
119. As a result of the above additional factors, the Immigration and Refugee Board may order the release of an individual, even if satisfied that a *prima facie* case for continued detention has been established. For example, the Board may order release because: detention has continued for an extremely long time with no realistic prospect of removal; the Minister is unable to explain a lack of diligence in taking steps to establish a detainee's identity; or it is satisfied that alternatives, such as release on

conditions, would adequately address the concerns underlying the grounds for detention.⁶⁵

120. If a person is released from detention, the Immigration and Refugee Board may impose any conditions that it considers necessary as alternatives to detention.⁶⁶ The commonly imposed 'generic conditions' include keeping the authorities updated with a current address, reporting any criminal charges and convictions and obtaining ID documents. Other conditions and alternatives to detention include the issuance of deposits or guarantees, in-person reporting, community case management and supervision, voice reporting and electronic monitoring.⁶⁷

Removals

121. A removal order may be stayed if the removal cannot be carried out.⁶⁸ The person is generally released if an order is stayed, subject to other relevant reasons for detention such as posing a danger to the public.
122. The Canada Border Services Agency can impose an Administrative Deferral of Removal (ADR) or the relevant Minister may impose a Temporary Suspension of Removal (TSR) in certain circumstances of foreign crises where removal would be inappropriate.⁶⁹
123. An ADR is a temporary measure put in place to temporarily defer removals to certain countries in situations of humanitarian crisis. Countries currently listed include the Gaza Strip, Libya, Mali, Somalia, Ukraine, Yemen, South Sudan, Sudan, Syria and Iran.⁷⁰
124. TSRs temporarily pause removals to a country where there is a risk to the entire civil population such as armed conflict.⁷¹ These are currently in place for Afghanistan, the Democratic Republic of the Congo and Iraq.

7.2 Germany

125. Germany is subject to the European Union *Returns Directive*, which provides for a number of safeguards against indefinite detention, including:
- a time limit for detention not exceeding 6 months, which may only be extended for a limited period not exceeding twelve months

- that detention may only be used if there are no sufficient alternatives to prepare or carry out removal, in particular if there is a risk of the individual absconding or avoiding or hampering the returns process
- that detention should be for as short a period as possible and only be permitted while removal arrangements are currently in progress and being executed with due diligence
- that detention shall be reviewed at reasonable intervals of time and if it is prolonged then the review should be subject to supervision of a judicial authority.⁷²

Removals

126. German laws do not permit detention awaiting deportation if the purpose of the custody can be achieved by other less severe means and detention is required to be limited to the shortest possible duration.⁷³
127. Detention to secure deportation is not permitted if it is clear that it will not be possible to carry out deportation within the next 3 months for reasons beyond the person's control, unless the person poses a significant threat to others or to significant security interests.
128. Detention to secure deportation may be ordered for up to 6 months,⁷⁴ but as a general rule, should not exceed 6 weeks.⁷⁵ It may only be ordered if there is a risk of the person absconding, the person is required to leave the territory after entering the territory unlawfully or a deportation order has been issued but is not immediately enforceable.⁷⁶
129. The detention order may be extended by a maximum of 12 months in cases where the person hinders their deportation and may be extended by a further and maximum of 12 months where the transmission of the necessary documents by the third country is delayed. Custody to secure deportation may not last longer than 18 months.⁷⁷
130. Conditions may be imposed on persons who are not detained. These include restrictions on geographic movement if the deportation is imminent or the individual has been convicted of an offence, reporting duties, an obligation to provide a financial deposit or surrender documents.⁷⁸
131. Deportation is not permitted or may be temporarily suspended for a number of situations including risk of refoulement, humanitarian grounds or substantial public interest grounds.

7.3 New Zealand

132. In New Zealand, the *Immigration Act 2009* (NZ) regulates immigration detention and contains numerous protections against arbitrary and indefinite detention. These include reporting and residence conditions upon a detainee's release into the community and judicial oversight of detention warrants.
133. Section 309(1)(b) of the *Immigration Act 2009* (NZ) authorises the detention of persons who are liable for deportation (for example, persons whose visa has expired or been cancelled, persons considered a threat to security, or asylum seekers found not to be owed protection). A person may only be subject to an initial detention of up to 96 hours without a warrant. After this, an immigration officer may apply to a District Court Judge for a 'warrant of commitment' authorising a person's detention for up to 28 days.⁷⁹ A judge may issue the warrant if satisfied that the person is likely to be removed from New Zealand within 'not an unreasonable period', if it is in the public interest or the person constitutes a threat or risk to security.⁸⁰
134. In determining whether the period of detention is unreasonable, the NZ High Court stated in *Tesimale v Manukau District Court* [2021] NZHC 2599, that this requires an assessment of the circumstances. Drawing on NZ and UK case law, the Court said that relevant factors could include: the detention conditions; the effect of detention upon a detainee; obstacles to removal; the diligence, speed and effectiveness of the steps taken by the authorities to effect removal; the realistic prospects of removal; the length of detention; whether 'too much time has elapsed'; the risk of absconding; and the risk of committing of criminal offences or re-offending.⁸¹ The overriding requirement is that the judge is satisfied on the balance of probabilities that the circumstances preventing deportation will not continue for an unreasonable period.⁸²
135. If the judge is not satisfied that the detention is warranted, then the person must be released from custody on conditions, as discussed below.⁸³
136. Warrants are renewable every 28 days and there is no limit on the number of renewals. However, s 323 stipulates that if a person has been detained

under consecutive warrants beyond 6 months, then they may only continue to be detained if a judge is satisfied that the person's deportation has been prevented by some action or inaction by the person and there are no exceptional circumstances that would warrant release. The Act does not define what is considered an exceptional circumstance, however does specify that the period of time a person is detained, or the possibility the person's deportation or departure may continue to be prevented by some action or inaction of the person are not exceptional circumstances.⁸⁴ If a judge is not satisfied these conditions are met, they must order the release of the person on conditions.⁸⁵

137. Section 315(1) of the *Immigration Act 2009* (NZ) provides that instead of being placed in, or continuing to be held in detention, a person may be required to:

- reside at a specified place
- report to a specified place at specified periods or times in a specified manner
- provide a guarantor who is responsible for the person's compliance with any agreed requirements and reporting any failure to comply with the requirements
- attend any required interview or hearing if they have made an application for a protection visa
- undertake any other action to facilitate the person's deportation or departure from New Zealand.

138. Such conditions are offered at the discretion of the immigration officer.⁸⁶ The immigration officer can end any such agreement at any time and failure to comply with any conditions may result in the resumption of that person's detention.⁸⁷ Similar conditions may also be imposed on a person detained who is liable for deportation as discussed above.

139. In addition, if the person is considered a threat or risk to security, then the following additional conditions may also be imposed:

- the person may not have access to or use specified communication devices or facilities (such as a telephone, the internet, or email):
- the person may be required to refrain from associating with any one or more named individuals, or individuals associated with one or more named organisations.⁸⁸

140. There are also other safeguards against indefinite detention for refugees, protected persons and prolonged detention periods such as:
- The Minister has the discretion at any time to cancel or suspend for up to 5 years a person's liability for deportation.⁸⁹
 - Persons who are recognised as refugees are not liable to arrest and detention, unless their deportation is permissible under the Refugee Convention (based on national security or public order concerns, articles 32(1) and 33(2)).⁹⁰
 - Persons who are recognised as 'protected persons' (a person who may be subject to the arbitrary deprivation of the right to life, to cruel treatment or to torture) under the Immigration Act may not be detained, unless they can be removed to a country where they will not face torture or the death penalty. Unlike the Refugee Convention provision, a protected person cannot be deported on the basis of national security concerns. If a protected person has committed serious international/war crimes, the Minister has a discretion to decide their immigration status and whether to grant them a visa and under what conditions.⁹¹

7.4 United Kingdom

141. Similar to the Minister's power to make a residence determination under s 197AB of the Migration Act, the UK 'immigration bail' scheme is designed to facilitate the release of persons in immigration detention awaiting the outcome of an application or their removal from the UK.
142. Any person who has been in detention for more than 4 months is automatically referred for an immigration bail assessment.⁹² There is a presumption in favour of granting immigration bail.⁹³
143. Immigration bail may be granted by either the Secretary of State as determined by the Home Office without a hearing⁹⁴ or by an independent judge in the First Tier Tribunal after a hearing.⁹⁵
144. In deciding whether to grant immigration bail and in deciding the condition or conditions to impose on such bail, the decision-maker is to have regard to the following:

- the likelihood of the person failing to comply with a bail condition
 - whether the person has been convicted of an offence
 - the likelihood of a person committing an offence while on immigration bail
 - the likelihood of the person's presence in the United Kingdom, while on immigration bail, causing a danger to public health or being a threat to the maintenance of public order
 - whether the person's detention is necessary in that person's interests or for the protection of any other person.⁹⁶
145. Once a decision on immigration bail is made, the immigration officer or Tribunal must provide the person with a notice of decision setting out any relevant bail conditions.⁹⁷ Schedule 10 item 2 provides a number of conditions that may be imposed on immigration bail if granted, including requirements to reappear, work or study restrictions, address restrictions, wearing an electronic monitoring tag, curfews, inclusion and exclusion zones.⁹⁸
146. For an immigration detainee who has had their visa cancelled as a result of a conviction for certain criminal offences - including homicide, sexual offences, or violent crime – the UK Home Office's guidance provides that immigration bail must include a condition imposing a curfew as well as electronic monitoring.
147. An individual may apply for immigration bail to the Tribunal every 28 days.⁹⁹
148. Under UK case law, detention may only be continued if there is a real prospect of removal within a reasonable timeframe. The 'Hardial Singh' principles, from *R v Governor of Durham Prison ex p. Hardial Singh* [1984] 1 WLR 704, set out that a person may only be detained if there is a clear intention to deport them and only for a period that is reasonable and necessary in all of the circumstances of the case. If it becomes apparent that removal cannot be effected within a reasonable period, the person should either not be detained or be released from detention on immigration bail.

7.5 United States

149. US laws contain a number of safeguards against indefinite detention in removal cases, including a time limit on detention.
150. If a person is ordered to be removed, they must be removed within 90 days. During this period, they cannot be released.¹⁰⁰
151. After 90 days, if the person does not depart or is not removed, the person is released and subject to supervision under regulations prescribed by the Attorney-General. The regulations include, among others, requirements that the person appears periodically before an immigration officer and obey written restrictions on conduct and activities.¹⁰¹
152. There are certain exceptions to the 90-day time limit on detention and these include:
 - if the person fails or refuses to make timely application in good faith for travel or other documents necessary to departure or conspires or acts to prevent removal
 - due to health-related grounds (e.g. a communicable disease); criminal and related grounds such as drug trafficking, money laundering; participation in genocide or war crimes, security grounds, terrorist activities
 - if the person has been determined by the Attorney-General to be a risk to the community or unlikely to comply with the order of removal.
153. In *Zadvydas v Davis* 533 US 678, the US Supreme Court found that the law does not permit indefinite detention following the initial removal period as this would be unconstitutional (a violation of the due process clause), and 'limits an alien's detention to a period reasonably necessary to bring about that removal'.¹⁰² The Court found that post-removal detention would be presumptively reasonable for the first 6 months, and once that period ends, aliens seeking release must show that there is 'good reason to believe that there is no significant likelihood of removal in the foreseeable future'.¹⁰³

154. A removal may be stayed if the Attorney-General decides their immediate removal is not practicable or proper. If a removal is stayed, the person may be released during this stay with the payment of a bond, condition that the person will appear as required and for removal, and any other conditions the Attorney-General sees fit.
155. The Attorney-General has the power to cancel removal and adjust a person's status if certain circumstances are met. This includes the person has been physically present in the US for over 10 years and has good moral character, has not been convicted of a relevant offence and it would cause 'exceptional and extremely unusual hardship' to their family.

7.6 Observations on other jurisdictions

156. Canada, Germany, New Zealand, UK and the US adopt a range of measures to safeguard against prolonged, indefinite and arbitrary detention, particularly in protracted removal situations. All countries contemplate the release of detainees where there are no realistic prospects of removal. In Canada and the UK, there is a presumption that individuals will be released from detention. These countries enable release with conditions to manage any risks to the community, with some exceptions such as where the person poses a significant threat to the community or national security.
157. These measures demonstrate how ongoing closed detention is not the only option where there are obstacles to a person's removal. To mitigate against the risk of prolonged, indefinite and arbitrary detention, these authorities use conditions analogous to those attached to parole or other conditional release schemes for the purpose of releasing detainees into the community pending their removal. The various measures demonstrate decision-making processes and conditions attached to release from detention that balance both protecting the community and safeguarding against arbitrary detention.

8 Act or practice of the Commonwealth

158. The complainants have each alleged that their detention in an immigration detention facility was arbitrary. On average they have been or were detained for over 10 years.
159. Their significant periods of detention appear to be largely attributed to the following:

- detention while awaiting the Minister to remove the statutory bar against visa applications – the bar was lifted for all relevant complainants and on average they waited 2 and a half years before they were able to lodge a visa application
 - detention while awaiting the outcome of visa application decisions and reviews and appeals of visa decisions, which often took several years to reach determination
 - delays in consideration of the complainant’s case (and subsequent referral to the Minister) for Ministerial Intervention under ss 195A and/or 197AB of the Migration Act
 - detention pending removal from Australia.
160. At the time their complaints were lodged, 9 of the complainants had no outstanding determinations concerning their visa applications. Nine of the complainants were on a removal pathway where it appears there were no real prospects of removal within a reasonable timeframe or removal was not reasonably practicable.
161. Mr Pjetri was assessed as medically unfit to travel on several occasions. For the remaining complainants except Mr WJ, Bangladesh, Iran, and Iraq do not accept involuntary returns which has prevented their return. Mr WA now has a protection finding in his favour, and cannot be returned to Afghanistan.
162. Obstacles to a person’s removal from Australia are not a proxy for continued and prolonged immigration detention. Closed detention should only be used in exceptional circumstances. To safeguard against arbitrary detention, the Department should conduct an individualised risk assessment to determine whether any risks, including risks to community or flight risks, could be mitigated and ongoing reviews to determine whether closed detention continues to be necessary.
163. In response to Professor Croucher’s preliminary view of these complaints, the Department stated that:
- The Department works to resolve the immigration status of all unlawful non-citizens in detention, consistent with the law and government policy. A non-

citizen can be released from detention through the grant of a visa, having a visa reinstated or departure from Australia. Factors which may impact the detainee being granted a visa to reside in the community include unresolved identity, national security risks or serious criminality.

...

The Department has in place a framework of regular reviews, escalations and referral points to ensure that people in detention are in the most appropriate placement while status resolution is pursued. This includes considering alternate means of detention or the grant of a visa, including through Ministerial Intervention. 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 Department reiterates that the powers are non-compellable and what is in the public interest is a matter for the Minister to determine.

164. As unlawful non-citizens under the Migration Act, the complainants could only be released from detention if the Minister exercised the discretionary public interest powers as discussed in 6.3 to either to grant a visa under s 195A of the Migration Act, or to make a residence determination enabling detention in a less restrictive manner than in a closed immigration detention centre under s 197AB of the Migration Act.
165. The Department undertook point-in-time assessments of the complainants' cases against the guidelines in considering referral to the Minister. Several complainants were assessed and referred several times over the course of their detention. On several occasions, lengthy delays in consideration of the complainant's case (and subsequent referral) may have contributed to their prolonged detention. The Department also held concerns about the risks to the community for some complainants, including criminal reoffending, if they were released.
166. The Department's assessments of the complainants' cases also often included consideration of CPAT recommendations. In her preliminary view, Professor Croucher noted that it is unclear how CPAT recommendations worked together with the guidelines, particularly the consideration of any unique or exceptional characteristics or compelling or compassionate circumstances.
167. The Department responded to this aspect of the preliminary view by informing the Commission:

The CPAT 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 resides

in the community on a bridging visa or subject to a residence determination arrangement, or in held immigration detention.

Fundamentally, the CPAT does not assess whether a case should be referred for Ministerial Intervention; however, it could be one, but not the only, factor taken into consideration by the Department when referring a case for Ministerial Intervention.

The CPAT presents a nationally consistent risk assessment tool that provides a placement recommendation based on a point in time assessment of the level of risk of harm a person poses to the Australian community. It does this through a set of defined parameters underpinned by the CPATs four harm indicators (National Security, Identity, Criminality and Behaviour Impacting Others). When completing a CPAT, Status Resolution Officers (SRO) consider additional factors as part of the placement assessment, including potential vulnerabilities and strength-based factors; such as, community support and employable skills that might support a community placement, notwithstanding an individual's criminal history.

When the CPAT recommends a community placement (bridging visa or residence determination), and the Minister is the only person with the power to grant the non-citizen a visa or to make a residence determination, the SRO refers the case for a Ministerial Intervention assessment.

168. The Department's decision-making framework does not appear to incorporate mandatory individual risk assessments that consider whether any risks posed by an individual could be satisfactorily mitigated if the person were released.
169. Consideration of alternatives to closed detention, with appropriate risk management, is particularly important for the complainants and other individuals in similar circumstances, when removal is not reasonably practicable and where they face the risk of prolonged or indefinite detention.
170. Professor Croucher considered the following 'acts' of the Commonwealth as relevant to this inquiry:
 - failure or delays 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
 - decisions of the Minister not to consider these alternative options.

171. This inquiry does not consider the decision to cancel or refuse a visa. Neither did Professor Croucher come to a view on whether any of the complainants should be released into, or remain in, the community.

8.1 Act: The decision of the Department not to refer or the delays in referring the case to the Minister in order for the Minister to assess whether to exercise discretionary powers under ss 195A or 197AB

172. Each of the complainants entered Australia by sea without visas and were immediately detained as they were considered unauthorised maritime arrivals under the Migration Act.

173. Two of the complainants were transferred to Nauru following their initial arrival in Australia for processing, and then subsequently transferred back to Australia.

174. As unauthorised maritime arrivals,¹⁰⁴ they were barred from making a valid visa application, unless the Minister personally determined that the bar did not apply to them.¹⁰⁵ The bar was lifted for all complainants and on average they waited 2 and a half years before they were able to lodge a Protection visa application. One complainant waited over 3 years before he was able to lodge an application.

175. As noted above, the UNHRC has summarised the position at international law in relation to article 9 of the ICCPR.

Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.¹⁰⁶

176. For most of these complainants, there were significant delays in their case being assessed by the Department, and in their subsequent referral to the Minister for consideration under ss 195A and/or 197AB. Except for Mr WG, the remaining 9 complainants remained detained during these periods. They were not able to take any steps to obtain a visa to end their

detention and for various periods the Department did not take steps to refer their cases to the Minister to consider alternatives to detention under ss 195A and/or 197AB.

177. Over the course of their detention, the Department also made assessments on numerous occasions that the complainants did not meet the s 195A and/or s 197AB guidelines for referral to the Minister.
178. Professor Croucher considered the complainants' cases individually and her findings are provided below.
179. Various guidelines for s 195A or s 197AB were relevant during the extensive periods of the complainants' detention. The various guidelines have been summarised in paragraph 69.

(a) Mr WA

(i) Background

180. Mr WA was born in Afghanistan and identifies as part of the Hazara ethnic group. He is 38 years old.
181. On 11 August 2011, he arrived in Australia by sea as a suspected unlawful non-citizen and was immediately detained under s 189(3) of the Migration Act. He remained in detention since his arrival, a period of over 11 years and 6 months, until 9 February 2023.
182. On 26 April 2012, Mr WA was found to be a refugee to whom Australia owed protection obligations.
183. On 22 May 2012, Mr WA was charged with indecent assault after he non-consensually touched a staff member at the detention centre. He was convicted in September 2012 and initially fined \$5,000, which was reduced to \$2,000 on appeal on 5 March 2013.
184. On 10 May 2013, the Minister lifted the bar under the Migration Act and on 24 May 2013, Mr WA lodged a protection visa application.
185. In August 2013, the visa application was refused under s 501(2) of the Migration Act on the basis that Mr WA had been convicted of an offence committed while in immigration detention.

186. On 11 September 2014, an International Treaties Obligations Assessment (ITOA) conducted by the Department found that Mr WA's case did not engage Australia's non-refoulement obligations, thus reversing the 2012 finding.
187. In February 2015, Mr WA's case was referred for removal action to commence.
188. On 19 May 2015, Mr WA lodged an application in the Federal Court for an extension of time to appeal the visa refusal decision made by the Minister, which was dismissed on 28 August 2015. On 21 September 2015, Mr WA applied to the Full Federal Court for review of the Federal Court's decision. On 2 October 2015, Mr WA filed a notice of discontinuance.
189. On 13 November 2015, Mr WA applied to the High Court for special leave to appeal the Federal Court decision. On 15 February 2016, the High Court dismissed the application.
190. In April 2016, Mr WA sought review of the ITOA decision before the Federal Circuit Court. On 18 August 2017, the Federal Circuit Court dismissed the application.
191. In August 2017, Mr WA was referred for involuntary removal from Australia. His removal was suspended indefinitely due to instability in Afghanistan. In August 2021, all removals to Afghanistan were ceased until further notice. The Department also advised that Mr WA's removal process was likely to be protracted, because he did not have a valid travel document, was unwilling to return to Afghanistan voluntarily and to engage in an assessment of whether he has any residency claims in Pakistan.
192. A note appears on the material before the Commission in the Department's consideration of whether to refer Mr WA for ministerial intervention in February 2022, which states:

The Department and ABF are currently reviewing Afghan nationals in held detention, and the impact of the current crisis in Afghanistan on individual cases. As per Government announcements, while Afghan nationals will not be forcibly removed from Australia, there have been no changes to immigration policies relating to individuals who are in Australia.
193. In March 2022, a security risk assessment conducted by Serco reported that Mr WA, over the ten years of his being held in closed detention, had 18 total incidents of 'aggressive/abusive behaviour'. None of these

incidents appear to have led to criminal charges (apart from the incident discussed at paragraph 183 above).

194. Mr WA has disclosed a history of torture and trauma. In at least March 2012, Mr WA was referred for mental health counselling due to the lengthy processing of his case. The Department's Case Reviews of Mr WA in August 2014 reported that the ongoing uncertainty and detention affected him mentally, with symptoms of 'inability to concentrate, to remember things, to relax'.
195. In the Ombudsman's report under s 486O of the Migration Act, tabled in February 2021, the Ombudsman expressed concern that Mr WA was likely to remain in immigration detention for an indefinite period because of the protracted nature of his removal from Australia. This poses a significant risk to his health and welfare.
196. In the same report, the Ombudsman made the following recommendations, that the Department
1. Expedites its assessment of Mr [WA]'s case against the guidelines for consideration of a bridging visa under section 195A of the Act. If Mr [WA]'s case is found to not meet the guidelines, or if the Minister declines to intervene under section 195A of the Act, the Ombudsman recommends that the Department of Home Affairs:
 2. Assesses Mr [WA]'s case against the guidelines for consideration of a community placement under section 197AB of the Act.
197. Several of the Department's Case Reviews of Mr WA note that no particular vulnerabilities have been identified and his physical/mental health needs can be adequately met by the detention facilities.
198. In August 2023, the Department made a finding that Mr WA 'continued to engage' Australia's protection obligations. It is unknown exactly when the Department reversed the earlier finding of September 2014.

CPAT assessment recommendations

199. In at least November 2016, a CPAT assessment recommended 'Tier 1' community placement and consideration of a bridging visa with conditions.

200. The Department's Case Reviews of Mr WA note that in July and November 2017, CPAT assessments recommended 'Tier 3 held detention placement'.

201. The Department explained this difference by indicating that:

The CPAT was implemented in 2017. The CPAT completed for Mr [WA] on 9 November 2016 was part of the CPAT pilot. This CPAT resulted in a recommendation of a Tier 1 (bridging visa with conditions) placement and Mr [WA]'s risk rating to the community was assessed as low, as per the criteria guide at the time.

Following the pilot, the CPAT was updated and the criteria guidance used for assessing the CPAT risk ratings was also updated. This included guidance for the criminality rating. As a result of these changes, Mr [WA]'s July 2017 CPAT assessed Mr [WA] as being of high risk to the community and recommended a Tier 3 (held immigration detention) placement.

202. The Department's Case Reviews of Mr WA note that in May, June, September and December 2018, and March 2019, CPAT assessments recommended a 'Tier 3 held detention placement'.

203. In the most recent CPAT provided to the Commission, dated 19 March 2022, Mr WA was assessed to be of 'high risk' of harm to the community and of 'medium risk' of not engaging with the Department and recommended a 'held detention placement'. The highest rated harm indicator appearing is due to the refusal of his protection visa pursuant to s 501(2) of the Migration Act, resulting from the conviction for indecent assault in 2012. Low risk indicators appear for the heading national security and identity. Medium risk indicators appear for engagement with status resolution, due to his unwillingness to return voluntarily to Afghanistan, and for behaviour impacting others, for repeated aggression in detention with no charges laid.

Summary of consideration and referrals under ss 195A and 197AB

204. Following refusal of Mr WA's protection visa application, the Minister indicated he was inclined to consider temporary visa options under s 195A. A referral to the Minister was made on this basis in December 2013.

205. The Department's referral made the following points:

As Mr [WA] was found to be a refugee, it is not possible to remove him at this time without breaching Australia's international obligations. As such, you may wish to consider exercising your Ministerial Intervention power, under s 195A of the Act, to grant Mr [WA] a temporary visa. This will provide him an

opportunity to demonstrate his willingness and ability to adhere to Australian laws.

206. In February 2014, the Minister indicated that he was inclined not to consider Mr WA's case.¹⁰⁷ A note from the Minister on the decision record queries, 'at what point can Mr [WA]'s refugee status be reassessed?'
207. In February 2017, Mr WA's case was referred to the Minister under s 195A. In May 2017, the Minister indicated that he was inclined not to consider Mr WA's case.
208. In December 2017, Mr WA's case was referred for assessment against the s 195A guidelines. The Department advised that, as there were no changes to Mr WA's circumstances since the Minister's decision in May of the same year, there were no compelling or compassionate circumstances, and noting his risk of harm to the community, on 21 December 2017 it was determined that further assessment of his case against the Minister's guidelines was not warranted.
209. In February 2019, Mr WA's case was included in a submission to the Assistant Minister. In the same month the Assistant Minister indicated his case should not be referred for consideration under ministerial intervention powers.
210. In June 2019, Mr WA's case was referred for assessment against the s 195A guidelines due to his protracted removal. The Department's Case Reviews note that referral was sent due to the following: 'long term detainee, no current immigration pathway and Removal is currently not practicable due to the protracted nature of involuntary removals to Afghanistan'.
211. In January 2020, the Department determined that Mr WA's case did not meet the Minister's s 195A guidelines. The Department advised that Mr WA's case was found not to meet guidelines, despite his protracted removal, due to his lack of cooperation with efforts to effect his departure and the absence of compassionate or compelling circumstances to warrant referral.
212. In July 2020, his case was referred for consideration by the Department under s 195A or s 197AB. On 20 November 2020, the Department decided not to refer his case. The decision not to refer him for intervention repeats

many of the previous considerations of criminal behaviour, behaviour while in detention, lack of removal opportunities and lack of non-refoulement obligations owed. The following observation is note-worthy:

Mr [WA] has never been involved in a community within Australia and has no family or connections that could support his financial and emotional needs should he be released from detention, therefor[e] placing a high risk on [sic] undesirable behaviour or harm to the Australian community as indicated in his CPAT Assessment.

213. In March 2021, the Department again commenced a Ministerial Intervention process for consideration. In its 16 February 2022, consideration, the Department writes:

Mr [WA] has now spent just over 10 years in detention. While it is not ideal [referring to incidents in detention], it is reasonable and understandable over that time for a detainee to be frustrated or agitated with his personal situation and environment. The fact that no charges have been raised in relation to any other incidents over this time, is considered to be an indication that the incidents were relatively minor when measured against expectations of people in the community.

214. The recommendation of the Department on that date was that Mr WA be referred to the Minister under the s 195A guidelines (but not under the s 197AB guidelines).
215. The Department informed the Commission that in August 2022, Mr WA's case was reconsidered under s 197AB and it was determined that a section 195A option would be included in the submission to the Minister. On 25 November 2022, the Department referred Mr WA's case for consideration under ss 195A and 197AB of the Act.
216. On 29 November 2022, the Minister indicated he wished to consider Mr WA's case under s 197AB of the Act, but not under s 195A. On 9 February 2023, the Minister intervened in the case under s 197AB of the Act to make a residence determination in respect of Mr WA.
217. Following the High Court decision in *NZYQ*, Mr WA was identified as being affected by the decision, and was released from community detention. He is currently in the community on a Bridging (Removal Pending) visa.

(ii) Findings – Mr WA

Failure to refer until December 2013

218. The Department first referred Mr WA's case to the Minister under s 195A in December 2013, after over 2 years in detention. In February 2014, the Minister indicated he was inclined not to consider Mr WA's case.
219. Professor Croucher acknowledged that Mr WA was convicted of a criminal offence in September 2012, for which he received a fine and no imprisonment. The conduct giving rise to this conviction appears to have occurred in October 2011, 2 months after his arrival in Australia. Recalling the authority of the General Comment on article 9 of the ICCPR above, Professor Croucher accepted that, prior to his conviction, Mr WA's detention may not have been arbitrary. There was insufficient material before the Commission to make findings on this issue. In principle, however, detention for the purpose of investigating a crime, or determining whether an individual poses a threat to the community, might be reasonable, necessary and proportionate in the circumstances. For this reason, Professor Croucher focused on the Department's delay after the conviction in September 2012, whereby Mr WA's case was not referred to the Minister until December 2013, 14 months later. At this time, Mr WA was found to be a refugee and had been detained for over 2 years.
220. However, there are further comments that need to be made regarding Mr WA's criminal conviction. Professor Croucher drew upon previous publications of the Commission in doing so.¹⁰⁸
221. First, the criminal conduct engaged in, and which caused him to fail the character test, arose from the operation of s 501(6)(aa)(i), which states that 'a person does not pass the character test if the person has been convicted of an offence that was committed while the person was in immigration detention'. This is a different limb of the test from most of the complainants who engage with the Commission, who, on the most part, fail the character test on the basis of a 'substantial criminal record' pursuant to s 501(6)(a) of the Migration Act. A 'substantial criminal record' generally involves a sentence of imprisonment of twelve months or more.

222. Accordingly, it was a much lower level of criminality which gave rise to the failure of the character test in this case. It appears from the CPAT and SRAT before the Commission that it is the failure of the character test itself, rather than the seriousness of the criminal conviction, which was used to justify the assessed high risk posed by Mr WA. Professor Croucher was of the view that this assessment was arbitrary given that it does not reflect any genuine consideration of the specifics of Mr WA's offending.

223. The Department responded to Professor Croucher's preliminary view on this subject, saying:

Prior serious offending of a criminal nature (as in the case of Mr [WA]) would generally indicate a detainee to be considered 'high risk of harm to the community'. The Department notes that prior offending is one of many factors a SRO considers when completing a CPAT. SROs consider additional factors as part of the placement assessment, including potential vulnerabilities and strength based factors, such as community support and employable skills that might support a community placement, notwithstanding an individual's criminal history.

In May 2022, the criteria guidance used for assessing CPAT risk ratings was further updated. This included specific guidance where a person has been convicted of a sexual crime, regardless of the sentence imposed. Mr [WA]'s CPAT assessment of high risk to the community continued to be accurate based on the guidelines.

224. Secondly, if the specifics of Mr WA's offending were considered in the risk assessment, it would be relevant that Mr WA was not sentenced to any term of imprisonment, and that he received only a fine, which was reduced on appeal to \$2,000. In submissions made on behalf of Mr WA regarding his visa refusal, the following quote from the Supreme Court on his appeal was extracted:

As to the seriousness of the appellant's conduct, the offence appears to have occurred on the spur of the moment and to have been of very short duration. It involved touching over the clothes and while no doubt unwelcome and distressing, it was not suggested that there was any bruising or long term psychological effects.

225. Professor Croucher was further informed from the submissions that the maximum sentence possible for Mr WA's offending behaviour was 2 years' imprisonment or a fine of \$24,000. His representative therefore submitted that Mr WA's offending was on the lower end of seriousness.

226. Thirdly, Professor Croucher noted that the decision made under s 501 of the Migration Act was made by the Minister rather than a delegate. The

effect of this was that Mr WA was denied any opportunity for merits review of the decision where an individualised assessment of his circumstances could have been conducted afresh by the Administrative Appeals Tribunal.¹⁰⁹

227. Following finalisation of Mr WA's criminal matter, and an individualised risk assessment, it may have been reasonable to consider that any risk to the Australian community posed by Mr WA could have been mitigated by the imposition of measures discussed above, particularly through community detention.
228. The 2009 Guidelines for assessment of a case under s 197AB stated that, 'in referring cases to [the Minister] for residence determination, the department is to note that I will give priority to ... people who may have experienced torture or trauma'.
229. Mr WA has disclosed a history of torture and trauma. It is unclear from the information before the Commission when the Department was first made aware of this history. If the Department knew before 30 May 2013, when the 2013 Guidelines came into effect, it is arguable that he did meet the 2009 Guidelines for referral to the Minister as a priority case. Mr WA's case was also not referred to the Minister for consideration under s 197AB until November 2022.

Failure to refer between February 2014 and February 2017

230. Following the Minister's decision not to consider Mr WA's case in 2014, it was then 3 years before the Department referred Mr WA's case to the Minister under s 195A. By the time a referral to the Minister was made in February 2017, Mr WA had been detained for over 5 years.
231. During this period, the 2012 Guidelines were in place until the 2016 Guidelines under s 195A were introduced on 29 April 2016. By these guidelines, the Minister would not expect referral of cases where a person's visa was refused or cancelled under s 501 of the Migration Act, unless there were unique or exceptional circumstances (under the 2012 Guidelines) or 'compelling or compassionate circumstances' (under the 2016 Guidelines).

232. Professor Croucher's comments made above at paragraph 224 again led her to consider that the application of these guidelines resulted in the arbitrary detention of Mr WA, as no individualised assessment was made as to the specific grounds on which he failed the character test.

Failure to refer in January 2020 and November 2020

233. In June 2019 and July 2020, Mr WA's case was referred for assessment against the s 195A or s 197AB guidelines. The Department found he did not meet the guidelines for referral on each occasion (January 2020 and November 2020 respectively) despite recognising his lengthy detention and protracted removal. On the latter assessment, the Department advised the decision was due to his lack of cooperation with efforts to effect his departure, and the absence of compassionate or compelling circumstances to warrant referral.

234. In addition, the case officer weighed the facts that:

- Mr WA's visa application was cancelled under s 501 as a result of his criminal offending
- in 2013 the then Minister decided to exercise his discretion to refuse Mr WA's visa application
- Mr WA's case had been considered by a number of previous Ministers, and all had decided not to intervene in his case
- Mr WA had been found not to engage protection obligations and had no ongoing processes
- IHMS advised that Mr WA's individual needs were able to be managed in a detention centre environment
- Mr WA had no family or community links and his continued placement would not result in irreparable harm or continued hardship to an Australian citizen.

235. Mr WA had been referred for removal in February 2015 and August 2017. The Department's Case Reviews in 2019 note the following in relation to Mr WA's removal:

- nil travel document
- 'travel document greater than six months to obtain'

- outcome of TD discussion: 'unwilling to apply'
 - involuntary removal pathway pending issuance of travel document
 - protracted involuntary removal to Afghanistan
 - detainee advised of IOM eligibility; detainee requested 'sometime to think' (September 2019).
236. The Department's decision not to refer him for consideration in November 2020, on the basis that he had no community ties, was both untrue on the basis of material before the Commission, and unjust – given he had never been released into the Australian community, which prevented him from forming such connections. It is noted that when Mr WA's visa was considered for refusal on character grounds in 2013, he supplied a number of letters from people in the community who were willing to offer support. These were provided to the Commission by Mr WA's representative, but not reflected in any of the Departmental material before the Commission.
237. Mr WA was included in a group submission to the Minister in February 2019. The submission is discussed in more detail below at paragraph 626.

Delay in referring until November 2022

238. The Department commenced a further consideration of Mr WA's suitability for referral in March 2021, but did not finalise that assessment until February 2022. No information before the Commission identifies any reason for the delay. That initial assessment found him to meet the s 195A guidelines, but not those under s 197AB. This was reassessed in August 2022, and the submission went to the Minister in November 2022, meaning that the entire Departmental process from consideration to referral took one year and 8 months.
239. This period of time traverses a time of great change in Mr WA's home country. It is also 3 years and 9 months since the Department last referred Mr WA's case to the Minister.
240. The security situation in Afghanistan has remained unstable and complex for several years. Since at least September 2017, DFAT has reported that 'conflict-related violence occurs in most areas of Afghanistan to varying

degrees' and '(n)o part of the country can be considered entirely free from conflict-related violence and high levels of insecurity affects people of all ethnicities'.¹¹⁰

241. The most recent DFAT Country Report on Afghanistan states:

DFAT assesses that Hazaras in Afghanistan face a high risk of harassment and violence from both the Taliban and ISKP, on the basis of their ethnicity and sectarian affiliation. While the level of mistreatment of Hazaras is currently less widespread than was predicted by some sources upon the fall of Kabul, members of the Hazara community have suffered from ISKP terror attacks and ISKP violence, including hundreds of evictions.¹¹¹

242. The Department responded to Professor Croucher's preliminary view on this subject by indicating that it found in August 2023 that Mr WA continued to engage Australia's protection obligations in light of the substantial change to the country information for Afghanistan. On 30 August 2023, the Department found Mr WA to meet the guidelines for a referral to the Minister under s 46A and s 48B of the Act (to allow him to make a new protection visa application), and a submission is being prepared for the Minister's consideration.

243. While the scope of this inquiry is to assess the arbitrariness of Mr WA's detention, rather than its lawfulness, it is noted that for a significant period of time, Mr WA was detained while there were no real prospects of his removal from Australia becoming practicable in the reasonably foreseeable future.¹¹² Applying the test as set by the High Court in *NZYQ*, it is likely that his detention became unlawful once this was known to the Department, which could have been as early as 2017.

244. Professor Croucher acknowledged that Mr WA committed a crime for which he received a \$2,000 fine and no imprisonment. This crime occurred in 2011 and the offending was at the lower end of seriousness. It appears from the material before the Commission that the Department never conducted a risk assessment to assess the nature and seriousness of Mr WA's offending in relation to any risk he posed to the community. Rather, it appears that the fact that he failed the character test in the Migration Act (as he committed a crime in immigration detention) was used as a proxy to categorise Mr WA as a 'high risk' detainee who poses a risk to the community.

245. It was Professor Croucher's view that, given the significant length of his detention, the disclosed history of torture and trauma and mental health issues related to his ongoing detention, Mr WA would have met the criteria

of 'unique or exceptional' and 'compelling or compassionate' circumstances warranting referral to the Minister under both s 195A and s 197AB.

246. Professor Croucher gave particular weight to the significant length of Mr WA's detention. This is particularly acute as for the first 20 months of his detention he was not permitted to make a visa application.
247. Further, the Department should have been aware of the longstanding instability in Afghanistan and that Mr WA's removal to Afghanistan was not reasonably practicable – which warranted referral to the Minister under the s 195A guidelines. The continuing unclear and uncertain prospects of removal and his high risk of indefinite detention would, in Professor Croucher's view, have met the criteria of 'unique or exceptional' or 'compassionate or compelling' circumstances to warrant referral to the Minister.
248. Professor Croucher also acknowledged the behavioural incidents recorded on the Serco files before her. Some indicate concerning behaviour of making threats to Serco staff and offensive language. In her consideration of this information, however, Professor Croucher was reminded of the Department's own assessment of Mr WA's behaviour in 2017 as outlined at paragraph 213 above. Mr WA never had an opportunity to demonstrate positive behaviour in the Australian community. He was in detention for over 10 years, with no progress made for many of these towards resolving his status, either through a visa grant or removal to his home country. Indeed, this view is reflected in the Department's own assessment of Mr WA's case from February 2022. It was Professor Croucher's view that the length of his detention was disproportionate to the nature of these behavioural incidents.
249. The Department referred Mr WA's case to the Minister only 4 times in 11 years, and never for consideration for a community detention placement under s 197AB of the Migration Act until November 2022.
250. Professor Croucher found that the Department's delay and failure to refer Mr WA's case to the Minister for consideration of alternatives to closed detention resulted in his prolonged and continuing detention being considered arbitrary, contrary to article 9(1) of the ICCPR, as follows:

- the failure of the Department to refer his case to the Minister for consideration under s 195A until December 2013
- the failure of the Department to refer his case to the Minister for consideration under s 195A for 3 years from February 2014 – February 2017
- the failure of the Department to refer his case to the Minister for consideration under s 195A for 2 years from February 2017 – February 2019
- the delay of the Department in considering and referring his case to the Minister for consideration under s 195A from March 2021 – November 2022
- the failure of the Department to refer his case to the Minister for attention under s197AB until November 2022.

251. In light of the Department’s concerns about Mr WA’s criminal history and behaviour in detention, any referral made should have contained a risk assessment of whether any risks of harm to the community could have been mitigated through conditions placed on his release.

(b) Mr WB

(i) Background

252. Mr WB was born in Bangladesh and is 35 years old.

253. On 12 November 2012, he arrived in Australia by boat via Ashmore Reef as a suspected ‘unlawful non-citizen’ and was immediately detained under s 189(1) of the Migration Act. He remained in detention from his arrival until 10 November 2022, a period of 10 years.

254. Soon after Mr WB’s arrival in Australia, he disclosed criminal charges of kidnapping in his home country. He was one of a group of people seeking asylum who all claimed to have criminal charges in Bangladesh, but who all recanted those claims in August 2014 in a group letter to the Minister.

255. On 28 August 2015, the Department invited Mr WB to lodge a protection visa application following the Minister lifting the bar under the Migration Act on 13 August 2015.

256. On 15 January 2016, Mr WB lodged a SHEV application. On 12 July 2016, Mr WB was found not to engage Australia’s protection obligations and his visa

application was refused. In September 2016, the Immigration Assessment Authority (IAA) affirmed the refusal decision.

257. On 13 May 2016, Mr WB was diagnosed with an adjustment disorder with an anxious mood and was prescribed medication. This medication was increased to the maximum dosage in November 2016 for several weeks and continued until 2018.
258. On 18 October 2016, Mr WB applied for judicial review of the IAA's decision in the Federal Circuit Court. On 1 March 2017, the Court affirmed the visa refusal decision.
259. On 15 March 2017, Mr WB appealed the decision of the Federal Circuit Court to the Federal Court. On 6 August 2018, the Full Court of the Federal Court found that Mr WB had not arrived in Australia at an offshore excised place because Ashmore Reef did not meet the definition of a 'port'.¹¹³ Accordingly, Mr WB was not an unauthorised maritime arrival, and was not subject to the jurisdiction of the IAA. The Court held that the Department had not notified Mr WB correctly of his SHEV refusal decision and quashed the decision of the IAA. This was a crucial decision for Mr WB and some other of the complainants in this report, and is referred to in this report as the *DBB16* decision.
260. On 19 August 2018, Mr WB applied for merits review at the Administrative Appeals Tribunal of the visa refusal decision.
261. On 5 April 2019, the Department re-notified Mr WB of the decision to refuse his SHEV application. On 8 April 2019 Mr WB again applied for merits review at the Administrative Appeals Tribunal.
262. In April 2019, International Health Medical Service (IHMS) reported that he had chronic stress.
263. On 11 October 2019, the Administrative Appeals Tribunal affirmed the decision to refuse his SHEV application.
264. On 14 October 2019, the second application lodged with the Administrative Appeals Tribunal in reference to the same refusal decision was found to have no jurisdiction, as the Tribunal had already made a decision on the matter.

265. In November 2019, Mr WB applied for judicial review in the Federal Circuit Court. In May 2020, Mr WB withdrew his application.
266. In January 2020, an IHMS counsellor reported that Mr WB had 'exhausted coping mechanisms due to stress compounded with depressive demeanour'.
267. In May 2020, Mr WB's torture and trauma counsellor reported that his symptoms of depression had become more pronounced and recommended ongoing mental health support.
268. On 3 June 2020, Mr WB was referred for involuntary removal from Australia. He had no identification documents and claims never to have held a passport or had a birth certificate. The Department advised that Mr WB was not willing to return to Bangladesh and the Bangladeshi authorities did not cooperate with the involuntary return of its citizens.
269. On 2 October 2020, Mr WB lodged an application for a Bridging E visa but was notified on 6 October 2020 that the application was invalid.
270. In September 2020, the Department advised the UN Working Group on Arbitrary Detention that Mr WB had a history of mental health issues.
271. The UN Working Group on Arbitrary Detention has issued an opinion in relation to Mr WB. It found that his detention was arbitrary on several grounds including:
- being subject to de facto indefinite detention due to his migratory status, without the possibility to challenge the legality of such detention before a judicial body
 - the lack of any effective remedy to challenge the legality of continued administrative detention
 - the absence of any attempt to ascertain if a less restrictive measure would be suited to his individual circumstances
 - the lack of reasons specific to Mr WB to justify detention, such as an individualised likelihood of absconding, a danger of crimes against others or a risk of acts against national security.
272. The Working Group recommended the immediate unconditional release of Mr WB, reparations and an independent investigation into his detention.

273. In the Commonwealth Ombudsman's report under s 486O of the Migration Act, tabled on 18 March 2021, the Commonwealth Ombudsman referred to IHMS advice that Mr WB received treatment for physical and mental health concerns including urological concerns, a depressive disorder, reactive depression, anxiety, a stress and adjustment reaction, chronic stress disorder and insomnia.

274. The Commonwealth Ombudsman made the following assessment and recommendations in the report:

The Ombudsman notes that Mr [WB] has been held in immigration detention for more than eight years and, as of November 2020, had no outstanding matters before the Department, tribunal or courts.

The Ombudsman is concerned that Mr [WB] is likely to remain in immigration detention for a prolonged period because of the protracted nature of his removal from Australia. This poses a significant risk to his health and welfare.

Noting the significant length of time Mr [WB] has remained in detention, his protracted removal, the absence of any recent behavioural or security concerns and the easing of COVID-19 restrictions in Victoria, the Ombudsman recommends that the Department of Home Affairs:

1. Refers Mr [WB]'s case to the Minister for consideration of a bridging visa under s 195A of the Act as a matter of priority.

275. Several of the Department's Case Reviews of Mr WB note that his placement was inconsistent with the CPAT recommendation of 'Tier 1 BV with conditions'.

276. Throughout his detention, Mr WB had been known to be of good character, had been consistently held in low-security centres and described as cooperating with the Department's processing of his case.

277. The Department advised that Mr WB has no outstanding matters before the Department, tribunals or courts and was on an involuntary removal pathway.

278. On 10 November 2022, Mr WB was granted a Bridging E visa, and on 17 February 2023, the Department further advised the Commission that there was no removal request in place.

Summary of consideration and referrals under ss 195A and 197AB

279. Prior to the submission leading to his release from detention, the Department assessed Mr WB against the s 195A guidelines on 7 occasions, resulting in 6 referrals to the Minister as summarised in the table below.

Date of Departmental consideration	Referred to Minister	Outcome of referral
Information not available	Yes – 16 January 2013	Minister agreed to consider his case – 18 January 2013 Referral not finalised – 25 January 2013
22 April 2016	Yes – 10 May 2016	Minister declined to intervene – 11 May 2016
10 October 2016	Yes – 30 January 2017	Minister declined to intervene – 13 February 2017
6 July 2017	No – 18 August 2017	
5 September 2018	Yes – 24 September 2018	Minister declined to intervene – 23 October 2018
26 February 2019	Yes – 7 May 2019 (group submission)	Assistant Minister agreed to consider – 1 March 2019 Minister declined to intervene – 24 July 2019
30 January 2020	Yes – October 2020	The Department advised that ‘Ministerial Intervention processing slowed between March and June 2020, while the Department focused its efforts on the Government’s COVID-19 response and diverted resources to critical functions. The assessment of Mr [WB]’s case remains ongoing.’ In October 2020, the submission was returned from the Minister with a request that all detainees residing in Victoria be removed from the

		<p>submission due to COVID-19 restrictions.</p> <p>Minister declined to intervene - 11 October 2021</p>
No information available	Yes - October 2022	Minister intervened to grant Bridging E visa - 10 November 2022

280. The Commission understands from the response received by the Department to Mr WB's complaint that the reason the initial referral to the Minister made in 2013 was not finalised, was due to Mr WB initially informing the Department that he had travelled to Australia due to poverty, and he was therefore 'screened out' as having no protection obligations.
281. Soon after this, on 12 March 2013, Mr WB informed the Department that he had been charged with kidnapping in Bangladesh and fled the country prior to trial. He informed the Department that the charges had been falsely brought against him.
282. Professor Croucher acknowledged that in cases where a serious criminal charge of kidnapping is disclosed, detention in a facility may be warranted for checks to ensure the safety of the Australian community.
283. In reaching this view, Professor Croucher was guided by the Commission's previous findings with respect to other detainees within the same cohort of people.¹¹⁴
284. However, in August 2014, Mr WB was one of a group of people who recanted this claim, saying that he had raised it on the advice of people smugglers.
285. By the time of the group submission brought to the Minister in April 2016, the Department recognised that Mr WB was one of many detainees whose alleged criminal activity had been discounted by the Department; and that they had been of 'largely good behaviour'.

286. Furthermore, by the time of the submission brought in October 2016, the Department recognised that the IAA had made a finding that Mr WB's offshore criminal activity had been fabricated.
287. The August 2017 consideration of Mr WB's case against the s 195A referral guidelines identifies again the low CPAT rating, the lack of security concern and the good behaviour. It contains the following assessment under the heading 'Is removal reasonably practicable? (If not, why?):'

Although he has an ongoing judicial review with the FFC in relation to his SHEV application, per PAM – Removal, this is not an impediment to removal. Mr [WB] was referred for involuntary removal on 25/03/2017 and Removals area decided to finalise the service on 13/04/2017 due to his ongoing judicial review.

CCRS notes the advice from Removals area that the current timeframe for involuntary removal to Bangladesh is more than six months. However, it is unclear as to the reason Removals area decided that Mr [WB]'s ongoing judicial review with the Full Federal Court is a barrier to his removal. On this basis, while Mr [WB]'s removal is reasonably practicable, it is not currently being progressed.

288. The Policy Advice Manual (PAM) referred to in the preceding paragraph in fact states a more nuanced position than that adopted by the Department on this occasion. It states:

The Act does not preclude voluntary removal of unlawful non-citizens who are entitled to seek judicial review or who are seeking judicial review of a decision in relation to a substantive visa. However, as a matter of policy, persons in this cohort usually should not be removed because:

- the person should be given adequate time after a negative tribunal decision to consider their legal options to seek judicial review
- the court may ultimately overturn the substantive visa decision and
- the court may grant an injunction to prevent removal of the person.¹¹⁵

289. The position taken by the Department in its August 2017 consideration against the guidelines is also in contrast with the submission prepared for the Minister in January 2017, which stated:

The submission has been reviewed by the National Returns and Removals Taskforce (NRRT) on 27 January 2017. Mr [WB] and [redacted] have a recorded barrier of *Judicial Review – Federal Circuit Court (Protection Related)*. ...

The AAT and Removals Injunctions Section has reviewed the cases of Mr [WB] and [redacted] and considers that the Department would be unlikely to resist

an injunction application in both instances. Current advice is not to attempt removal until the completion of the judicial review process.

290. In the submission to the Minister for consideration under s 195A in October 2020 (and updated in September 2021), the Department advised that it took into consideration the time spent in detention, Mr WB's mental health issues, and the prolonged removal process. However, the fact that all visa applications made by Mr WB had been finally determined, that he was unwilling to depart Australia voluntarily and that the Minister declined to consider Mr WB's case on 4 previous occasions, weighed against intervention.

(ii) Findings – Mr WB

291. For the first 3 and a half years of Mr WB's detention, until May 2016, and for over 18 months from the period February 2017 to September 2018, the Department did not refer Mr WB's case to the Minister to consider intervening under s 195A. Moreover, during the entire period of his detention, the Department did not refer Mr WB's case to the Minister to consider a community detention placement under s 197AB of the Migration Act.

292. The Department did refer Mr WB's case to the Minister to consider intervening under s195A in May 2016, January 2017, September 2018, May 2019 and October 2020, however the Minister declined to intervene. Further comments about the Minister's consideration are made in section 8.2(b) below.

293. An initial period of detention was possibly warranted, in light of Mr WB's disclosure of serious criminal charges of kidnapping in his home country, although he did claim these to have been falsely brought, and then recanted the claim in August 2014. In light of this, Professor Croucher saw no reason why his case was not brought to the Minister sooner than May 2016.

294. The assessment of Mr WB's case against the s 195A guidelines in August 2017, while identifying many factors in favour of intervention, is heavily weighted, in the Commission's view, by the fact that the writer thought that Mr WB could be referred for removal (despite this position being inconsistent with the Department's PAM), and that there had been no

significant changes in circumstances since the Minister's previous considerations.

295. Mr WB has a long history of mental health issues. From at least May 2016, Mr WB was prescribed medication to treat his mental health issues. Professor Croucher also noted that, from January 2016, Mr WB lodged protection and bridging visa applications and exercised his various review rights. The Minister's guidelines under ss 195A and 197AB note that a person's immigration history and any ongoing processes were considered 'relevant information' that should be brought to the Minister's attention. They are not specified as grounds upon which a case should not be referred to the Minister.
296. The CPAT consistently recommended Tier 1 bridging visa with conditions for Mr WB and several of the Department's Case Reviews of Mr WB's case note that his placement was inconsistent with the CPAT recommendation. While the Department identified some minor incidents in detention, these appear to be related to innocuous contraband and peaceful demonstration. The Department has not provided any other material indicating Mr WB's involvement in any major behavioural incidents of concern or that he posed any risk to the community during this period. Rather, Mr WB was consistently identified as being of good behaviour in detention with no security or community placement concerns.
297. Professor Croucher considered the significant length of Mr WB's detention and gave particular weight to this factor. This is particularly acute as for the first 3 years of his detention, he was not permitted to make a visa application.
298. Further, the effect of the *DBB16* decision on Mr WB's case significantly extended the length of time needed to consider Mr WB's SHEV application and, subsequently, the exercise of his review rights.
299. From the Department's assessments of Mr WB's case and submissions to the Minister under s 195A, it appears that the ongoing visa application and review processes were a factor against alternatives to detention being considered for Mr WB. Given the delays in the visa application process were largely attributable to the Department, Professor Croucher held serious concerns that this weighed against referral of Mr WB's case to the Minister, and that timely consideration of alternatives to detention did not occur, particularly where Mr WB was found not to pose a risk to the community.

300. Further, Mr WB disclosed a history of torture and trauma. It is unclear from the information when the Department was first made aware of this history. If the Department knew before 30 May 2013, when the 2013 Guidelines under s 197AB came into effect, it is arguable that he did meet the 2009 Guidelines for referral to the Minister as a priority case. Mr WB's case was also not referred to the Minister for consideration under s 197AB at any stage.
301. Professor Croucher acknowledged that the Department did refer Mr WB's case to the Minister on 5 occasions between May 2016 and October 2020, for consideration under the s 195A guidelines, and that the Minister declined to consider intervening on each occasion. There were however other periods of time when the Department's consideration was delayed.
302. It was Professor Croucher's view that, given the significant length of Mr WB's detention, his low risk to the community, his serious mental health issues, the Department's protracted removal pathway, and several CPAT recommendations that he be released on a bridging visa, there was scope for his case to fall within the guidelines for referral to the Minister to consider exercising his powers under s 195A and s 197AB from at least August 2014 until the time of his release in November 2022.
303. Professor Croucher found that the Department's delay and failure to refer Mr WB's case to the Minister for consideration of alternatives to closed detention may have resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR, as follows:
- the failure of the Department to refer his case to the Minister for attention under s 195A between August 2014 to May 2016
 - the failure of the Department to refer his case to the Minister for attention under s 195A between February 2017 and September 2018
 - the failure of the Department to refer his case to the Minister for attention under s 197AB, for consideration of community detention, at any stage.

(c) Mr WD

(i) Background

304. Mr WD was born in Bangladesh and is 43 years old.
305. On 25 February 2013, Mr WD arrived in Darwin by sea and was detained as a suspected unlawful non-citizen. He remained in detention from his date of arrival until 10 November 2022, when he was released on a Bridging E visa. In total, his detention lasted 9 years and 8 months.
306. Mr WD, similarly to Mr WB and Mr WC, disclosed criminal charges in his home country for passport fraud, which he retracted in August 2014. According to the Department, he also self-declared as a supporter of Jamaat-e-Islami.
307. On 31 May 2015, Mr WD was identified as suffering from situational stress related to his prolonged detention.
308. On 26 August 2015, Mr WD's case was referred to an external agency for consideration, due to his claimed involvement in criminal activities.
309. The Minister lifted the s 46A bar on 29 September 2015, allowing Mr WD to apply for a SHEV, which he did on 22 April 2016. At the same time, he attempted to apply for a Bridging E visa which was found invalid due to the statutory bar in place.
310. On 15 December 2015, Mr WD was reported to have refused food and fluid and was monitored by IHMS.
311. On 28 March 2016, Mr WD was referred to police for allegedly assaulting a Serco officer. It does not appear, on the materials before the Commission, that he was charged or convicted of any offence related to this incident.
312. Mr WD's application for a SHEV was refused on 9 August 2016 and, presumed to be a fast-track review applicant, he was referred to the IAA.
313. The IAA affirmed the Department's decision on 11 November 2016. This decision was later quashed by consent due to the *DBB16* decision, and he was able to apply for merits review by the Administrative Appeals Tribunal.
314. The Administrative Appeals Tribunal also affirmed the Department's decision on 19 March 2019. Mr WD sought judicial review of this decision on 8 April 2019.

315. The Federal Circuit Court upheld the Administrative Appeals Tribunal's decision on 21 October 2019.
316. On 8 December 2019, Mr WD suffered a heart attack while in detention and he was transported to Perth hospital for treatment.
317. On 24 January 2020, Mr WD was referred for involuntary removal planning. The Department lodged an application for a travel document with the Bangladesh authorities on his behalf on 5 February 2020.
318. The onset of the COVID-19 pandemic then stalled any progression of plans for Mr WD's removal.
319. On 18 May 2021, the Bangladesh High Commission indicated that it would not issue any travel document for involuntary removal cases.
320. On 23 June 2022, the Bangladesh High Commission implemented a new travel document application process which required all Bangladesh nationals to complete and sign the application. Mr WD was requested to attend to sign this application form on 29 June 2022 at the Yongah Hill IDC, but refused.
321. As of 30 March 2023, the Department advised that Mr WD's removal case had been closed due to the grant of a Bridging E visa for 6 months.
322. Throughout Mr WD's detention, the Commonwealth Ombudsman tabled regular reports into his detention, and made numerous recommendations that he be considered and referred to the Minister for a Bridging E visa.
323. In so doing, the Ombudsman highlighted Mr WD's particular health needs and referred to reports from IHMS that Mr WD was receiving treatment for complex physical and mental health concerns, including detention fatigue, and that prolonged detention was adversely impacting his physical and mental health.
324. I note that a record made on the Department's report to the Commonwealth Ombudsman dated 27 August 2018, indicated that Serco had assessed Mr WD as a high-risk detainee, but with no additional explanation.

325. The CPATs provided to the Commission assessed Mr WD as being of high risk of harm to the community from October 2016 to 6 July 2018. This appears to relate to an alert placed on his file as a result of the referral to the external agency due to his disclosure of offshore criminal offences. This was confirmed by the Department in a submission to the Minister in January 2018.
326. A CPAT assessment conducted on 30 July 2018, manually substituted this high rating to low, with the reason given that the external agency permitted the grant of any future temporary or permanent visa or citizenship. It also stated:
- He has not demonstrated violent or aggressive tendencies in detention, and has never been convicted or charged with any offences in Australia since he arrived on 25/02/2013.
327. The CPAT recommendation of 'Tier 3 – Held Detention' has been manually substituted with a recommendation of 'Tier 1 – Bridging Visa with conditions'.
328. A CPAT assessment conducted on 20 August 2019, indicated no issues with a low risk of harm to the community, and recommendation of 'Tier 1 – Bridging Visa' was made accordingly.
329. Yet in an assessment conducted on 16 March 2020, with no new information apparent on the CPAT indicating a basis for the increase in risk, he is assessed as being a medium risk of harm. The recommendation made on this date is for 'Tier 1 – Residence Determination'. The Department informed the Commission that the reason for the increase in risk of harm to the community was 'due to Mr [WD]'s incidents in detention and inconsistencies with his bio-data information which were not recorded in the previous CPAT assessment'.

Summary of consideration and referrals under ss 195A and 197AB

330. The Department has assessed Mr WD against the s 195A guidelines on 7 occasions, resulting in 4 referrals to the Minister as summarised in the table below.

Date of Departmental consideration	Referred to Minister	Outcome of referral
12 May 2016	No – 10 June 2016	
5 January 2018	Yes – 6 February 2018	1 March 2018, Minister declined to intervene
26 July 2018	Yes – 6 August 2018	29 August 2018, submission returned due to change of Minister 25 September 2018, referred to Minister again 23 October 2018, Minister declined to intervene
6 February 2019	Yes – 14 February 2019 (group submission)	26 February 2019, Minister Reynolds indicated he should be referred for consideration. 7 May 2019, group submission was referred to the Minister 21 May 2019, submission was returned from the Minister for redrafting 11 July 2019, submission was again referred to the Minister 29 August 2019, Minister declined to intervene
11 March 2020 (195A and 197AB)	Yes (195A) – date unknown No – 6 July 2021	October 2020, submission referred to the Minister but returned unsigned for redrafting
Information not available	No – 17 February 2022	

28 July 2022 (195A)	6 October 2022 – first stage submission referred under s 195A with no guidelines assessment 2 November 2022 – second stage submission referred	17 October 2022 – Minister indicated he wished to consider under s 195A 10 November 2022 – granted Bridging E visa for 6 months
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331. The first stage submission of 6 October 2022, identified that Mr WD had been found to meet the s 48B Ministerial Intervention guidelines as a result of a privacy breach occurring on 19 April 2022. The Commission did not request further information from the Department about this.

(ii) Findings – Mr WD

332. Mr WD was detained for over 3 years before the Department first considered his suitability for release on a bridging visa. No assessment of his protection claims was made during this time. Nor was any assessment made of Mr WD's suitability for a community detention placement.

333. While Professor Croucher acknowledged that Mr WD did make a claim relating to criminal activities soon after his arrival in Australia in 2013, the nature of the conduct was not such in her view to warrant a lengthy period of detention, and particularly so in light of his subsequent retraction of the claim in August 2014. The offence did not involve violence or otherwise indicate that Mr WD posed a risk to the Australian community. In this regard, Professor Croucher differentiated the offending behaviour disclosed by Mr WD from that of Mr WB and Mr WC, and other detainees within the same cohort of people previously considered by the Commission.¹¹⁶

334. The Department responded to Professor Croucher's preliminary view on this point by saying that it was necessary to undertake 'appropriate identity, character and security investigations', due to his self-declared criminal charges and political involvement. However, Professor Croucher considered that Mr WD's disclosures were of such a nature that they did not preclude those checks from being conducted while he was in the community.

335. It was then a further 18 months before the Department reconsidered Mr WD's suitability for referral to the Minister, at which time Mr WD had been detained for 5 years.

336. The Department has provided insufficient justification for its delay in referring Mr WD's case to the Minister for a period of 5 years. Additionally, the relevant Ministers have not recorded reasons for declining the use of their personal discretion when Mr WD's case was ultimately referred to them (and nor are they required to do so according to law).
337. It is difficult therefore to understand why it was necessary for Mr WD to remain in detention for almost 10 years, and particularly so in light of the fact that he was subsequently granted a Bridging E visa on 10 November 2022.
338. Other than his self-disclosed and retracted claim noted above, there is only one incident that appears to have suggested that Mr WD was a person of any risk, which was the allegation made by a Serco officer in March 2016. This matter was referred to the Northern Territory police and not proceeded with. Despite this, Serco appears to have identified Mr WD as a high-risk detainee and a record to this effect remained on his file for at least a further 2 years.
339. Similarly, as a result of a referral to an external agency resulting from disclosures of offshore criminal activity, which were later retracted (and found not to be credible), an alert remained on his file which resulted in multiple CPAT assessments of him being high risk to the community.
340. As noted in the cases of Mr WB and Mr WC, the fact that Mr WD was affected by the outcome of the case *DBB16* meant that the time taken to assess and review his protection claims became significantly protracted.
341. A referral process to the Minister was commenced in March 2020 as a result of Department of Health advice that people in detention were at risk of contracting COVID-19. Despite this, the Department's assessment was not completed until 6 July 2021. The Department's consideration of Mr WD at this time contains a number of inconsistencies with respect to the impact that prolonged detention was having on Mr WD's mental health, and the practicality of his removal from Australia:

Health

On 28/4/2021, International Health and Medical Services (IHMS) reported Mr [WD] has respiratory issues, gastroenterology issues, gastro-oesophageal

reflux disease, heart attack (in 2019), high cholesterol, liver hemangioma, elevated lipase and symptoms of detention fatigue. He declined to attend routine mental health screening on 07/04/2021 and there have not been any concerns regarding his mental health.

342. The submission concludes that there are no unique or exceptional circumstances in the case despite Mr WD's 8 years spent in immigration detention, and records that all his health and welfare needs are able to be met in held detention.
343. The submission also records that removal from Australia is reasonably practicable in Mr WD's case, which is in direct contrast to the information recorded above at paragraphs 319 and 320 with respect to the pandemic and information received from the Bangladesh High Commission.
344. These same conclusions are mirrored in the document recording the Department's decision not to refer Mr WD to the Minister in February 2022. This decision record suggests that removal of Mr WD was being planned for 10 March 2022, however it is difficult to understand how that expectation was reasonably held in light of Mr WD having no travel document.
345. The Department did not at any stage refer Mr WD's case for consideration by the Minister for release into community detention pursuant to the s 197AB residence determination power.
346. In light of Mr WD's prolonged detention, protracted removal situation, and his complex mental and physical health needs that were being exacerbated in detention as identified by IHMS and highlighted by the Commonwealth Ombudsman, there was scope for his case to fall within the guidelines for referral to the Minister to consider exercising his powers under s 195A and/or s 197AB.
347. Professor Croucher found that in Mr WD's case, the following delays and failures to act by the Department resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR:
 - a) the delay of the Department in considering s 195A referral to the Minister for a period of more than 3 years until 12 May 2016, and deciding against referring Mr WD to the Minister on that occasion
 - b) the failure of the Department to refer his case to the Minister for attention under s 195A for a period of 5 years until February 2018

c) the failure of the Department to refer his case to the Minister between October 2020 to October 2022.

(d) Mr WE

(i) Background

348. Mr WE was born in Iraq and is 46 years old. He claims to be stateless.
349. On 1 May 2010, Mr WE arrived in Australia by sea as a suspected 'unlawful non-citizen' and was immediately detained under s 189(3) of the Migration Act. He remained in detention until the Minister intervened to make a residence determination on 28 March 2023, a period of 12 years and 11 months.
350. On 7 September 2010, Mr WE was determined not to be a refugee under the Refugee Status Assessment. He requested an Independent Merits Review and was found to not be a refugee under the review on 30 June 2011.
351. On 30 August 2011, Mr WE lodged an application for judicial review of the Independent Merits Review decision with the Federal Magistrates Court. On 13 January 2012, the Federal Magistrates Court remitted the refugee assessment back to Independent Merits Review.
352. On 8 May 2012, the Independent Merits Review found that Mr WE was a person to whom Australia had protection obligations.
353. On 10 August 2012, Mr WE appeared before the Perth Magistrates Court in relation to a common assault charge. The charges were discontinued.
354. The Department's Case Review of Mr WE in April 2013, noted his continuing behavioural issues and 'high' security rating and assessed his placement as appropriate.
355. In the Department's report to the Ombudsman dated 1 May 2013, the Department stated Mr WE had been involved in a number of incidents – including threatened and self-harm disturbances, abusive behaviour and alleged assaults on Commonwealth officers and IHMS mental health staff.

356. On 2 May 2013, after a facial image comparison report, the Department found that Mr WE's identity was not supported as WE and asserted that his name was Mr WF, an Iranian citizen born on 9 December 1970.
357. In correspondence with the Commission, the Department refers to the complainant as Mr WF. The Commission is not aware of Mr WE's views on this assertion, but it appears from the documents before the Commission that he has continuously denied this finding. The complaint with the Commission was lodged under the name Mr WE and, for the purposes of this report, the Commission has referred to the complainant as Mr WE.
358. On 5 August 2013, Mr WE's case was sent to the Minister for consideration of lifting the prohibition under s 46A.
359. On 22 August 2013, following advice from the Australian Federal Police (AFP) that no further action was to be taken in relation to the identity issues, the Minister intervened lifting the s 46A bar.
360. In the Department's report to the Ombudsman dated 8 November 2013, the Department notes that Mr WE had threatened self-harm on several occasions and had been involved in several incidents in detention.
361. On 13 November 2013, Mr WE lodged a protection visa application. On 24 February 2014 the visa application was refused, as the Department concluded that Mr WE had provided incorrect identity information.
362. On 4 March 2014, Mr WE sought review of the visa refusal decision before the Refugee Review Tribunal. On 5 May 2014, the Refugee Review Tribunal affirmed the refusal decision.
363. On 30 May 2014, Mr WE sought judicial review at the Federal Circuit Court. On 14 November 2014 the Federal Circuit Court dismissed the application for review.
364. Between 2014 to 2016 Mr WE was involved in several incidents while in detention, including assault and verbal threats towards detention staff. Some of these incidents resulted in prosecutions and sentences, including conditional release orders and a 12-month imprisonment sentence as set out below.
365. An IHMS psychiatry summary note dated 26 November 2014, contains the following:

Full HCR -20 score for [redacted] is 32/40 which indicates a high risk of violence to self and others. This is despite the absence of mental illness. Of particular concern is 10/10 for Risk items in this setting (CI) which indicates that current placement is entirely unsuitable for safety of other clients, staff and [redacted]. [Redacted] demonstrates chronic hostility to SERCO, Australian government and IHMS staff and is highly impulsive which adds to the unpredictability ...

Optimal placement would be in a forensic setting for example MSPC in Long Bay NSW which provides a more secure setting and treatment for men with severe borderline and antisocial pathology. There are ethical and governmental issues with such a transfer but in my opinion current placement renders staff, other clients and [redacted] at a high level of risk.

366. On 26 August 2015, an International Treaties Obligations Assessment process found that Mr WE did not engage Australia's protection obligations.
367. On 20 July 2015, Mr WE was allegedly involved in an incident of property damage at the Perth Immigration Detention Centre. The AFP did not investigate the matter.
368. On 13 April 2016, the Minister lifted the ss 46A and 48B statutory bars under the Migration Act to allow Mr WE to lodge a TPV or SHEV application.
369. On 30 June 2016, Mr WE was sentenced to 12 months imprisonment for making a verbal threat to kill the Serco Operations Manager in May 2015.
370. On 29 June 2017, Mr WE was released from criminal custody and transferred to immigration detention.
371. On 30 August 2017, the Department invited Mr WE to apply for a TPV or a SHEV, but he declined. An extension was provided to the invitation requiring lodgement by 1 October 2017. When no application was received, the Minister made a decision under s 46A(2C) to revoke the determination allowing him to apply for a TPV or SHEV.
372. On 3 October 2017, Mr WE lodged a SHEV application. As he did not apply by 1 October 2017, his application was deemed to be invalid.

373. On 20 November 2017, a Ministerial Intervention request under s 48B of the Migration Act was assessed by the Department as not meeting the Minister's guidelines for referral to the Minister and a subsequent protection visa application was not allowed.
374. On 25 November 2019, it was confirmed that Mr WE would not be permitted to lodge a protection visa application.
375. In addition to his conviction in 2016, Mr WE has been convicted of the following offences which occurred in immigration detention:
- assault of an Operations Manager on 18 March 2015
 - being armed or pretending to be armed in a way that may cause fear and 2 counts of common assault on 17 March 2015
 - assault and being armed in a way that may cause fear on 12 December 2014.
376. A CPAT assessment conducted on 2 August 2017 resulted in recommendation of a 'Tier 3 – Held Detention' placement. This was also the case for CPATs completed 18 July 2018 and 23 October 2018.
377. The Department's Case Reviews of Mr WE, from at least December 2019 to October 2020, noted that his placement was inconsistent with the CPAT recommendation of '1.3 Tier 1- Residence Determination'. The Department informed the Commission that 'the "behaviour impacting others" section was reassessed ... and downgraded to an amber rating due to the most recent incidents involving contraband and a minor assault' in August 2019.
378. In the most recent CPAT provided by the Department to the Commission, conducted on 5 April 2022, it was noted that Mr WE has an extensive history of over 500 incidents while in immigration detention. It was also noted, however, that 'Good relationships with stakeholders are maintaining good behaviour in recent times'. The CPAT recommendation of 'Tier 1 – Residence Determination [1.3]' was substituted with a recommendation of 'Tier 1 – Bridging Visa [1.1]'.
379. The Commission also reviewed a number of SRATs provided by the Department, and it seems that the last noted incident of abusive or aggressive behaviour occurred on 28 July 2021. More recent SRATs to see if this apparent improvement in his behaviour continued were not available.

380. In Ombudsman reports tabled in September 2019 (96- and 102-month reports) the Ombudsman made the following assessment and recommendations (using the name determined by the Department):

International Health and Medical Services advised that Mr [WF] continued to receive treatment for numerous complex mental health concerns, including a history of torture and trauma, depression, borderline personality disorder and adult disturbed behaviour with self-harm. Mr [WF] threatened self-harm during this assessment period and continued to be supported by the mental health team.

In October 2018 Mr [WF] advised that his eyes were sensitive to bright sunlight and he had difficulty living at Yongah Hill Immigration Detention Centre (IDC) as he had to move around in bright sunlight.

...

On 2 January 2019 the Department advised that Mr [WF] had been reviewed by a general practitioner and a mental health nurse on 5 October 2018 who both confirmed that Mr [WF] was sensitive to bright sunlight and therefore slept during the day to avoid going out in the sun.

...

The Ombudsman recommends that the Department:

1. Consider transferring Mr [WF] to Perth IDC to enable him to manage his eye concerns.
2. Refer Mr [WF]'s case to the Minister for consideration under s 195A for the grant of a bridging visa, noting the significant length of time he has remained in immigration detention and his ongoing mental health concerns.

381. In February 2020, IHMS reported that Mr WE's insight and judgement was impaired and that he is 'at risk of impulsive acts of self-harm and suicide when his judgement is impaired'.
382. In the Ombudsman's report under s 486O of the Migration Act, tabled on 22 February 2021, the Ombudsman noted advice from IHMS that Mr WE received treatment for physical and mental health concerns, including benign prostatic hypertrophy, depression, borderline personality disorder and a history of torture and trauma.
383. The Ombudsman also made the following recommendation:

The Ombudsman is concerned that Mr [WF] is likely to remain in immigration detention for a prolonged period because involuntary removal to Iran is not possible at present. This poses a significant risk to his health and welfare.

... the Ombudsman recommends that the Department of Home Affairs:

1. Assesses Mr [WF]'s case against the guidelines for consideration of a bridging visa or community placement under ss 195A and 197AB of the Act.
2. If it has not already done so, transfers Mr [WF] to the Brisbane Immigration Transit Accommodation.

384. On 17 March 2021, Mr WE filed an application seeking a writ of habeas corpus in the Federal Court of Australia, seeking release from detention. Following the decision of the High Court in *Commonwealth of Australia v A/L20* (see paragraph 102, above), he discontinued the case.
385. In July 2021, the Commission spoke with Mr WE who raised his mental and physical health issues, concerns about the mental health services provided in detention and threatened self-harm.¹¹⁷ The Commission conveyed these issues to the Department.
386. Other material provided by the Department indicates that Mr WE attempted suicide on a number of occasions, including on 27 July 2021 – the most recent attempt on the materials before the Commission.
387. On 3 September 2021 the UNHRC issued the Department with an Interim Measures Request (IMR) on behalf of Mr WE. The Commission is unaware of the status of Mr WE's complaint to the UNHRC.
388. The Department advised that Mr WE is on an involuntary removal pathway and he does not have valid travel documents. The Department has been unable to progress Mr WE's removal to date, as Iran does not currently accept involuntary removals and has a policy of not providing travel documents for involuntary removals.
389. After issuing Professor Croucher's preliminary view in this matter, the Department informed the Commission that on 28 March 2023, the Minister intervened under s 197AB of the Act to make a residence determination, with the effect that Mr WE was released into community detention. The Department informed the Commission that Mr WE has twice absconded from his community detention placement, but that he has made recent contact with his case coordinator, and has been reminded of his obligation to reside at the specific address determined by the Minister.

Summary of consideration and referrals under ss 195A and 197AB

Date of Departmental consideration	Referred to Minister	Outcome of referral
17 July 2011 (s 197AB)	No – 18 January 2012	
Date not known - ss 195A and 197AB	Yes – 5 August 2013	Minister declined to intervene – 22 August 2013
21 April 2016 (s 195A)	Not finalised – 30 June 2016	
6 October 2017 (s 195A)	No – 2 November 2017	
19 June 2018 (s 195A)	No – 16 August 2018	
	Yes – group submission – 12 February 2019	Assistant Minister declined to intervene – 26 February 2019
15 August 2019 (s 197AB)	No - 25 March 2020	
2 December 2020 (ss 195A and 197AB)	No – 29 June 2021	
13 September 2021 (ss 195A and 197AB)	No – 9 November 2021	
No information available	No – 24 October 2022	
		28 March 2023 – Minister intervened under s 197AB

(ii) Findings – Mr WE

390. The Department first considered Mr WE's case against the s 197AB guidelines in January 2012, after Mr WE had spent 20 months in detention. The Department determined that Mr WE's case did not meet the guidelines for referral. It was 17 months later, in August 2013, before the Department considered Mr WE's case again, determining that his case did meet the s 195A or s 197AB guidelines for referral to the Minister. By this stage, Mr WE had been detained for nearly 3 and a half years.
391. Professor Croucher acknowledged that, during this period, Mr WE was charged with common assault. However, charges were formally discontinued on 10 August 2012. It was a year later before Mr WE's case was referred to the Minister. The Minister declined to intervene at this time.
392. Following the Minister's decision not to intervene in August 2013, it was a further 3 years before the Department considered Mr WE's case again against the Ministerial Intervention guidelines. The Department did not finalise its consideration of Mr WE's case at this time as he was convicted of a criminal offence and sentenced to a term of imprisonment.
393. Following Mr WE's release from criminal custody in June 2017, the Department considered his case against the Ministerial Intervention guidelines on 5 occasions – however referred his case to the Minister only once in February 2019, as part of a group submission relating to 88 long-term detainees who had no ongoing processes in place but for whom removal was not practicable.
394. During the 12 years and 11 months (to March 2023) that Mr WE spent in immigration detention, the Department referred his case to the Minister for consideration of alternatives to held immigration detention on only 3 occasions.
395. The Department should have been aware of the Iranian authorities' longstanding policy of not cooperating on the involuntary removal of Iranian citizens. Since at least April 2016, DFAT has reported that Iran 'does not accept involuntary returnees ... Iranian overseas missions will not issue travel documents to an Iranian whom a foreign government wishes to return involuntarily to Iran'.¹¹⁸ This was reiterated in DFAT's June 2018 report.¹¹⁹

396. Professor Croucher acknowledged that Mr WE has a criminal history and has served 12 months imprisonment. She also noted a very large number of serious behavioural incidents in which threats and aggression arose in the context of immigration detention over a decade but did not result in criminal charges.
397. The existence of a criminal record does not preclude the referral of a case to the Minister. It is relevant, and which is reflected in the Department's own assessments, that all of the behaviour giving rise to this history, occurred while Mr WE was in held detention. As in the case of Mr WA, he did not have the opportunity to demonstrate good behaviour while in the Australian community.
398. In the Department's assessment of Mr WE against the s 195A and s 197AB guidelines in 29 June 2021, Mr WE's criminal and behavioural history was detailed at length, and the Department noted:

The most recent CPAT, completed on 21/06/2021, assessed Mr [WF] as a Medium Risk of harm to the community, a Medium Risk of not engaging with the Department and recommended *Tier 1 – Residence Determination*. The Status Resolution Officer substituted the Residence Determination recommendation with *Tier 1 – Bridging Visa with conditions*, noting Mr [WF] has no vulnerability or unique or exceptional circumstance, has not had a visa cancelled or refused under s 116 or s 501 due to criminality and the Medium Risk to community rating is based on behaviour in detention and could be attributed to frustration.

Behaviour in the community:

Mr [WF]'s behaviour in the community remains untested. If Mr [WF] were to be considered for the grant of a Bridging E (subclass 050) visa (BVE) he would be required to sign the Code of Behaviour, introduced to make sure people who are granted a bridging visa behave appropriately while in the Australian community.

399. In the Department's assessment of Mr WE against the s 195A and s 197AB guidelines in November 2021, the Department drew attention to Mr WE's serious mental health issues including:
- history of torture and trauma
 - depression

- Borderline Personality Disorder
 - adult disturbed behaviour with self-harm
 - attempted suicide (May 2020, July 2021).
400. Despite these assessments by the Department in June and September 2021, his CPAT assessments at the time recommending a bridging visa or community placement, and the Ombudsman's recommendations during the period from at least 2019, that consideration be given to a bridging visa or community placement for Mr WE in light of the 'significant length of time he has remained in immigration detention and his ongoing mental health concerns', the Department did not refer Mr WE's case to the Minister until March 2023.
401. It was Professor Croucher's view that, given the significant length of detention (almost 13 years), his refugee status (noting this status changed in August 2015 after 5 years in detention), numerous serious physical and mental health issues including incidents of self-harm, CPAT assessments from at least December 2019 recommending community placement, Ombudsman's concerns about the significant length of his detention and several recommendations for consideration of a bridging visa under s 195A or community placement under s 197AB, his protracted and unlikely prospects for removal, and the high risk of indefinite detention, there was scope for his case to fall within the guidelines for referral to the Minister to consider exercising the powers under ss 195A and 197AB of the Migration Act.
402. Professor Croucher found that the Department's delay and failure to refer Mr WE's case to the Minister for consideration of alternatives to closed detention resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR, as follows:
- the Department's delay for a period of more than 3 years in referring his case to the Minister under the s 195 or s 197AB guidelines prior to August 2013
 - the Department's failure to consider his case against the s 195 or s 197AB guidelines at all for a period of 3 years from August 2013 to June 2016

- the failure of the Department to refer his case to the Minister, save for on one occasion, during the period from June 2017 until March 2023.

403. In light of the Department's concerns about Mr WE's criminal history and behaviour in detention, the Department's assessments should have contained a risk assessment of whether any risks of harm to the community could have been mitigated by conditions placed on the visa.

(e) Mr WG

(i) Background

404. Mr WG was born in Iran and is 44 years old.

405. On 26 July 2012, he arrived in Australia by sea as a suspected unlawful non-citizen and was immediately detained under s 189(3) of the Migration Act.

406. Mr WG was granted a bridging visa on 6 May 2013, after 9 months in detention.

407. On 2 July 2014, he was transferred into criminal custody. On 26 August 2016, he was released from criminal custody and transferred to immigration detention where he currently remains and has been detained for over 7 years and 5 months (at the time of Professor Croucher's findings).

408. In this inquiry, Professor Croucher focused only on his detention within immigration detention since his release from criminal custody on 26 August 2016.

409. On 31 October 2012, the Minister intervened to lift the bar under the Migration Act and allowed Mr WG to lodge a protection visa application. The bar lift that took place at this time was for both protection and bridging visa applications.

410. On 20 December 2012, Mr WG applied for a protection visa which was refused on 17 February 2014. On 6 May 2013, the Minister granted a Bridging E visa under s 195A, associated with Mr WG's protection visa application.

411. On 2 July 2014, Mr WG was charged with aggravated sexual assault and aggravated indecent assault against a cognitive impaired person.
412. On that day, the Department cancelled Mr WG's bridging visa under s 116(1)(g) of the Migration Act. Mr WG was refused bail and remanded in criminal custody.
413. By operation of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, Mr WG's protection visa application was deemed to be an application for a TPV from 15 December 2014.
414. On 8 January 2016, the Refugee Review Tribunal affirmed the TPV refusal decision.
415. On 23 August 2016, the District Court of NSW ordered that no further proceedings would take place with respect to the criminal charges against him. He was released from criminal custody after over 2 years and was transferred to immigration detention. On 12 April 2017, the Director of Public Prosecutions decided not to take any further proceedings against Mr WG. The entire time (2 years and 1 month) spent in criminal custody was on remand only, and Mr WG was never convicted of the charged offences.
416. On 15 November 2016 and again on 17 October 2018, Mr WG was referred for involuntary removal.
417. In 2018, Mr WG lodged a complaint with the UN Working Group on Arbitrary Detention.
418. In the Ombudsman's report under s 486O of the Migration Act, tabled in December 2021, the Ombudsman made the following assessments and recommendation:

The Ombudsman also notes Mr [WG]'s removal is likely to be delayed because involuntary removal to Iran is not possible at present.

...

Noting the length of time Mr [WG] has been in detention and the protracted nature of his removal, the Ombudsman recommends the Department of Home Affairs:

1. Expedites its assessment of Mr [WG]'s case against the guidelines for consideration of a bridging visa under s 195A of the Act.

419. Mr WG does not hold a valid Iranian travel document and the Department advised that it has been unable to obtain a travel document without Mr WG's cooperation. In its report dated 26 April 2018 to the Ombudsman under s 486N of the Migration Act, the Department confirmed that Iranian authorities are not cooperating on the involuntary removal of Iranian citizens.
420. The Department has advised Mr WG is not being referred for consideration for a community placement due to community protection concerns. He has been assessed as a high risk to the Australian community due to the criminal charges which led to the cancellation of his bridging visa.
421. CPAT assessments between 4 August 2018 and 10 February 2022, assess Mr WG to be of high risk of harm to the community and recommended 'Tier 3 – held detention'. The CPATs noted that Mr WG has cooperated with case management and other departmental officers and Serco while in detention and has no national security concerns. Over the course of his time in detention (as at December 2020), there were 18 recorded incidents. These incidents included a number which reflected Mr WG as being a victim of minor assault or abusive/aggressive behaviour, and contraband such as iPhone chargers found in his room. On the Commission's review of the incidents, none were identified that indicated Mr WG to be a person who poses a high risk, and the Department confirmed this by informing the Commission that Mr WG was assessed as high risk due to being charged with aggravated sexual assault, and not as a result of his incidents in detention.
422. The UN Working Group on Arbitrary Detention issued an opinion that Mr WG had been detained arbitrarily in contravention of articles 1, 9 and 26 of the ICCPR.

Summary of consideration and referrals under ss 195A and 197AB

Date of Departmental consideration	Referred to Minister	Outcome of referral
2 March 2017 (s 195A)	No - 2 June 2017	
19 February 2018 (s 195A)	No - 21 February 2018	
25 October 2018 (s 195A)	No - 15 November 2018	
30 July 2019 (s 195A)	No - 30 December 2019	
13 July 2020 (ss 195A and 197AB)	No - 24 December 2021	
5 May 2022 (ss 195A and 197AB)	No - 5 June 2022	
5 October 2022 (ss 195A and 197AB)	Ongoing (as at 20 December 2022)	Outcome unknown
	September 2023	Minister agreed to consider under s 195A and not under s 197AB

(ii) Findings - Mr WG

423. Professor Croucher focused on Mr WG's detention after 26 August 2016, after he was released from criminal custody and transferred into immigration detention.
424. The Department assessed Mr WG's case against the s 195A guidelines on 7 occasions since August 2016, none of which resulted in a referral to the Minister, until September 2023. This was as a result of the Minister agreeing to the Department referring identified cohorts for consideration (known as the Detention Status Resolution Review). By this time, Mr WG had been detained for almost 7 years.

425. The Department advised that the assessments in 2018 and 2019 took into consideration Mr WG's prolonged period in detention, and noted he had no ongoing immigration matters, was unwilling to depart Australia voluntarily, had no health conditions that could not be cared for in a detention centre environment, and his current placement in held detention would not result in irreparable harm or continuing hardship to an Australian citizen. These factors were balanced against Mr WG's criminal history, and the Department decided there were no compelling or compassionate circumstances that would outweigh the risk to the Australian community.
426. Professor Croucher noted that the 2016 Guidelines under s 195A consider criminal history including criminal charges as 'adverse' information, however it is not a specific ground upon which a case should not be referred to the Minister.
427. The reason stated in the material before the Commission for not referring Mr WG to the Minister was that 'his criminal history exceeds the threshold for refusal on character grounds'. Mr WG has never had a visa cancelled or refused on character grounds, and he was not convicted of the offences with which he was charged. The cancellation of his Bridging E visa occurred under s 116(1)(g) of the Migration Act and pursuant to regulation 2.43(1)(p)(ii) of the Migration Regulations. This regulation allows cancellation of Bridging E visas on the basis of criminal charges.
428. It appears from this that the Department has conducted its own quasi-determination about the application of the character test to Mr WG, outside of the proper process for doing so. Had Mr WG had a visa considered for refusal or cancellation pursuant to s 501 of the Migration Act, he would have had an opportunity to respond to a notice to that effect, and the right of merits review and/or judicial review.
429. The Department in its guidelines assessments incorrectly identified that Mr WG could have been considered for the grant of a Bridging E visa pursuant to regulation 2.25 of the Migration Regulations. They did not do so, on the basis that they considered that he failed the character test. The Department informed the Commission that 'based on all factors relating to Mr WG's circumstances at that time, this would not have changed the final

outcome and the assessment would still have resulted with the case not meeting the guidelines’.

430. Mr WG was referred for removal in November 2016. The Department should have been aware of the Iranian authorities’ longstanding policy of not cooperating on the involuntary removal of Iranian citizens. Since at least April 2016, DFAT has reported that Iran ‘does not accept involuntary returnees ... Iranian overseas missions will not issue travel documents to an Iranian whom a foreign government wishes to return involuntarily to Iran’.¹²⁰ This was reiterated in DFAT’s June 2018 report.¹²¹
431. The criminal charges were the main reason given by the Department for their assessment that Mr WG posed a high risk to the Australian community. As outlined above, The Commission has not seen any evidence of behaviour in detention that would warrant such a lengthy period of detention. It is acknowledged that Mr WG was *charged* with serious crimes and, on this basis, he was considered to pose a high risk to the community. It is also noted he was *not convicted* of these crimes and was held in criminal custody on remand only for over 2 years (from July 2014 to August 2016). The Commission has previously raised its concerns regarding cancelled bridging visa holders who may remain in detention for significant periods of time, despite the fact that no charge against them has been proven: *Lives on hold: Refugees and asylum seekers in the ‘Legacy Caseload’*.¹²²
432. In this respect, the Commission expresses concern that in the Department’s assessment in June 2021, it is stated:
- The risk Mr [WG] poses to the Australian community, namely due to the sexual offences he committed against a vulnerable person, outweighs any risk of his ongoing and continued detention due to his refusal to voluntarily return to Iran.
433. This summary clearly disregards the presumption of innocence enshrined in Australia’s legal system. The position is stated more accurately in the subsequent assessment conducted in October 2022. On that occasion, the overall position taken is on the basis that:
- Mr WG does not engage Australia’s protection obligations
 - Mr WG’s health conditions can be properly cared for in a detention environment
 - the absence of harm caused to an Australian citizen

- the finalisation of Mr WG’s visa processing
- his unwillingness to depart Australia voluntarily
- the lack of compassionate and compelling, or unique or exceptional circumstances
- the CPAT recommendation of Tier 3 – Held Detention.

434. It was Professor Croucher’s view that, given the significant length of his detention, the protracted removal and high risk of indefinite detention, there was scope for Mr WG’s case to fall within the guidelines for referral to the Minister to consider exercising the powers under ss 195A and 197AB of the Migration Act.

435. Professor Croucher found that the Department’s failure to refer Mr WG’s case to the Minister for consideration of alternatives to closed detention, until he had been detained for 7 years and one month, resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR.

436. In light of the Department’s concerns about Mr WG’s criminal history, the Department’s referral to the Minister should have contained a risk assessment of whether any risks of harm to the community could have been mitigated by conditions placed on the visa.

(f) Mr WH

(i) Background

437. Mr WH was born in Iran and is 34 years old.

438. On 20 December 2012, he arrived in Australia by sea and was detained as a suspected unlawful non-citizen.

439. On 21 January 2013, he was transferred to Nauru under the regional processing arrangements. Accordingly, he became what is known as a ‘transitory person’ as defined by s 5(1) of the Migration Act.

440. This report does not consider the period of time in which Mr WH was detained in Nauru for the purpose of this report. It considers only the

period of time in which he was in held detention in Australia, noting his placement into community detention on 20 December 2022.

441. He was transferred back to Australia from Nauru on 18 March 2013 for medical treatment, and detained in Australia, initially at the Brisbane ITA.
442. He was transferred from there to Villawood and the Melbourne ITA, where it was alleged on 9 July 2014, that he had inappropriately touched a Serco staff member. As a result, he was transferred again to Maribyrnong IDC.
443. On 5 March 2015, Mr WH was convicted of false imprisonment and indecent assault with respect of the 9 July 2014 incident.
444. On appeal from this decision, he was found not guilty of false imprisonment but convicted of indecent assault, and ordered to pay a \$1,750 fine.
445. He was transferred to Christmas Island on 27 January 2016.
446. By reason of a legislative instrument signed on 24 March 2016 (LI 2016/008), Mr WH became a fast-track review applicant (and no longer a transitory person) and was permitted to apply for a protection visa in Australia, following a ss 46A and 46B bar lift on 18 April 2016.
447. He lodged an application for a SHEV on 23 June 2016.
448. The SHEV was refused by the Department on 7 September 2016 and his case was referred to the IAA for review.
449. On 26 November 2016, the IAA affirmed the Department's decision, and Mr WH sought judicial review of that decision in the Federal Circuit Court.
450. The application was unsuccessful by orders dated 8 June 2017 and on appeal by orders dated 22 June 2018.
451. With no matters on foot, the Department sought to remove Mr WH, however they identified to the Ombudsman on 14 February 2019 that Iran had a longstanding policy of not cooperating on involuntary removals, and Mr WH did not wish to be returned.
452. The prolonged detention was having negative impacts on Mr WH's mental health, as indicated in an IHMS report from STARTTS on 4 January 2019:

in terms of future prospects for recovery, the stressors associated with the detention environment will continue to negatively impact on Mr [WH]’s psychological, emotional and physical health.

453. On 25 July 2019, the Ombudsman recommended that the Department consider Tier 4 specialised detention for Mr WH in light of significant mental health concerns.
454. In the Department’s response to the Commission following Mr WH’s complaint, 12 months of case reviews into his ongoing detention were provided, from October 2019 to September 2020. In each of these, the Department noted that Mr WH’s placement in held detention is inconsistent with CPAT recommendation of Tier 1 – Bridging visa.
455. The UN Working Group on Arbitrary Detention issued its opinion that Mr WH had been detained arbitrarily in contravention of articles 1, 9 and 26 of the ICCPR.
456. According to the UN Working Group on Arbitrary Detention decision, Mr WH’s only criminal conviction was overturned, but the Commission has not been able to verify this information.

Summary of consideration and referrals under ss 195A and 197AB

457. Prior to his release from held detention on 20 December 2022, Mr WH was considered by the Department for possible referral to the Minister on 8 occasions, and referred to the Minister on 7, as summarised in the below table:

Date of Departmental consideration	Referred to Minister	Outcome of referral
No information available	Yes – 28 April 2016 (no guidelines assessment made)	30 June 2016, Minister declined to intervene
No information available	Yes – 2 February 2017	19 April 2017, submission referred to Department unactioned

24 October 2017	Yes – 28 November 2017	15 January 2018, Minister declined to intervene
28 June 2018	3 August 2018 (195A guidelines met) Yes – 17 October 2018	27 March 2019, Minister declined to intervene
	14 February 2019 (group submission)	26 February 2019, Assistant Minister indicated would be willing to consider 27 March 2019, Minister declined to intervene
26 June 2019	11 March 2020 (195A guidelines met) October 2020 – included in draft submission to Assistant Minister February 2021 – submission rebadged following change in ministerial responsibilities	Closed without referral to Assistant Minister
August 2021	No – 1 September 2021	
13 January 2022	Yes – 17 November 2022 (no guidelines assessment made) – first stage submission 9 December 2022 – second stage submission	21 November 2022 – Minister indicated he wanted to consider under s 197AB 19 December 2022 – residence determination made

458. The submission referred to the Minister in April 2016 focused predominantly on the event leading to Mr WH's criminal conviction, and a number of other reported behavioural issues which did not lead to any formal charges being laid. Mr WH had been identified as one of a group of detainees who all had a criminal or character concern of some nature, but none of whom had been involved in any incident for 3 months or more, and were not of interest to any relevant authorities.

459. The submission also referred to an incident on 25 November 2014 leading to a conviction, which included aggression towards a Serco staff member, however no other materials before the Commission refer to this conviction as separate to that which relates to the incident on 9 July 2014.
460. Similarly, the referral submission of November 2017 highlighted 'over 30 behavioural incidents', and the 9 July 2014 incident. Further, the Department provided conflicting information to the Minister regarding his mental health within the submission:

International Health and Medical Services (IHMS) has advised the Department that Mr [WH] has an extensive mental health history. In 2013, an IHMS psychiatrist reported that Mr [WH]'s detainment in the Nauru RPC exacerbated his post-traumatic stress disorder symptoms, which resulted in his self-harm behaviours. The psychiatrist strongly recommended not to return Mr [WH] to Nauru.

Mr [WH] has attended specialised counselling for torture and trauma. In 2014, a Foundation House psychologist reported that in their opinion, 'he is more likely to become more depressed if he remains in held detention'. ...

On 23 November 2017, IHMS advised the Department that Mr [WH] has no health conditions that are likely to be exacerbated by remaining in a detention centre environment.

461. The following submission prepared in August 2018 highlighted several concerning incidents indicating that the IHMS assessment that Mr WH had no health conditions likely to be exacerbated in detention in November 2017 had been incorrect. These included:

Mr [WH] has had major Food and Fluid Refusal (FFR) incidents while in held detention in Australia. In May 2018, Mr [WH] was admitted to Fiona Stanley Hospital (FSH) in Perth with moderate to severe dehydration. Over the next month, Mr [WH]'s health continued to deteriorate. ...

On 2 September 2018, Mr [WH]'s and Serco officers found his roommate, [redacted] hanging in his room, unconscious and not breathing at Yongah Hill Immigration Detention Centre (IDC). [Redacted] passed away on 5 September 2018 at Royal Perth Hospital ... This case has been the subject of media reporting.

Following this incident, Mr [WH] was diagnosed with an acute stress disorder by the IHMS psychiatrist on 11 September 2018 and remains on an ongoing

Supportive Monitoring and Engagement (SME) management plan. IHMS have recommended Mr [WH] be relocated from Yongah Hill IDC, as his health conditions are likely to be exacerbated by remaining in a detention centre environment.

462. The group submission prepared in February 2019, which included the names of 88 detainees, specifically identified Mr WH as a low-risk detainee who could not be returned to Iran, and for whom the Department considered management in the community appropriate.

463. The November 2022 submission similarly advised the Minister that:

Multiple health professionals have advised that Mr [WH]'s mental health is being adversely affected by being in a held detention environment. Mr [WH] has been noted to have chronic stress and detention fatigue, and has been formally diagnosed with mixed anxiety and depression for which he has been intermittently medicated.

464. In addition, the submission detailed about 85 incidents occurring in immigration detention regarding Mr WH's behaviour. Management of Mr WH's behaviour through either Bridging E visa conditions or residence determination conditions were both canvassed accordingly.

(ii) Findings – Mr WH

465. An exceedingly long delay occurred in the early years of Mr WH's detention, in that, from the time he returned to Australia from Nauru in March 2013 until April 2016, no consideration seems to have been made by the Department for his suitability for release into the community either on a Bridging E visa or into community detention.

466. The earliest mention in the documents before the Commission of this is in August 2015, on the Department's 30 Month s 486O Report to the Ombudsman. Despite an indication at that time that Mr WH had then been identified for assessment against the guidelines for a referral, no referral was made until April 2016.

467. Professor Croucher acknowledged that, for the period between 9 July 2014 and 18 December 2015, there was an active investigation, trial and appeal on foot, related to false imprisonment and indecent assault charges, however these complications could have been adequately managed with Mr WH being in the community through bail and various conditions. These matters should have been set out in a risk assessment prepared by the Department to accompany its referral of Mr WH's case to the Minister.

468. From April 2016 onwards, it appears that the Department did consider him numerous times and, on each occasion, initiated a submission to the Minister for the use of the discretionary powers.
469. This was the case until the consideration given by the Department in June 2019. It took the Department 9 months to make the guidelines assessment in Mr WH's favour. Given he had numerous positive assessments prior to this occasion, it is difficult to understand what could have delayed it on this occasion.
470. It is particularly concerning that this delay took place after Mr WH's mental health became significantly worse as a direct result of his prolonged detention and his experience of finding his roommate following his suicide. Mr WH had a number of suicide attempts and food and fluid refusals of his own by that time, which should have led to a prioritisation of his case.
471. Furthermore, it then took a further 7 months after that positive assessment for a draft submission to be put to the Assistant Minister. Another 4 months passed by which time the submission required rebadging due to a change in ministerial responsibilities. Eventually, the Department conducted a fresh assessment against the guidelines in August 2021 (more than 2 years since commencement of the initial assessment) but reversed its position.
472. The Department then commenced a further consideration in January 2022, but took 10 months for a first stage submission to be referred to the Minister.
473. It does not appear on the materials before the Commission that the Department considered the Ombudsman's specific recommendation of specialised detention dated 25 July 2019. The Commission does not have sufficient information before it as to exactly what that recommendation might have entailed, or what availability might have existed within an appropriate facility.
474. Professor Croucher acknowledged that Mr WH had a relatively lengthy history of incidents while in detention, which may have given the Department concerns about any risk he might pose in the community.

However, as was identified in each of the submissions referred to the Minister, there was scope for these potential risks to be mitigated through visa or residence determination conditions. Only one of the incidents identified led to a criminal conviction, and the fact that they occurred during a prolonged period while held in immigration detention, is not necessarily indicative of how Mr WH would behave outside of a detention environment.

475. Professor Croucher found that the Department's delay and failure to refer Mr WH's case to the Minister for consideration of alternatives to closed detention resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR, as follows:

- the failure of the Department to refer his case to the Minister for attention under s 195A for a period of 3 years from March 2013 and April 2016
- the delays of the Department in considering and referring his case to the Minister for a period of 3 years between June 2019 and November 2022
- the failure of the Department to refer his case to the Minister for attention under s 197AB, until 13 January 2022.

(g) Mr WI

(i) Background

476. Mr WI was born in Iraq and is 42 years old.

477. Mr WI arrived on Christmas Island on 24 December 2012 and was detained under s 189(1) of the Migration Act as he was reasonably suspected to be an unlawful non-citizen.

478. He was transferred to the regional processing centre in Nauru on 12 January 2013 under s 198AD of the Migration Act. He was therefore a 'transitory person' as defined by s 5 of the Migration Act.

479. On 18 August 2013, Mr WI was transferred back to Australia for operational reasons and remained in immigration detention in Australia until his release on 3 August 2022, a period of almost 9 years.

480. This report is confined to the period during which Mr WI was in immigration detention in Australia.

481. On 20 November 2014, the Department was advised that Mr WI was under consideration by ASIO. The effect of this was that the Department's CPAT conducted on 23 November 2016 recommended held detention for him.
482. On 25 August 2015 the Minister intervened to allow Mr WI to lodge a protection visa application, and he applied for a SHEV on 9 June 2016.
483. The SHEV was refused on 26 April 2017 and referred to the IAA for merits review.
484. On 1 June 2017, the IAA affirmed the Department's decision.
485. Mr WI lodged an application for judicial review in the then Federal Circuit Court on 20 June 2017. He withdrew that application on 15 June 2020.
486. On 6 December 2016, Mr WI attended an interview with an external agency.
487. It then appears that a National Security Alert in place was deactivated in February 2017, and the Movement Alert List (MAL) status on his file was resolved on 5 October 2017. CPAT assessments after this time accordingly reduced from recommending Tier 3 – Held Detention to Tier 1 – Bridging Visa.
488. By the time of the fourth Ombudsman report into Mr WI's continuing detention on 9 May 2018, the Department indicated that he was no longer of interest to the external agency.
489. At this time, the Ombudsman also raised concerns about Mr WI's mental health, and recommended that he be referred for consideration under the Minister's personal powers.
490. Mr WI made a number of invalid applications for Bridging E visas in June 2019.
491. On 23 July 2019, he stitched his lip and was taken to hospital for its removal and treatment.
492. Following this, the IHMS assessed Mr WI to be in a severe state of psychological distress and the Ombudsman again recommended that he be considered for the grant of a Bridging E visa.

493. On 16 August 2019, Mr WI made a request for ministerial intervention under s 48B of the Migration Act, to allow him to make a new protection visa application on the basis that he had a protection claim not previously considered by the Department. This included a claim of bisexuality, which had not been previously disclosed in his application for a SHEV and related review processes. This, and subsequent requests, were finalised without referral to the Minister, on the basis that the Department did not accept Mr WI's stated reason for not raising his sexuality in his SHEV application.
494. In response to the complaint lodged with the Commission, the Department provided 12 months of case reviews into Mr WI's ongoing detention, from October 2019 to September 2020. In each of these, it is noted that his placement in held detention is 'inconsistent with the CPAT recommendation of Tier 1 – Bridging Visa.'
495. In its assessment of Mr WI's ongoing detention tabled 27 August 2020 the Ombudsman indicated that Mr WI
- Received treatment for his pre-existing conditions, including depression, anxiety, insomnia and an adjustment disorder. Mr [WI] was prescribed medication, attended routine mental health reviews and was closely monitored.
496. On 29 September 2020, Mr WI was referred for involuntary removal.
497. The UN Working Group on Arbitrary Detention has issued an opinion on Mr WI's continued detention. The Australian Government had failed to make a timely reply to the allegations raised, and so the response that they did make (out of time) was disregarded. The Department informed the Commission that this had been as a result of a communication error, meaning that the response was not submitted within the timeframe, despite the Department's efforts to address the allegation and submit a response in a timely manner. The Department has sought to implement additional steps to address this issue moving forward.
498. This opinion concluded that Mr WI's detention was arbitrary for the following reasons:
- the continued reliance of the Australian Government on domestic legislation to justify the continued detention of multiple complainants was insufficient where that law had consistently been found to breach international human rights law

- the Australian Government had been unable to satisfy the Working Group that there was any other reason for his detention other than the fact that he was seeking asylum and had arrived in Australia without a visa
- no judicial review as to the arbitrariness of his ongoing detention was available through the Australian courts.

Summary of consideration and referrals under ss 195A and 197AB

Date of Departmental consideration	Referred to Minister	Outcome of referral
Information not available	Yes – 23 August 2013 (group submission)	27 August 2013, Minister agreed to consider 30 August 2013, referral finalised
7 March 2018 (195A guidelines)	Yes – 7 March 2018	20 July 2018, Minister declined to intervene
7 August 2018 (197AB guidelines)	No – 3 April 2019 – found not to meet 197AB guidelines	
14 February 2019 Initiated group referral to Minister	Yes – 18 September 2019	26 February 2019 indicated client should be referred for consideration under personal powers 2 December 2019, Minister declined to intervene
11 March 2020	Initiated group referral to Minister	
	28 August 2020	1 September 2020, Minister indicated he was inclined to consider

		25 May 2021, Minister declined to intervene
9 November 2021	No – found not to meet 197AB guidelines	
9 May 2022 – found to meet 195A guidelines and not 197AB guidelines	Yes	25 July 2022, Minister indicated he was inclined to consider 3 August 2022, Minister intervened to grant Bridging E visa for 12 months and s 46A bar lifted to allow Mr WI to apply for a further Bridging E visa

(ii) Findings – Mr WI

499. Unlike the case of Mr WH, the Department did assess Mr WI’s suitability for ministerial intervention, and referred his case to the Minister relatively soon after his return to Australia from Nauru.
500. It is understood from the materials, that this referral was not finalised to second stage because of the interest taken by ASIO into Mr WI and the national security alert on his file.
501. However, there was a marked delay between the negative outcome of this first assessment in August 2013, and the Department’s further assessment in March 2018.
502. The only indication as to why that might have been, are the notes referring to Mr WI being a person of interest and the involvement of an external agency. The period in which Mr WI was identified as being of interest to the external agency until he was no longer a person of interest was approximately 2 years.
503. The Department has stated that a security referral was commenced with respect to Mr WI on 21 April 2017 but that no further information regarding the referral can be provided.
504. Professor Croucher placed significant weight on the fact that Mr WI has few instances of concern regarding his behaviour throughout the entire period of his detention. Those that were raised did not result in any criminal charges.
505. She referred in this respect to the Commission’s report into persons with adverse security assessments detained in immigration detention.¹²³ As was

recommended in that report, temporary avenues to ameliorate any potential security risk while the external agency was conducting its assessment could have been explored for Mr WI.

506. After this initial delay, the Department did refer Mr WI's case to the Minister at regular intervals, apart from on 3 April 2019 and 9 November 2021 when they assessed him as not meeting the guidelines for a residence determination pursuant to s 197AB.
507. The November 2021 consideration against the s 197AB guidelines specifically notes that Mr WI does fall within one of the categories for referral, namely having ongoing illness/es requiring ongoing medical intervention.
508. The submission identifies his vitamin D deficiency, history of torture and trauma and reactive depression/drug seeking behaviour. An IHMS psychiatrist had noted that Mr WI was seeking prescriptive medications as a coping mechanism in response to his prolonged detention. However, the Department concluded that there were no compelling circumstances warranting referral.
509. In light of Mr WI's prolonged detention, serious mental health issues, CPAT assessment outcomes, recommendations made by the Commonwealth Ombudsman, and the lack of any significant behavioural concerns, it was Professor Croucher's view that there were exceptional circumstances in Mr WI's case which warranted the referral of his case to the Minister.
510. Professor Croucher found that the Department's delay and failure to refer Mr WI's case to the Minister for consideration of alternatives to closed detention resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR, as follows:
- the failure of the Department to refer his case to the Minister for attention under s 195A for a period of 5 years between 30 August 2013 and 7 March 2018
 - the failure of the Department to refer his case to the Minister for attention under s 197AB for consideration of community detention at any time.

511. During the period in which Mr WI was of interest to an external agency, the Department's assessments should have contained a risk assessment of whether any risks of harm to the community could have been mitigated by conditions placed on the visa. Alternatively, the Department could have requested ASIO to assess Mr WI's suitability for community-based detention.

(h) Mr WJ

(i) Background

512. Mr WJ was born in Sri Lanka and is 51 years old.

513. On 10 December 2009, he arrived in Australia by sea as a suspected unlawful non-citizen and was immediately detained under s 189(3) of the Migration Act.

514. On 23 November 2021, the Minister intervened under s 197AB to make a residence determination allowing Mr WJ to reside in the community at a specified address. Prior to this, he was detained for over 11 years and 11 months.

515. On 15 July 2010, Mr WJ was found, following an Independent Merits Review, to be a refugee to whom Australia owed protection obligations.

516. Due to his claim of involvement with the LTTE, Mr WJ was interviewed by ASIO on 1 and 2 September 2010. On 18 February 2011, Mr WJ received an adverse permanent visa security assessment from ASIO. The summary of reasons provided to Mr WJ in April 2013 stated that ASIO considered it inconsistent with the requirement of security to grant Mr WJ a protection visa because he was likely to continue to support the LTTE in Australia and would be likely to engage in acts prejudicial to Australia's security.

517. The independent reviewer of security assessments, the late Hon Margaret Stone AO found, on 25 August 2014, that ASIO's assessment was appropriate, and should be reviewed again in 12 months.

518. On 4 August 2015, the Minister lifted the s 46A bar and on 10 October 2015 Mr WJ lodged a TPV application. On 19 October 2015, ASIO again advised the Department that they assessed Mr WJ to be directly or indirectly a risk to security. Due to the adverse security assessment, Mr WJ's visa application was not actively considered.

519. Robert Cornall AO then commenced a further review of Mr WJ's adverse security assessment. On 24 August 2016, he issued a Final Primary Review Report. Contained within this report was a recommendation that the circumstances of Mr WJ's involvement in the LTTE, having been recruited at age 16, and where the LTTE was known to have 'brutally controlled' the area in which he lived, were not sufficient to support the adverse security assessment.
520. On 28 November 2016, ASIO issued a qualified security assessment.¹²⁴ ASIO did not recommend against the grant of a temporary visa, including a bridging visa, for Mr WJ. As a result, the processing of Mr WJ's visa application was progressed.
521. On 24 July 2017, Mr WJ's visa application was refused. Mr WJ was found to be a refugee and to meet the complementary protection criterion, however he was found ineligible for a visa on the basis there were serious reasons for considering Mr WJ had committed war crimes and crimes against humanity.¹²⁵
522. On 27 July 2017, Mr WJ sought review of the visa refusal decision before the Administrative Appeals Tribunal. On 5 April 2019, the Administrative Appeals Tribunal affirmed the refusal decision.
523. On 10 May 2019, Mr WJ sought review of the Administrative Appeals Tribunal decision before the Federal Court. On 30 August 2019, the Federal Court set aside the Administrative Appeals Tribunal's decision and remitted the matter back to the Administrative Appeals Tribunal.
524. On 14 May 2021, the Administrative Appeals Tribunal again affirmed the refusal decision. On 21 December 2021, the Federal Court affirmed the Administrative Appeals Tribunal's decision.
525. The UN Working Group on Arbitrary Detention has issued an opinion in relation to Mr WJ. It found that his detention was arbitrary on several grounds, including:

- the lack of valid legal basis to justify the detention – while the Australian Government has asserted that the detention is lawful and in accordance with the Migration Act, the UN Working Group stated that the treatment of Mr WJ was not compatible with Australia’s international legal obligations
 - the absence of any attempt to ascertain if a less restrictive measure would be suited to his individual circumstances
 - the lack of reasons specific to Mr WJ to justify detention, such as an individualised likelihood of absconding, a danger of crimes against others or a risk of acts against national security
 - the absence of any ability to challenge the legality of such detention.
526. The Working Group recommended the immediate unconditional release of Mr WJ, reparations and an independent investigation into the detention.
527. Throughout his detention, Mr WJ was treated by IHMS and medical specialists for a number of physical and mental health issues related to his ongoing detention including:
- chronic risk of suicide
 - major mood disorder
 - depression, anxiety, adjustment disorder, detention fatigue
 - chronic headache disorder
 - persistent chest pain and breathing difficulties.
528. The Department’s Case Reviews noted Mr WJ had an ‘extended history of mental health concerns given his prolonged detention’.
529. He received torture and trauma counselling and was assessed to be at high risk if an outbreak of COVID-19 occurred in the detention environment.
530. In 2015, Mr WJ was diagnosed with chronic lymphoblastic leukaemia. In March 2021, Mr WJ’s representative advised the Commission that his cancer had progressed and he would likely need chemotherapy in the next 3 to 6 months.
531. Mr WJ’s representative also advised that Mr WJ’s ability to receive cancer treatment has been impacted by his detention placement and he was

ineligible for certain trial treatments due to being in detention. Mr WJ expressed concerns about the need to be placed in isolation as a COVID-19 precaution measure following each treatment and the impact this would have on his mental health.

532. Chemotherapy treatment was commenced in April 2021. In July 2021, Mr WJ was admitted to hospital due to complications related to his chemotherapy. Following this, Mr WJ was noted to be at risk of further complications. In July 2021, the Detainee Health Service Provider (DHSP) clinician advised the Department that Mr WJ's health care needs could no longer be properly cared for in held detention.
533. Throughout Mr WJ's detention, numerous IHMS and treating medical professionals raised concerns with the impact of detention on his physical and mental health and made repeated recommendations for alternatives to closed detention. These included:
- In November 2015, IHMS noted Mr WJ would benefit from being placed in a less restrictive environment.
 - In November 2016, a counsellor at the Victorian Foundation for Survivors of Torture (Foundation House) assessed Mr WJ as suffering from Major Depressive Disorder. The counsellor recommended Mr WJ's release from detention in order to prevent further damage to his mental health.
 - In the Ombudsman's report under s 486O of the Migration Act, tabled in June 2017, the Ombudsman made the following assessment and recommendations:

The Ombudsman notes that the department has assessed Mr [WJ] through its CPAT as being a low risk of harm to the Australian community. Accordingly, the Ombudsman does not consider Mr [WJ]'s current detention placement to be appropriate.

1. In light of Mr [WJ]'s protracted immigration pathway, the significant length of time he has remained in detention, his deteriorating mental health and the department's assessment that he does not pose a risk to the Australian community, the Ombudsman recommends that the Minister urgently consider Mr [WJ]'s case under s 195A and grant him a bridging visa.

... The Ombudsman is further concerned about the marked deterioration in Mr [WJ]'s mental health evidenced in IHMS reports over the seven and a half years he has spent in detention.

...

The Ombudsman notes with serious concern that if Mr [WJ] is not granted a bridging visa, it appears he will either be detained indefinitely, or returned to Sri Lanka in violation of Australia's obligations under international law.

4. The Ombudsman recommends that the department brief the Minister on management options for the cohort of long-term detainees with qualified security assessments, and that the Minister prioritise finding a solution for this cohort that meets Australia's non-refoulement obligations without detaining these individuals indefinitely.

The Ombudsman further considers that the ongoing long-term detention of this cohort of vulnerable individuals in increasingly hardened immigration detention facilities is inappropriate.

5. In the event that the Minister declines to grant Mr [WJ] a bridging visa, the Ombudsman recommends that the department transfer him to a lower security detention placement that is more appropriately tailored to accommodating vulnerable individuals facing prolonged immigration detention, such as a designated alternative place of detention in the community.

- In August 2017, a consultant psychiatrist recommended Mr WJ be transferred into the community because of the significant impact that detention had had on his mental health.
- In April 2018 and November 2018, IHMS reiterated its earlier recommendations and advised Mr WJ's mental health was exacerbated by his detention.
- In response to the IHMS report of April 2018, advising that Mr WJ's mental health condition continued to be exacerbated by remaining in his current detention environment, the Ombudsman's report under s 486O of the Migration Act, tabled in February 2019, stated: 'the Ombudsman is of the opinion that Mr WJ's current placement in an immigration detention facility is inappropriate'.
- In February 2019, a Foundation House (specialist refugee trauma agency) counsellor reiterated her November 2016 recommendation that Mr WJ displayed symptoms of Major Depressive Disorder and that he should be released into the community to prevent further damage to his mental health.

- In July 2019 and August 2019, an IHMS psychiatrist recommended Mr WJ be released into the community on mental health grounds citing the cumulative effects of prolonged detention combined with his leukemia diagnosis were adversely impacting his mental health. This was reiterated again in October 2019 and May 2020.
- In February 2020, the Ombudsman recommended the Department refer Mr WJ's case under s 197AB, noting medical advice and Mr WJ's vulnerability to COVID-19.
- In July 2020, a Foundation House counsellor strongly recommended that Mr WJ be released into the community as soon as possible in order to mitigate the effects of the prolonged detention that has 'so severely and detrimentally affected his mental and physical health'.
- In August 2020, IHMS conducted a Special Needs Health Assessment and confirmed he required health support in the community.
- In the Ombudsman's report under s 486O of the Migration Act, tabled on 27 August 2020, the Ombudsman expressed concern that Mr WJ was likely to remain in immigration detention for a prolonged period while his immigration matters remain ongoing, stating 'this, and the uncertainty of his immigration pathway, poses a significant risk to his health and welfare'.
- The Ombudsman recommended Mr WJ's case be referred to the Minister for consideration of a community placement under s 197AB and stated:

In light of the IHMS medical advice and Mr [WJ]'s vulnerability to COVID-19, the Ombudsman considers Mr [WJ]'s continued placement in an immigration detention facility should be revisited.

- In November 2020, an IHMS counsellor reiterated the recommendation that Mr WJ be released into the community as soon as possible to mitigate the effects of prolonged detention on his health.
- In September 2020, Mr WJ's representative advised that Mr WJ required chemotherapy, which had not yet been provided because of the COVID-19-related requirement to isolate following treatment.

Mr WJ expressed that his mental health would not withstand such isolation.

- In March 2021, Mr WJ's representative conveyed advice from a haematologist in November 2020 that Mr WJ may require treatment soon but he could not be a trial treatment candidate while in detention. A treating haematologist in January 2020 advised Mr WJ would likely need chemotherapy very soon (in the next 3–6 months). Mr WJ commenced chemotherapy treatment in 2021.

534. All CPAT assessments provided to the Commission from 2019 onwards have assessed Mr WJ as being a low risk of harm to the Australian community and recommended Mr WJ be considered for a bridging visa or residential placement in the community.
535. Only a small number of minor behavioural incidents appear on the materials provided by the Department with respect to Mr WJ's time in detention.
536. Due to the non-refoulement obligation found in Mr WJ's case, he has not at any time been assessed for removal to Sri Lanka. The Department's Case Reviews noted under the heading 'Barriers to case resolution and actions taken or being taken to resolve those barriers' that due to ongoing appeal processes, Mr WJ was 'not available for removal' and 'involuntary removal/no travel document'.

Summary of consideration and referrals under ss 195A and 197AB

537. In July 2011, Mr WJ requested the Minister intervene under s 197AB. In December 2011 the Department determined that Mr WJ did not meet the s 197AB referral guidelines due to the adverse security assessment. No written assessment to this effect was made, and the outcome was recorded in Departmental systems only.
538. On 3 January 2012, the Department initiated a request for assessment against the Minister's s 195A guidelines, but due to the adverse security assessment, it was again excluded from consideration.
539. In November 2016, the Department referred Mr WJ's case to the Minister for consideration under s 195A. In January 2017, the submission was returned unactioned by the Minister due to Mr WJ's outstanding TPV application and outstanding character assessment.

540. In February 2018, the Department referred Mr WJ's case to the Minister for consideration under s 195A as a group submission with respect to 3 detainees with qualified security assessments. In April 2018, the Minister declined to exercise his powers to grant a visa.
541. In February 2019, Mr WJ's case was part of a group submission to the Assistant Minister on a number of long-term detention cases. On 26 February 2019, the Assistant Minister indicated that Mr WJ's case should be referred for consideration under the Minister's intervention powers.
542. In April 2019, the Department referred Mr WJ's case to the Minister for consideration under ss 195A and 197AB. In September 2019, the Minister declined to intervene under both powers.
543. On 8 September 2020, a first stage submission in Mr WJ's case was referred to the Minister for consideration under ss 195A and 197AB. The submission was returned for rebadging following a change in Minister. On 7 January 2021 the submission was again referred to the Minister.
544. On 4 March 2021, the submission was returned unsigned from the Minister's Office for further information.
545. In July 2021, Mr WJ's case was found not to meet the Ministerial Intervention guidelines following an assessment initiated by the Department.
546. On 27 August 2021, the Department referred a submission to the Minister under ss 195A and 197AB. On 13 September 2021, the Minister declined to consider Mr WJ's case under s 195A, however indicated that he wished to consider the case under s 197AB. The Minister also requested advice from ASIO as to whether the qualified security assessment would need to be reviewed.
547. In the submission made to the Minister for consideration under s 197AB, it was identified that:
- ASIO advice was received to the effect that no review of the qualified security assessment was required

- Detention Health had been considering placing Mr WJ into a Tier 4, specialised complex care detention placement, but had advised that a community detention placement would be sufficient, provided that Mr WJ's medical needs were met
- as Mr WJ would remain in detention (albeit in the community), IHMS would continue to manage his health needs.

548. On 23 November 2021, the Minister made a residence determination under s 197AB of the Migration Act, requiring Mr WJ to reside at a specified place.

549. The Department identified that Mr WJ was affected by the decision of *NZYQ*, and released him from community detention shortly after the High Court issued its orders in that case. He is now residing in the community on a Bridging (Removal Pending) visa.

(ii) Findings – Mr WJ

550. From the date of his arrival in Australia in December 2009 until 30 November 2016, Mr WJ's case was not considered by the Department under ss 195A or 197AB. On 2 occasions in 2011 and 2012, the Department specifically excluded Mr WJ's case from consideration due to the adverse security assessment made by ASIO.

551. It appears that the first time the Department became aware of Mr WJ's involvement with the LTTE was through his review before the Independent Merits Reviewer in May 2010. The Commission does not have any information before it to indicate the reasons for not referring the case to the Minister before the adverse security assessment of February 2011.

552. ASIO revised this assessment to a qualified security assessment in November 2016, at which time the Department first referred Mr WJ's case to the Minister for consideration under s 195A, after more than 7 years in detention.

553. By the Minister's guidelines, Mr WJ's adverse security assessment meant the Minister would not expect his case to be referred to him:

- from February 2014, under s 197AB
- from April 2016, under s 195A

unless there were 'exceptional reasons'.

554. Those guidelines provide that the Minister would expect a case to be referred to him for consideration of those powers where:
- a person has an ongoing illness, including mental health illness, requiring ongoing intervention or has individual needs that cannot be properly cared for in detention, or
 - there are 'unique or exceptional' or 'compelling or compassionate' circumstances.
555. Professor Croucher also noted that, under the 2012 Guidelines for s 195A, which were in place until 28 April 2016, the criteria for referral of a case to the Minister included a person with well-founded non-refoulement and complementary protection claims but was ineligible for grant of a protection visa under ss 5H(2)(a) and 36(2C)(a)(i) of the Migration Act (serious reasons for the commission of war crimes and crimes against humanity). Mr WJ clearly fell within this criterion.
556. The Department was well aware of Mr WJ's significant physical and mental health issues. Medical professionals regularly conveyed their health concerns including chronic risk of suicide. Together with Mr WJ's cancer diagnosis, he clearly met the criteria of a person with ongoing illnesses that required not only ongoing intervention but were exacerbated by his prolonged detention.
557. Professor Croucher was also concerned by the significant length of Mr WJ's detention without adequate consideration of alternatives to detention. The length of time in detention is particularly important in Mr WJ's case because, for the first 5 and a half years of his detention, he was not permitted to make an application for a protection visa. There were no further steps he could take to bring his detention to an end and no steps were being taken by the Commonwealth to progress an assessment of his protection claims. This was compounded by the fact his TPV application, lodged in October 2015, was not actively assessed until more than 12 months later when the adverse security assessment was revised in November 2016.
558. Professor Croucher considered that the Department may not have actively considered referral during this period due to the Australian Government's longstanding policy that individuals with an ASIO adverse security

assessment should remain in held detention, rather than live in the community, until such time as resettlement in a third country or removal is practicable.

559. Notwithstanding this policy, it was her view that the Department should have referred Mr WJ's case to the Minister prior to November 2016 based on the following new and substantive issues warranting referral and the Minister's reconsideration:
- his refugee status determination in July 2010
 - his cancer diagnosis in 2015
 - IHMS' assessment in at least November 2015 that he would benefit from being placed in a less restrictive environment
 - medical evidence of the significant harm to his health due to the prolonged detention including IHMS assessment in at least April 2015 that he was at chronic risk of suicide.
560. Viewed cumulatively, Professor Croucher considered the above factors should have also clearly established 'exceptional reasons' and would have met the criteria of 'unique or exceptional' and 'compelling or compassionate' circumstances warranting referral. She noted that Mr WJ met the criteria for referral under the 2012 Guidelines for s 195A as a person with well-founded non-refoulement claims but was ineligible for grant of a protection visa under ss 5H(2)(a) and 36(2C)(a)(i) of the Migration Act.
561. While the scope of this inquiry is to assess the arbitrariness of Mr WJ's detention, it is noted that for a significant period of time, Mr WJ was detained while there were no real prospects of his removal from Australia becoming practicable in the reasonably foreseeable future.¹²⁶ Applying the test as set by the High Court in *NZYQ*, it may be that his detention became unlawful once this was known to the Department.
562. In light of the Department's concerns about Mr WJ's adverse security assessment, the referral could have contained a risk assessment of whether any risks of harm to the community could have been mitigated by conditions placed on a community detention placement. Alternatively, the Department could have asked ASIO to assess Mr WJ's suitability for community-based detention or asked ASIO to consider whether any risk Mr WJ might pose to the community could be mitigated during the period the adverse security assessment was in effect (February 2011 to

November 2016). The Commission has made recommendations to the Department to this effect in previous reports.¹²⁷

563. Professor Croucher found that the Department's delay and failure to refer Mr WJ's case to the Minister for consideration of alternatives to closed detention resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR:

- a) the failure of the Department to refer Mr WJ's case under the s 195A guidelines until approximately 30 November 2016
- b) the failure of the Department to refer Mr WJ's case under the s 197AB guidelines until 8 April 2019.

564. It was Professor Croucher's view that these acts or omissions by the Department likely contributed to the extraordinarily long period of detention of Mr WJ without consideration of whether that detention was justified in the particular circumstances of his case, and resulted in his detention becoming arbitrary, contrary to article 9(1) of the ICCPR.

(i) Mr Pjetri

565. Mr Pjetri lodged a complaint with the Commission alleging breaches of articles 7, 9 and 10 of the ICCPR against IHMS and the Department.

566. On 6 April 2021, the complaint against IHMS was finalised under s 20(2)(b) of the AHRC Act on the ground that the delegate was satisfied that Mr Pjetri did not want the Commission to inquire into this act or practice.

567. For the purpose of this thematic inquiry into arbitrary detention, the Commission has focused only on his complaint under article 9 of the ICCPR, and a supplementary report will be issued with respect to Mr Pjetri's complaint under articles 7 and 10 of the ICCPR, which relate to an incident on 8 November 2019 and the deterioration in his health arising from his prolonged detention.¹²⁸

(i) Background

568. Mr Mirand Pjetri was born in Albania and is 35 years old.

569. On 16 September 2013, he arrived in Australia by sea as a suspected unlawful non-citizen and was immediately detained under s 189(1) of the Migration Act.
570. On 21 September 2021, Mr Pjetri was removed from Australia. He was detained for 8 years.
571. Mr Pjetri was initially screened out of the protection process on 4 March 2014, but screened in on 16 December 2014.
572. On 29 September 2015, the Minister lifted the s 46A bar and in November 2015 the Department invited Mr Pjetri to lodge a visa application. On 6 May 2016 Mr Pjetri applied for a SHEV which was refused on 26 September 2016.
573. Appeals by Mr Pjetri of the SHEV decision were unsuccessful before the IAA (2 December 2016), the then Federal Circuit Court (10 November 2017), and the Full Court of the Federal Court (7 December 2018). Mr Pjetri's special leave application was not granted by the High Court on 17 April 2019. Mr Pjetri sought to apply for a further protection visa in May 2019, however he was barred on the basis his previous visa application was refused.¹²⁹
574. In September 2013, the Department received information alleging Mr Pjetri had committed an offence offshore and was the subject of an Interpol Red Notice. The Red Notice was withdrawn the next day.
575. In October 2013, Mr Pjetri was convicted in absentia by the Belgian authorities for criminal offences involving aggravated theft and criminal conspiracy and was sentenced to 2 years imprisonment.
576. In February 2015, the Department was advised that Mr Pjetri did not face outstanding charges for the alleged offshore offences. The reason for this appears to be that the statute of limitations for his sentence had been reached.
577. On 23 April 2019, Mr Pjetri was referred for involuntary removal from Australia. The Department advised that Mr Pjetri held an Albanian passport which expired on 25 December 2022.
578. There were a number of attempts to remove Mr Pjetri from Australia. On 2 occasions, on 10 July and 24 September 2019, IMHS assessed Mr Pjetri as medically unfit to travel. He was deemed fit to travel on 18 October 2019. A removal attempt was aborted in November 2019 due to Mr Pjetri's

behaviour during the attempt. The Department also advised that travel restrictions owing to the COVID-19 pandemic contributed to delays to his removal.

579. On 7 September 2020, Mr Pjetri submitted a complaint to the UNHRC for consideration under the Optional Protocol to the ICCPR. On 9 September 2020, the Committee requested Australia undertake several interim measures while the Committee considered the complaint including:

- reassess the justification for removal in light of the condition of the author (Mr Pjetri), the information provided in the communication and international human rights standards
- assess the conditions of his detention and the need for continuing detention until a final decision about the author's status is taken
- provide the author with clarifications about current plans concerning his removal.

580. In May 2021, the UN Working Group on Arbitrary Detention issued an opinion concerning Mr Pjetri.¹³⁰ It found that the detention of Mr Pjetri was arbitrary on several grounds including:

- his de facto indefinite detention without any indication of the length of his detention
- the absence of any judicial assessment of the legality of his detention
- the lack of any effective remedy to challenge the legality of his detention.

581. The Working Group recommended the immediate release of Mr Pjetri, providing an enforceable right to reparations and conducting an independent investigation into the detention.

582. Throughout his detention, Mr Pjetri received medical treatment including by IHMS for a number of physical and mental health issues related to his ongoing detention including self-harm, suicide attempt (2013), anxiety, suicidal ideation (2014), food and fluid refusal for at least 200 days (as at July 2020), history of torture and trauma, major depressive disorder, post-traumatic stress disorder, insomnia, adjustment disorder, chronic

traumatic stress disorder and infected kidney stones requiring hospitalisation.

583. Mr Pjetri was frequently seen by psychologists and mental health nurses throughout his detention. He was admitted to The Melbourne Clinic for mental health treatment on several occasions.

584. In June 2020, a NSW hospital psychiatry registrar made the following assessment:

Mirand is not acutely mental ill ... His low mood, sense of hopelessness and anxiety is entirely congruent with his long and traumatic detention for 7 years in various centres ... Admission to hospital is unlikely to be of any benefit, and may lead to further traumatisation by once again depriving Mirand of his civil liberties.

585. In the same month Mr Pjetri was diagnosed with severe major depressive illness and a mild neurocognitive disorder due to severe malnutrition.

586. In July 2020 IHMS reported Mr Pjetri was severely emaciated, cachexic (muscle wasting) and his health risks included organ failure, hypoglycaemic coma and death, sudden cardiac risk, prolonged and severe gastritis, and possible acute abdominal infection. He was again found unfit to travel on 17 July 2020.

587. In August 2020, IHMS reported Mr Pjetri was at a critical stage of his food and fluid refusal and was at risk of death. The IHMS medical director stated:

IHMS does not make decisions regarding the placement and Visa status for people in immigration detention.

IHMS holds serious concerns for the health and wellbeing of Mr Pjetri noting his critical state.

588. In October 2020, a public guardian was appointed for Mr Pjetri for 6 months. In the same month Mr Pjetri underwent psychiatric review and a medical assessment at Liverpool Hospital and he was deemed to not be in immediate danger of death.

589. In November 2020, a IHMS psychiatrist opined that Mr Pjetri did not present with severe depression, was not substantially cognitively impaired, and had capacity to make decisions.

590. In relation to food and fluid refusal, the Department has advised the following:

engaging in food and/or fluid refusal will not positively or adversely affect the decision-making processes: a detainee's immigration case will not cease being progressed nor will it be expedited.

The Department has assessed Mr Pjetri of being at risk if COVID-19 occurred in the detention environment.

On several occasions Mr Pjetri has declined hospital admission on the basis any such placements still constituted a deprivation of his liberty. He has offered to accept hospital admission and finalise his complaint against the Department if he is released into the community following completion of medical treatment.

591. From 2016 to 2020, the Ombudsman made the following assessments and recommendations concerning Mr Pjetri:

- concern with the serious risk to mental and physical health prolonged detention may pose (reports tabled 29 April 2016 and 21 February 2019)
- recommendation that consideration be given to granting a bridging visa while Mr Pjetri awaits resolution of his immigration status given the significant length of time he has remained in detention (reports tabled 29 April 2016 and 21 February 2019)
- noting the significant length of time Mr Pjetri has remained in detention and medical advice that his health concerns are likely to be adversely affected by continued immigration detention, recommended consideration of a community placement (report tabled 26 October 2020).

592. In response to Mr Pjetri's health issues, the Ombudsman and health professionals made numerous recommendations for Mr Pjetri's release from detention including:

- August 2015 – IHMS recommended a less restrictive detention environment
- April 2016 – Ombudsman recommended consideration of a bridging visa
- February 2019 – Ombudsman recommended consideration of a bridging visa

- September 2019 – treating psychiatrist advised that a return to detention would be damaging to Mr Pjetri’s recovery and recommended his transfer to a less restrictive place, such as community detention, instead of an ongoing stay at the detention centre
- October 2020 – Ombudsman recommended consideration of a bridging visa or community placement.

593. Throughout his detention, Mr Pjetri was held in low-security facilities. His detention record reflects his good character and no serious incidents of concern.

594. The most recent CPAT assessment before me, conducted on 14 September 2021, indicates that Mr Pjetri remained on a Tier 1 – Residence Determination recommendation up until the time of his removal from Australia.

595. On 6 September 2021, Mr Pjetri was deemed fit to travel with a medical practitioner and on a charter flight. He was removed on 21 September 2021.

Summary of consideration and referrals of under ss 195A and 197AB

Date of Departmental consideration	Referred to Minister	Outcome
30 November 2015 (s 195A)	No – 4 February 2016	
21 March 2017 (s 195A)	No – 23 March 2017	
3 January 2018 (s 195A)	No – 17 January 2018	
26 July 2018 (s 195A)	Guidelines met – 17 August 2018 8 October 2018 – referred to Minister	Minister declined to consider intervening – 27 March 2019

2 May 2019 (ss 48B and 195A) (requested by Mr Pjetri)	No – 7 May 2019	
3 September 2019 (s 195A)	No – 6 September 2019	
28 May 2020 (s 195A and 197AB)	197AB Guidelines met – 13 April 2021 (195A Guidelines not met) 27 September 2021 – finalised as not referred due to removal from Australia	

596. Mr Pjetri asserts that he was told that the existence of an Interpol Red Notice was a significant factor as to why he had not been referred for consideration. On review of the documents before the Commission, it was one factor considered, but it does not appear to have been given greater weight than other factors, such as the assessment that he did not engage Australia’s protection obligations, his ongoing review processes, and the Department’s perception that he had no significant health issues (prior to 2019). Based on the information outlined above, this last factor was, in Professor Croucher’s view, misguided.

597. Once Mr Pjetri had exhausted his review processes, it appears that the factor weighing most heavily against him was his unwillingness to depart Australia voluntarily.

598. In February 2020, Mr Pjetri was informed that the Department was no longer considering release from detention because he had been referred for removal.

(ii) Findings - Mr Pjetri

599. The first time the Department assessed Mr Pjetri’s case for Ministerial Intervention under s 195A was in November 2015, after almost 2 years in detention. He was found not to meet the guidelines for referral on 4 February 2016. No sufficient justification has been given for the delay in

considering Mr Pjetri's case, although it seems likely that his initial screening-out of the protection visa process may have given rise to an initial period of delay, and the investigations regarding the Interpol Red Notice. This is despite the fact that the Red Notice was withdrawn the day after the Department was notified of its existence. The Department responded to Professor Croucher's preliminary view on this subject by confirming that based on the information contained within the Interpol Red Notice, his status resolution officer did not refer his case for consideration under s 195A or s 197AB at that time.

600. Over the following 2 and a half years, Mr Pjetri's case was found by the Department not to meet the s 195A guidelines on 3 occasions: 21 March 2017, 3 January 2018 and 26 July 2018. By the time his case was referred to the Minister under s 195A in October 2018, Mr Pjetri had been detained for over 5 years. Following this, Mr Pjetri's case was found by the Department not to meet the s 195A guidelines in May and September 2019.
601. The Department only referred Mr Pjetri's case to the Minister for consideration of the exercise of his intervention powers once (October 2018) in the 8 years he was in held immigration detention, and this referral took place after Mr Pjetri had been detained for 5 years.
602. In July 2018, after almost 5 years in detention, Mr Pjetri was found not to meet the s 195A guidelines for referral because of ongoing judicial appeal matters. In Professor Croucher's view, the exercise of Mr Pjetri's rights of appeal should not have prejudiced the duty to consider less restrictive forms of detention.
603. In September 2019, Mr Pjetri was found not to meet the s 195A guidelines for referral because he was on a removal pathway. However, Mr Pjetri was assessed as medically unfit to travel on at least 2 occasions during this period. Further, a psychiatrist assessed that a return to detention would damage his recovery. His ongoing detention had clearly impacted his health and was in turn, impeding his removal. It was unclear when removal could take place, prolonging his detention and increasing the risk of indefinite detention. Under the s 195A guidelines, removal that is not reasonably practicable also warranted referral to the Minister.
604. In Professor Croucher's view, the decision to place Mr Pjetri on a removal pathway should not have been used as a basis not to consider alternatives to detention particularly where removal did not take place within 3

months and would not be considered 'imminent' as specified in the 2009 Guidelines (s 195A), 2014 Guidelines (s 197AB), 2015 Guidelines (s 197AB), and the timeframe was uncertain given his serious health issues.

605. His final CPAT assessment indicated that he 'engages with SRO [Status Resolution Officer] well and attends most appointments'. Professor Croucher acknowledged the failed removal attempt, which resulted from Mr Pjetri's own disruptive behaviour, but this occurred in November 2019, and so does not justify his detention prior, nor the subsequent 2 years in which he remained detained throughout the COVID-19 pandemic, when removal could not occur imminently.
606. It appears that the refusal to refer Mr Pjetri's case to the Minister initially was on the basis of the disputed Interpol Red Notice. The Commission was not in the position to assess the veracity of the matters alleged in the Interpol Notice.
607. It is also possible that the initial delay was on the basis that Mr Pjetri had been 'screened-out' of the protection visa processing system. The Commission has previously expressed concern about the use of this process,¹³¹ and Professor Croucher did not consider it provided any justification for detention.
608. The Department was also well aware of Mr Pjetri's significant and ongoing physical and mental health issues related to his ongoing detention. Notably in August 2015 IHMS recommended a less restrictive detention environment. In at least April 2016 and February 2019, the Ombudsman expressed concern with the impact of prolonged detention on Mr Pjetri's mental and physical health. From at least July to September 2019 IHMS assessed Mr Pjetri as medically unfit to travel.
609. It was Professor Croucher's view that there was scope for Mr Pjetri's case to fall within the guidelines for referral to the Minister to consider exercising his powers under ss 195A and/or 197AB for the following reasons:
- his significant length of detention (8 years as at September 2021)
 - absence of any information to indicate that he posed a risk to the community

- the IHMS assessment in at least November 2015 that he would benefit from being placed in a less restrictive environment
- disclosed history of torture and trauma
- significant health issues related to the ongoing detention
- the likelihood that his removal was not imminent and the risk of indefinite detention.

610. In particular, the length of time in detention is particularly important in Mr Pjetri's case, because for the first 2 years of his detention, he was not permitted to make an application for a protection visa. His length of detention was also prolonged by Mr Pjetri's removal status, which may have caused the Department to not consider alternatives to detention when it was known that his removal was likely to be protracted.

611. It is also unclear why the Department did not consider a referral under s 197AB until May 2020, after more than 6 years in detention. It is noted, for example, that under the 2012 Guidelines (s 195A), there is scope for the Department to provide a joint submission regarding any other Ministerial Intervention Powers and under the 2016 Guidelines the Minister states that any referral under s 195A 'should not prejudice referral of a case under any of my other Ministerial intervention powers'.

612. While the Department may have held security concerns related to the disputed Interpol Red Notice, it does not appear that any assessment was undertaken to enable Mr Pjetri to reside in the community or in a less restrictive form of detention, with appropriate conditions imposed, if necessary, to mitigate any identified risks.

613. Professor Croucher found that the Department's delays in assessing, and failure to refer, Mr Pjetri's case to the Minister to consider alternatives to closed detention save for on one occasion after 5 years in held detention resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR.

8.2 Act: The decision of the Minister not to consider exercising the discretionary powers under ss 195A or 197AB of the Migration Act.

614. Those complainants that the Department did refer to the Minister pursuant to s 195A and/or s 197AB on multiple occasions, experienced

respective Ministers declining to consider exercising their discretionary powers.

615. Professor Croucher considered these acts and practices separately in order to highlight the effect that ministerial intervention powers have on detainees in that, for each of them, their only pathway for ending their protracted detention, was through the use of these discretionary powers.
616. As is highlighted in each of the below case studies, the Ministers' decisions do not contain reasons, and are generally recorded only by way of the Minister indicating on a prepared submission whether they agree to consider the case. This might be through circling the relevant words (consider/not consider), or by striking through a detainee's name (to indicate that they declined to consider).
617. No merits review of the Ministers' decisions is available. Attempts to judicially review similar discretionary powers have been unsuccessful, with the High Court confirming that the Minister is under no duty to consider the exercise of the discretion, and that the valid exercise of the power does not require procedural fairness to be afforded.¹³²

(a) Mr WA

618. Professor Croucher formed the following view, drawing on the background set out above at section 8.1(a) in relation to Mr WA, which is not repeated here.
619. In December 2013, February 2017 and February 2019, the Department sent submissions to the Minister, requesting the Minister to indicate whether he was inclined to consider intervention under s 195A with regard to Mr WA. The Ministers declined to consider exercising their powers on each occasion.
620. In its December 2013 submission, the Department noted that, as a refugee, it was not possible to remove Mr WA without breaching Australia's international obligations. It was noted that granting a temporary visa would provide Mr WA with the opportunity to 'demonstrate his willingness and ability to adhere to Australian laws'.

621. In February 2017, the Department sent a submission to the Minister, requesting the Minister to indicate whether he was inclined to consider intervention under s 195A with regard to Mr WA (and 6 other detainees).
622. In its submission the Department stated Mr WA (and the other detainees) were being referred to the Minister due to:
- the length of time the detainees have spent in immigration detention
 - being assessed as low risk of harm to the community through the CPAT
 - that they are unable to be removed from Australia at this time
 - that they are unwilling to voluntarily depart.
623. Under the heading 'Key Issues', the Department stated that all IMAs (irregular maritime arrivals) have
- either been involved in incidents whilst in immigration detention or have been subject to alleged or actual criminal charges. These IMAs are no longer of interest to relevant authorities and have not been involved in major incidents of concern for a period of three or more months whilst in detention.
624. It was also noted that Mr WA had no known health or welfare concerns that would prevent him from being placed in the community.
625. Under the heading 'Behaviour in Detention', it was noted that Mr WA
- has been involved in several incidents of minor aggression towards detention staff and other detainees whilst in immigration detention. All incidents have been resolved and did not require police involvement.
626. The February 2019 submission put to the Minister encompassed a summary of 88 detainees all being put forward for consideration. None of Mr WA's individual circumstances were identified in the submission. It was noted that all of the detainees had been detained for more than 5 years.
627. The submission identified that the cost of managing an individual in held detention is estimated to be \$360,000 per annum, as opposed to a cost of \$10,250 to manage the cost of a person in the community on a Bridging visa.

628. Mr WA was grouped in the submission under the heading of *Detainees who have no ongoing processes and removal is not currently practicable*. The Department identified generally that,

Notwithstanding that some of these detainees present community protection risk factors, their ongoing detention is considered intractable and may be the subject of criticism by the courts or external scrutiny bodies.

629. In the list of names, the words 'not consider' were circled next to that of Mr WA.

630. As noted above at paragraph 243, this advice to the Minister about Mr WA's removal prospects may also give rise to a finding that Mr WA's detention had become unlawful.

631. A further submission was put forward to the Minister on 25 November 2022 following the Department's positive assessment of Mr WA's suitability in February 2022 and August 2022, but the Commission did not have that document as part of its inquiry.

632. The Ministers were not required to give reasons for their decision not to consider the exercise of their discretion under s 195A. Their decisions in each case were recorded by circling the words 'not consider'.

633. Professor Croucher acknowledged that Mr WA was convicted with indecent assault in September 2012 and received a \$2,000 fine and no sentence of imprisonment. She also acknowledged that Mr WA has been involved in several behavioural incidents in the 11 and a half years he has spent in held detention and all CPAT assessments since 2017 recommended a held detention placement. The issue before her was whether his detention in an immigration detention facility was arbitrary. It was Professor Croucher's view that the following factors weighed in favour of Mr WA's case being considered by the Minister for the grant of a visa or a less restrictive form of detention sooner than February 2023:

- extraordinary length of detention (over 11 years)
- change of situation in home country of Afghanistan
- limited prospects of removal

- high risk of indefinite detention
- history of torture and trauma
- mental health concerns related to the ongoing detention.

634. In light of the above, Professor Croucher found that the detention of Mr WA in closed detention facilities cannot 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. Professor Croucher found that the Ministers' decisions not to consider exercising their discretionary powers under s 195A, resulted in his prolonged and continued detention without an individual assessment of his circumstances becoming arbitrary, contrary to article 9(1) of the ICCPR.
635. Professor Croucher considered it likely on the material before the Commission that the Ministers considered that Mr WA presented some risk to the community. If the Ministers considered the matter and had concerns about Mr WA posing a risk to the community, they could have asked the Department to conduct a risk assessment to consider whether any risks could be mitigated. In particular, the risk assessment could have assessed the nature and seriousness of Mr WA's offending in 2011 in relation to any risk he posed to the community almost 12 years later.

(b) Mr WB

636. Professor Croucher formed the following view, drawing on the background set out above at section 8.1(b) in relation to Mr WB.
637. On 11 May 2016, 13 February 2017, 23 October 2018 and 24 July 2019, the Department requested the Ministers to indicate whether they would consider intervention under s 195A with regard to Mr WB. The Ministers declined to consider exercising their powers on each occasion.
638. On each occasion, the Department recommended that the Minister intervene. It was recommended that the Minister also grant a Humanitarian Stay (Temporary) visa (subclass 449) which would then empower the Department to grant further Bridging E visas without the need for ministerial intervention on subsequent occasions.
639. The Department identified that Mr WB would be required to sign a Code of Behaviour in order to receive the grant of the bridging visa, and that any breach of the code would result in the ability to cancel it.

640. The May 2016 submission contains the following recommendation:

The Department has undertaken to examine each case in detail and progress the resolution of their immigration status. Given the length of time each detainee has remained in immigration detention, their largely good behaviour, and that there is presently no evidence to substantiate the allegations, the Department recommends that you consider each detainee for the grant of a BVE under s 195A.

641. The May 2019 submission noted the following in relation to Mr WB's case:

- he had remained in immigration detention for more than 5 years
- he was considered a low-risk to the Australian community
- CPAT considered these detainees to be low risk and recommended a 'Tier 1 – Bridging visa with conditions' placement. The Department noted that the CPAT considered removal readiness, risk to the community and engagement with the status resolution process.
- he had ongoing merits review
- there was no information before Department to suggest he was a risk to national security or of interest to ASIO
- while in detention he was involved in 8 incidents namely contraband, minor disturbance and onsite demonstration. His last incident occurred in November 2018.

642. In its submission, the Department requested the Minister strike through the name of each detainee that 'you do not wish to exercise your power under s 195A'. The Minister signed the submission on 24 July 2019 and Mr WB's name was not struck out, however the Department confirmed that the Minister did not wish to intervene in Mr WB's case. Mr WB sought a declaration from the Federal Court that his detention was not authorised on the basis that by signing the declaration, he should have been released from detention. That application was dismissed on 8 July 2022.

643. In May 2016, Mr WB was prescribed with medication to treat his mental health issues. In April 2019 IHMS reported that he had chronic stress.

644. It is also noted that Mr WB has no known health or welfare concerns that would prevent him from being placed in the community.

645. The Ministers were not required to give reasons, and reasons were not provided, for their decision not to consider the exercise of their discretion under s 195A. Their decisions in each case were recorded by circling the words 'not consider' or otherwise indicating in the returned signed submissions that they did not seek to intervene in Mr WB's case.
646. It was Professor Croucher's view that the following factors weighed in favour of Mr WB's case being considered by the Minister on the 4 occasions during the period from May 2016 to July 2019 that the Department put his case to the Minister and recommended that the Minister intervene:
- extraordinary length of detention (over 6 years as at July 2019)
 - history of torture and trauma
 - mental health concerns related to the ongoing detention
 - absence of any risk to national security or to the community
 - CPAT assessments recommended a 'Tier 1 – Bridging visa with conditions' placement
 - the difficulties in obtaining travel document and pursuing a removal pathway.
647. This view is further enhanced by the fact that Mr WB was in fact granted a Bridging E visa in November 2022, after 10 years in held detention. On the basis of the material before the Commission, it does not appear that this change of position by the Minister was due to any material change in circumstances in Mr WB's case, but rather from a change of Minister.
648. In light of the above, it was Professor Croucher's view that Mr WB's detention for 10 years cannot 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. Professor Croucher found that the Ministers' decisions not to consider exercising their discretionary powers under s 195A on 10 May 2016, 13 February 2017, 23 October 2018, 24 July 2019 and 11 October 2021, resulted in his prolonged and continued detention becoming arbitrary, contrary to article 9(1) of the ICCPR.
649. It is pleasing that Mr WB's protracted detention has been resolved through the grant of a Bridging E visa, but its limited duration of 6 months is noted. Given Mr WB cannot make an application for a visa himself, he is reliant on

the Minister to intervene again in his favour for further bridging visas, or he risks becoming unlawful in the community or being re-detained. This position may have changed since the initial visa was granted, but no additional information about it has been provided to the Commission.

(c) Mr WC

(i) Background

650. Mr WC was born in Bangladesh and is 48 years old.

651. On 12 November 2012, Mr WC arrived in Darwin by sea via Ashmore Reef as a suspected 'unlawful non-citizen' and was immediately detained under s 189(3) of the Migration Act.

652. He remained in detention from his arrival date until 11 November 2022, when he was released into the community on a Bridging E visa of 6 months' duration. His detention lasted for 10 years.

653. Shortly after his arrival in Australia, Mr WC advised an officer of the Department that he had been found guilty of 2 counts of murder in Bangladesh and had spent 10 years in prison. He retracted this claim in 2014, indicating that he had fabricated it based on advice provided to him by people smugglers.

654. On 13 August 2015, the Minister lifted the s 46A bar and on 16 October 2015, Mr WC lodged an application for a SHEV.

655. In a submission put to the Minister to intervene to grant Mr WC a Bridging visa dated 27 January 2016, it was noted that Mr WC was one of 8 detainees who had retracted claims of criminal activity in Bangladesh, and all of whom had remained in detention since their arrival. The submission states:

The allegations have not been substantiated as offshore checks are limited due to the outstanding assessment of protection claims. The Department has conducted Interpol and Five Country Conference checks for each detainee with no matches found. While the detainees all have alerts on the Central Movement Alert List as a result of the allegations, departmental systems do not indicate any security concerns in these cases.

...

Given the length of time each has remained in immigration detention, the circumstances to the allegations being made, there being no evidence from the checking the Department has been able to conduct to substantiate the allegation and their largely good behaviour while in detention, the Department recommends you consider each detainee for the grant of a BVE under s195A.

656. His application for a SHEV was refused on 11 July 2016 and his case referred to the IAA, which affirmed that decision on 22 September 2016.
657. A note made on the Department's report into Mr WC's detention as at 10 November 2016 was made to the effect that no security assessment into Mr WC had been requested due to the refusal of his claims for protection.
658. Six minor behavioural incidents are recorded on the Department's file, with the last occurring on 8 July 2016. These included his involvement in a protest, minor disturbance and contraband.
659. IHMS at this time reported to the Department that Mr WC suffered from situational distress as a result of his prolonged detention, and that he had disclosed a torture and trauma background but declined treatment.
660. He applied for judicial review of the IAA's decision, and on 11 July 2018, the Federal Circuit Court quashed the IAA's decision because Mr WC was not a 'fast-track review applicant' due to his arrival in Australia at Ashmore Reef (as a result of the *DBB16* decision).
661. Mr WC was then eligible to apply for review of his SHEV decision through the Administrative Appeals Tribunal, which he did on 17 August 2017, and again on 8 April 2019.
662. The Administrative Appeals Tribunal affirmed the decision to refuse Mr WC's SHEV application on 13 May 2020 (and found it had no jurisdiction to determine the second application made).
663. The Department referred Mr WC for involuntary removal on 1 July 2020.
664. Following Mr WC's complaint to the Commission, the Department included with its response 12 months of case reviews, between September 2019 and September 2020.
665. On each case review, it is recorded that Mr WC's placement in held detention was 'inconsistent with current CPAT recommendation of Tier 1 – Bridging visa with conditions [1.2]'.

666. The last of these case reviews contains the following notes:

Mr [WC] has not received any notices or decisions that have or will impact on his immigration status; therefore, his detention has not been affected by case law. There is nothing to indicate that Mr [WC] has particular vulnerabilities. There is nothing to indicate that this case will receive, or has received, potential media attention. Based on the available information, evidence indicates that Mr [WC] remains an unlawful non-citizen. As a result, reasonable suspicion is maintained and his ongoing detention is lawful; therefore, a referral to the Detention Review Manager (DRM) is not required.

667. Recommendations were made by the Commonwealth Ombudsman in 2019 and 2020 that the Minister be referred Mr WC's case for consideration pursuant to the Minister's personal intervention powers to grant him a Bridging visa.

668. In both s 486O reports, the Ombudsman noted the effect that long-term detention was having on Mr WC, which extended to detention fatigue, anxiety, and suicidal ideation.

669. In response to the 2020 s 486O report, the Minister responded:

In line with recent guidance from the Assistant Minister for Customs, Community Safety and Multicultural Affairs, the Department decided not to refer this case for Ministerial Intervention at this time. This person's circumstances have not significantly changed since the Minister last considered their case and decided not to intervene to grant them a bridging visa under s 195A of the Act.

670. With respect to removal efforts, Mr WC's case reviews note that barriers to removal existed, namely the lack of a travel document. The final case review provided by the Department to the Commission indicated that a travel document would take more than 6 months to obtain.

671. A December 2016 submission to the Minister noted that,

if the detainees become available for removal (voluntary or involuntary), time frames for the issuance of a travel document by the Bangladesh High Commission is often significantly protracted due to the process employed by Bangladesh to verify an individual's identity. Bangladeshi authorities will not provide a timeframe for resolution of travel document applications that are newly submitted, or that remain outstanding.

672. This issue was further expanded upon in a submission to the Minister in October 2022. It states:

The Department had previously submitted travel document (TD) applications on these individuals' behalf without their signature to the Bangladesh High Commission. However, on 23 June 2022, the Bangladesh High Commission advised they will not issue TDs unless the applicant completes and signs a new Machine Readable Passport Application Form. As these [redacted] have continued to refuse to cooperate with removal process, the Department will not be able to submit TD applications with their signatures to the Bangladesh High Commission. As such, these five individuals' involuntary removal remains protracted.

Summary of consideration and referrals under ss 195A and 197AB

673. The Department has assessed Mr WC against the s 195A guidelines on 8 occasions, resulting in 7 referrals to the Minister as summarised in the table below.

Referred to Minister	Outcome of referral
Yes – 16 January 2013 – group submission prepared No – 18 January 2013 – not referred to Minister due to allegations of overseas convictions	
27 January 2015	Minister declined to intervene on 2 March 2016
20 December 2016	Minister declined to intervene on 13 February 2017
6 February 2018	Minister declined to intervene on 1 March 2018
24 September 2018	Minister declined to intervene on 23 October 2018
14 February 2019 (group submission)	26 February 2019, Minister Reynolds indicated he should be referred for consideration. 9 May 2019, group submission was made 13 June 2019, submission returned from Minister's office with request for further information 26 July 2019, submission returned to Minister 6 September 2019, Minister requested Mr WC be removed from the submission without explanation

16 October 2020 (group submission)	Minister declined to intervene on 11 October 2021
6 October 2022 (group submission)	17 October 2022, Minister indicated he should be referred for consideration 10 November 2022, Minister intervened pursuant to s 195A

674. The October 2020 submission to the Minister explained that

The grant of an FDBVE [Final Departure Bridging Visa E] would not provide these IMAs with an onshore visa pathway. If granted an FDBVE, the Department would continue to engage with these IMAs with respect to departure expectations. Should their removal become a viable option, they could be re-detained for removal purposes once their FDVBES cease. These IMAs would be given permission to work, to enable them to support themselves in the community. Only IMAs who arrived at an excised offshore place may have access to Medicare.

675. Similarly, the October 2022 submission highlighted that any future Bridging E visa for Mr WC could only be granted by way of ministerial intervention, allowing for his compliance with any departure-related conditions to be considered as part of a subsequent submission.

676. Recommendations about conditions to be imposed also appear in the submission, including conditions to promote engagement, conduct related conditions and departure related conditions.

(ii) Finding – Mr WC

677. It appeared to the Commission that the initial assessment of Mr WC with respect to the appropriateness of referring him for the grant of a Bridging E visa was marred by his claim to have been convicted of murder in Bangladesh.

678. It is difficult to find fault on the part of the Department at that time, particularly given they did in fact consider referring his case for assessment to the Minister in January 2013, 2 months after his arrival. As outlined above at paragraph 175, an initial period of detention may be warranted for the purpose of conducting necessary checks, including with respect to criminal convictions.

679. In reaching this view, Professor Croucher was guided by the Commission's previous findings with respect to other detainees within the same cohort of people.¹³³
680. She noted, however, that Mr WC was one of a group of detainees who retracted such claims in August 2014. Thereafter, Mr WC's case was referred by the Department to the Minister a further 6 times, and on each occasion, the Minister declined to intervene.
681. By the time of the submission put to the Minister in January 2015, Mr WC presented as having no security concerns, and had demonstrated no significant behavioural issue to the Department.
682. The Department identified to the Minister at that time that any Bridging visa granted to Mr WC would come with a condition that he must not engage in criminal conduct, and that he must agree to abide by a Code of Behaviour in order to be granted a visa pursuant to the personal intervention power.
683. The submission put to the Minister in December 2016 clearly identified to the Minister that there were no national security concerns and that Mr WC had been assessed as low risk through the CPAT. It also noted that, should the Minister decline to intervene, the time in which Mr WC would remain in detention may be protracted and attract external scrutiny.
684. No justification for these outcomes has been provided by the Department, and the relevant Ministers have not recorded reasons for declining the use of their personal discretion (and nor are they required to do so according to law).
685. It is difficult therefore to understand why it was necessary for Mr WC to remain in detention for 10 years, and particularly so in light of the fact that he was subsequently granted a Bridging E visa on 11 November 2022.
686. As noted above in the case of Mr WB, the fact that Mr WC was affected by the outcome of the case *DBB16* meant that the time taken to assess and review his protection claims became significantly protracted.
687. It is noted with concern that the Department's case reviews identified no vulnerabilities for Mr WC, despite IHMS advice that he was experiencing negative mental health impacts from prolonged detention.
688. While it is difficult to identify whether this had any impact on the outcome of his case, the submissions put forward on his behalf had very limited

information about this. A 2018 submission provided to the Minister related that IHMS had assessed Mr WC as 'despondent' which does not appear to adequately reflect the concerns relayed to the Department by the Commonwealth Ombudsman.

689. It is also noted that the Department did not at any stage refer Mr WC's case for consideration by the Minister for release into community detention pursuant to the s 197AB residence determination power. Given the Minister's approach towards the s 195A submissions made, however, it seemed unlikely that this alternate submission would have made any difference.
690. There were a number of factors which, in Professor Croucher's view, gave rise to grounds for consideration by the Minister of Mr WC's possible release into the community either by way of a residence determination or grant of a Bridging E visa. These included his lengthy period of detention, the fact that his removal from Australia was likely to be protracted, his deteriorating mental health, the CPAT assessments recommending bridging visa with conditions, and his general good behaviour in detention.
691. In light of the above, it was Professor Croucher's view that Mr WC's detention for 10 years cannot 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. Professor Croucher found that in Mr WC's case, it is the Minister's delays and failures to act which resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR as follows:
- the failures of the Minister to consider intervening in favour of granting Mr WC a Bridging visa and against the recommendations made by the Department on 2 March 2016, 13 February 2017, 1 March 2018 and 23 October 2018
 - the decision of the Minister to remove Mr WC from the group submission put forward by the Department on 6 September 2019 without explanation
 - the delay of the Minister in considering the submission referred on 16 October 2020 until 11 October 2021.

692. It is pleasing to note the end of Mr WC's protracted detention, through the grant of a Bridging E visa, but its limited duration of 6 months is noted. Given Mr WC cannot make an application for a visa himself, he is reliant on the Minister to intervene again in his favour for further bridging visas, or he risks becoming unlawful in the community or being re-detained. This position may have changed since the initial visa was granted, but no additional information about it has been provided to the Commission.

(d) Mr WD

693. Professor Croucher formed the following findings, drawing on the background set out above at section 8.1(c) with respect to Mr WD.
694. As outlined above, the Department did refer Mr WD for consideration under the ministerial intervention powers on 4 occasions during the 9 years and 8 months of his held detention.
695. On 3 occasions, the Minister ultimately declined to intervene. No reasons for the decisions were provided (nor are Ministers required by law to provide reasons).
696. In the submission of August 2018, the Department identified that Mr WD had already been declined for intervention by the Minister in March 2018, however identified as a change in circumstances the Federal Circuit Court's ruling that Mr WD was not an unauthorised maritime arrival. This, and Mr WD's application to the Administrative Appeals Tribunal, was identified as the predominant reason for referral, due to the associated protraction of resolution of his case (and therefore to his lengthy period in immigration detention). Despite appearing to underline the appeal to the Administrative Appeals Tribunal in the submission, the Minister declined to intervene.
697. After the Assistant Minister agreed, in February and March 2019, to consider long-term detainees who presented a low risk of harm to the community, another submission referring Mr WD to the Minister was prepared in July 2019 for the Minister to consider intervening pursuant to s 195A. The submission highlighted Mr WD's particular health needs, including an IHMS report that his mental health was likely to be adversely impacted by his detention. The Minister's decision not to intervene was indicated by his striking Mr WD's name out on the decision instrument, without any reason.

698. The following factors weighed in favour of the Minister's consideration of Mr WD's situation:
- his retraction of claims in 2014 made by him that he had been charged with a criminal offence in Bangladesh
 - the lack of behavioural concerns (noting that the Northern Territory police did not pursue charges against him for the alleged assault)
 - his protracted detention
 - his serious physical and mental health conditions.
699. The first stage submission leading to the Minister's positive intervention in Mr WD's case of October 2022, contained no new information that was not known at the time of the previous Ministers' consideration. It is difficult therefore to understand why Mr WD could not have been released on a Bridging E visa sooner than he ultimately was.
700. In light of the above, it was Professor Croucher's view that Mr WD's detention for 9 years and 8 months cannot 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. Professor Croucher found that the failure of the Ministers to consider intervening in favour of granting Mr WD a Bridging visa on 1 March 2016, 23 October 2018, and 29 August 2019, resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR.
701. It is pleasing to note the end of Mr WD's protracted detention through the grant of a Bridging E visa but its limited duration of 6 months is noted. Given Mr WD cannot make an application for a visa himself, he is reliant on the Minister to intervene again in his favour for further Bridging visas, or he risks becoming unlawful in the community or being re-detained. This position may have changed since the initial visa was granted, but no additional information about it has been provided to the Commission.
- (e) Mr WE**
702. Professor Croucher formed the following view, drawing on the background set out in section 8.1(d) in relation to Mr WE.

703. Mr WE's case was referred to the Minister on only 3 occasions known to the Commission during his detention that lasted almost 13 years. The Minister finally decided to consider Mr WE's case and intervene to make a residence determination on 28 March 2023, allowing him to reside in community detention.
704. Mr WE was referred to the Assistant Minister for consideration for the exercise of the s 195A power on 12 February 2019.
705. On 26 February 2019, the Assistant Minister declined to consider the exercise of this power in Mr WE's favour. Mr WE's name, client ID number, and CPAT rating (Tier 3) is included in a schedule of names, with the words 'not consider' circled adjacent.
706. Almost no personalised information regarding Mr WE appears within the submission to the Minister. The submission outlined the length of detention for the 88 detainees (average 6 years), the high cost of their detention (\$360,000 per annum), and a summary of detainees' modes of arrival, CPAT ratings, security assessments, and removal pathways.
707. Particularly given the absence of any information in this submission as to Mr WE's behaviour in immigration detention, and there being no requirement to provide reasons, it is difficult to understand why the Assistant Minister declined to consider intervening on this occasion.
708. The Assistant Minister did not ask the Department for any further information to allow consideration of the individual circumstances of Mr WE's case. This further information may have allowed the Minister to assess whether Mr WE's detention was 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. Mr WE had been in held detention for almost 9 years at this time.
709. Professor Croucher found that the Minister's failure to consider the individual circumstances of Mr WE's case and the exercise of his intervention powers to grant Mr WE a Bridging E visa or to consider making a residence determination on 22 August 2013 and 26 February 2019, resulted in his detention becoming arbitrary in contravention of article 9(1) of the ICCPR.

(f) Mr WH

710. Professor Croucher made the following findings, drawing on the background set out above at section 8.1(f) with respect to Mr WH.
711. As set out in section 8.1(f) above, the Department referred Mr WH's case to the Ministers on 6 occasions between April 2016 and 11 March 2020. On each occasion, the Ministers declined to consider exercising their powers under s 195A of the Migration Act. One referral was returned to the Department unactioned.
712. The submission of November 2017 highlighted as reasons for the referral, Mr WH's length of detention, low rating on the CPAT, ongoing judicial review, and his unwillingness to return to Iran. In October 2018, the deterioration of Mr WH's mental health while in immigration detention is identified as a key issue. This submission highlighted multiple incidents of food and fluid refusal and the impact of seeing his deceased roommate in their room after his suicide.
713. The first stage group submission in 2019, which led to the Assistant Minister indicating that he would consider Mr WH for intervention, identified him as a detainee with a CPAT recommendation of tier 1, and as someone for whom removal from Australia was not practicable. Despite the Assistant Minister's positive indication, the Minister chose not to intervene once the second stage submission was made.
714. The Ministers were not required to give reasons for their decisions not to consider the exercise of the discretions under ss 195A or 197AB. The Ministers' decisions in each case were recorded by circling the words 'not consider'.
715. Although the Minister is not required to give reasons, without written reasons it is difficult to understand the factors the Minister considered weighed against exercising his powers in respect of Mr WH.
716. In Professor Croucher's view, the following factors weighed in favour of Mr WH's case being considered by the Minister:

- his initial status as a transitory person, meaning that he had no prospect of being processed for a visa in Australia until after the signing of LI 2016/008 on 24 March 2016
- his significant and ongoing physical and mental health issues which had been deemed by several IHMS and other medical professionals as exacerbated by his lengthy detention, and that his health was deteriorating the longer he remained in detention
- CPAT assessments recommended release on bridging visas
- recommendations from the Ombudsman, IHMS and other medical professionals that he should be transferred to the community.

717. The seventh referral to the Minister did ultimately result in Mr WH's release from held detention in December 2022, at the Department's recommendation and on the basis of Mr WH's health condition and the prolonged nature of his detention.

718. It was Professor Croucher's view that Mr WH's detention has not been 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. Professor Croucher found that in Mr WH's case, the Minister's delays and failures to act resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR, as follows:

- the failures of the Minister to consider intervening to grant Mr WH a bridging visa and against the recommendations made by the Department on 30 June 2016, 15 January 2018, and 27 March 2019
- the apparent failure of the Minister to make any decision with respect to the submissions made 19 April 2017
- the delay following the draft submission made to the Minister in October 2020.

(g) Mr WI

719. Professor Croucher made the following findings, drawing on the background set out in section 8.1(g) in relation to Mr WI.

720. Apart from an initial delay between 2013 and 2018 which the Department has insufficiently accounted for, Professor Croucher found that it was the Ministers' failure to consider the exercise of their powers to grant Mr WI a

Bridging E visa or to make a residence determination in favour of Mr WI, which resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR.

721. The Minister was first referred Mr WI's case for possible intervention on 27 August 2013. After indicating on a first stage submission that the Minister would agree to consider, that referral was finalised but with no information provided about why the Minister did not give consideration at that time.
722. The next time Mr WI's case was referred to the Minister was 5 years later in March 2018, after he had been found by the Department to meet the s 195A guidelines for referral. On 20 July 2018 the Minister declined to consider intervention.
723. The submission to the Minister from the Department noted as reasons for the referral:
- Mr WI's status as a maritime arrival
 - the ongoing judicial review of his refused SHEV application
 - the fact that he had been detained at that time for more than 5 years
 - he had been assessed through the CPAT as being recommended for a Tier 1 – Bridging visa and was a low risk to the community.
724. The submission noted the 'significant delay' caused to resolution of Mr WI's case by:
- an unresolved Movement Alert List (MAL) status, interest by the Australian Security and Intelligence Organisation (ASIO) and an active National Security Alert. Advice has been received that these issues have now been resolved.
725. The September 2019 submission to the Minister identified as major factors influencing the referral, the significantly higher cost of keeping individuals in held detention as opposed to in the community on Bridging E visas. It also identified that Mr WI had an Australian citizen sister who was willing to support him if released. This submission, and the subsequent one of August 2020 also identified that IHMS raised concerns about Mr WI's

health including vitamin D deficiency, history of torture and trauma, depression, anxiety, insomnia, and adjustment disorder.

726. In total, the Minister was referred 4 submissions between August 2013 and May 2021, and on each occasion, the Ministers declined to use their personal discretions to consider intervening on behalf of Mr WI.
727. Eventually, the Minister did indicate on 25 July 2022 that he was inclined to consider Mr WI's case under s 195A, and did in fact do so on 3 August 2022. For the most part, the information contained within the submission to the Minister on this occasion was the same as previous submissions, with the additions that:
- the effect of the Iraqi authorities' unwillingness to issue travel documents to involuntary removals on the protraction of Mr WI's detention
 - the pending outcome of the complaint made by Mr WI to the United Nations Working Group on Arbitrary Detention
 - Mr WI's diagnosis received in March 2022 of pulmonary embolism with associated pulmonary infarction
 - there had been a lack of any behavioural issues in detention since March 2022.
728. While a number of these factors certainly weighed in favour of Mr WI's release from detention on a Bridging E visa, Professor Croucher noted that the main factors raised had not changed since the previous submissions, namely the lengthy period of time in which Mr WI had been detained, his low security rating, and the negative impact that detention was having on his mental health.
729. It was Professor Croucher's view that Mr WI's detention has not been 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. Professor Croucher found that in Mr WI's case, the Minister's failure to consider intervening to grant Mr WI a Bridging E visa on 30 August 2013, 20 July 2018, 2 December 2019 and 25 May 2021 resulted in his prolonged and continuing detention being arbitrary, contrary to article 9(1) of the ICCPR.

(h) Mr WJ

730. Professor Croucher made the following findings, drawing on the background set out in section 8.1(h) above in relation to Mr WJ.
731. As set out in section 8.1(h), on at least 5 occasions from the period January 2017 to September 2020, the Department referred Mr WJ's case to the Ministers to consider exercising their discretionary powers. The Ministers declined to consider exercising their powers under s 195A of the Migration Act in December 2016, April 2018, September 2019 and under s 197AB in September 2018. In January 2017 a referral by the Department under s 197AB was returned unacted on by the Minister due to an outstanding TPV application and ongoing consideration under s 501 of the Migration Act, despite the issuance of a qualified security assessment in November 2016.
732. The Department prepared written submissions for the consideration of the Ministers. The primary reasons for the Department referring Mr WJ to the Ministers included the length of time he had spent in immigration detention, his poor mental and physical health, his low risk of harm to the Australian community and the reduction in the ASIO security assessment.
733. The Ministers were not required to give reasons for their decisions to not consider the exercise of the discretions under s 195A or s 197AB. The Ministers' decisions in each case were recorded by circling the words 'not consider'.
734. Although the Minister is not required to give reasons, without written reasons it is difficult to understand the factors the Minister considered weighed against exercising his powers in respect of Mr WJ. Significantly, the Department informed the Minister that it had not identified any security concerns or threats to the community in releasing Mr WJ into the community.
735. In Professor Croucher's view, the following factors weighed in favour of Mr WJ's case being considered by the Minister:
- the removal of the adverse security assessment in November 2016
 - all CPAT assessments determined he was of low risk to the community

- his significant period of detention (almost 12 years when he was released), which was compounded by the ongoing and lengthy review processes, noting the Federal Court remitted the visa refusal decision to the Administrative Appeals Tribunal on 30 August 2019, almost 4 years after his visa application on 1 October 2015
- his significant and ongoing physical and mental health issues which had been deemed by several IHMS and other medical professionals as exacerbated by his lengthy detention, and that his health was deteriorating the longer he remained in detention
- inability for Mr WJ to receive trial cancer treatment due to his detention placement
- numerous repeated recommendations from the Ombudsman, IHMS and other medical professionals that he should be transferred to community detention.

736. In light of the above, Professor Croucher found that the Ministers' decisions not to consider exercising their discretionary powers under ss 195A and 197AB contributed to the continued and prolonged detention of Mr WJ without proper justification in the particular circumstances of his case.
737. If the Minister considered the matter and had concerns about Mr WJ posing a present risk to the community, the Minister could have asked the Department to conduct a risk assessment to consider whether any risks could be mitigated.
738. In relation to the types of conditions that could be imposed where a risk to the community has been identified and in addition to the discussion in section 6.3, the Commission refers to its *Report of an inquiry into complaints by Sri Lankan refugees in immigration detention with adverse security assessments*.¹³⁴ In this report, former President, the Hon Catherine Branson AC KC, considered the possibility of less restrictive detention options for refugees who had received adverse security assessments from ASIO:

It may well be that there are alternative options to prolonged detention in secure facilities which can be appropriately provided to the complainants despite their having received adverse security assessments. These alternative options may include less restrictive places of detention than immigration detention centres as well as community detention, if necessary with conditions to mitigate any identified risks. Conditions could include a

requirement to reside at a specified location, curfews, travel restrictions, regular reporting and possibly even electronic monitoring.

739. Professor Croucher found that Mr WJ's prolonged detention in closed facilities without such a risk assessment was arbitrary for the purposes of article 9(1) of the ICCPR.

740. The Minister ultimately intervened in November 2021 under s 197AB to make a residence determination allowing Mr WJ to reside in the community. He had been in held detention for nearly 12 years. After the decision of the High Court in *NZYQ*, Mr WJ was released from community detention, and now resides in the community on a Bridging (Removal Pending) visa.

(i) Mr Pjetri

741. Professor Croucher made the following findings, drawing on the background set out above at section 8.1(i) in relation to Mr Pjetri.

742. In October 2018 the Department referred Mr Pjetri's case to the Minister for consideration under s 195A. Mr Pjetri's case was referred to the Minister only once in the 8 years of his held detention.

743. In its submission the Department noted the following as key issues for the Minister to consider:

- the length of Mr Pjetri's detention (almost 5 years at the time of drafting)
- the ongoing judicial review proceedings as a barrier to removal
- the Interpol Red Notice, which had been withdrawn as a result of invalid arrest warrants
- the convictions against him in his absence for aggravated theft, criminal conspiracy/criminal organisation, and violation of alien law.

744. In March 2019, the Minister declined to consider exercising his powers under s 195A. The Minister was not required to give reasons for his decision. His decision was recorded by circling the words 'not consider'. At this stage, Mr Pjetri had been detained for over 5 years.

745. It was Professor Croucher's view that the following factors weighed in favour of Mr Pjetri's case being considered by the Minister:
- extraordinary length of detention (over 5 years as at March 2019)
 - lack of any indication that Mr Pjetri posed a risk of harm to community
 - the risk of prolonged and indefinite detention
 - disclosed history of torture and trauma
 - health issues related to the ongoing detention (acknowledging that these were not as severe at this point in time as in comparison to 2020)
 - the IHMS assessment in at least November 2015 that Mr Pjetri would benefit from being placed in a less restrictive environment
 - in April 2016 and February 2019, the Ombudsman expressed concern with the impact of prolonged detention on Mr Pjetri's mental and physical health.
746. If the Minister had concerns about Mr Pjetri 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 parole-like conditions and ensuring the provision of appropriate health support. This was highlighted to the Minister in the submission made in 2018.
747. It was Professor Croucher's view that Mr Pjetri's detention has not been 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. Professor Croucher found that the Minister's decision to not consider exercising his discretionary powers under s 195A and Mr Pjetri's continued detention in closed facilities without an individual assessment of his circumstances, resulted in his detention becoming arbitrary, contrary to article 9(1) of the ICCPR.

9 Resettlement options

748. Professor Croucher gave consideration to steps taken by the Department to pursue third country resettlement for the complainants on a removal pathway. While Mr WG is the only complainant who remains in held detention, with the exception of Mr WA and Mr WJ, those complainants

currently in the community are at risk of being returned to detention should they become unlawful non-citizens again.

749. Third country resettlement was briefly explored and discounted for Mr WA with respect to family in Denmark. There is currently no evidence before the Commission indicating that the Department has considered or is considering possible third country settlement pathways for any of the other complainants. No additional information came to light in the Department's response to President Croucher's preliminary view.
750. The Commission encourages the Commonwealth to continue actively to pursue alternatives to detention, including the prospect of third country resettlement. If third country resettlement is not possible, the Commonwealth should actively consider all other appropriate alternatives to detention as outlined in this report.

10 **Determinations by the UN Working Group on Arbitrary Detention**

751. The UN Working Group on Arbitrary Detention has determined that the following complainants were arbitrarily detained:
- Mr WB
 - Mr Pjetri¹³⁵
 - Mr WJ
 - Mr WI
 - Mr WG
 - Mr WH.
752. It is noted that, in at least the 2014, 2015 and 2017 Guidelines for s 197AB, interest in a case by key organisations is considered a relevant matter that should be brought to the Minister's attention. Professor Croucher considered the UN Working Group to be a key organisation, given their expertise in examining cases involving deprivation of liberty across the UN member States.

753. The Working Group recommended the immediate unconditional release of Mr WB, Mr Pjetri, Mr WJ, Mr WI, Mr WG, and Mr WH; that they each be accorded an enforceable right to compensation and other reparations; and an independent investigation into their detention.
754. No additional information was provided by the Department in response to President Croucher's preliminary view with respect to the Australian Government's response to these UN Working Group Opinions including information on any steps taken in response to the recommendations (other than the release from detention or removal of all except for Mr WG).

11 Recommendations

755. 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.¹³⁶ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.¹³⁷ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.¹³⁸

11.1 Alternatives to held detention

756. In August 2022, the Department conducted a stakeholder briefing about its Alternatives to Held Detention program. It subsequently published a briefing note and slide deck in relation to that briefing.¹³⁹ These documents described a range of important initiatives that were being explored by the Department, including:
- **Risk assessment tools:** reviewing current tools and developing a revised risk assessment framework and tools that enable a dynamic and nuanced assessment of risk across the status resolution continuum
 - **An 'independent panel':** establishing a qualified independent panel of experts to conduct a more nuanced assessment of a detainee's risk, including risks related to their physical and mental health, and provide advice about community-based placement for detainees with complex circumstances and residual risk (the Independent Assessment Capability or IAC)

- **Increasing community-based placements:** in particular, by focusing on detainees who pose a low to medium risk to the community, and managing residual risk through the imposition of bail-like conditions and the provision of post-release support services
- **A 'step-down' model:** considering transfer from held detention to a residence determination as part of a transition to living in the community.

757. Those initiatives were prompted by two reviews:

- the Independent Detention Case Review conducted for the Department in March 2020 by Robert Cornall AO¹⁴⁰
- the Commission's report to the Attorney-General, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958* (Cth) [2021] AusHRC, 141 in February 2021.

758. More recently, the Department informed the Commission that the program was effectively 'on hold', given that the individuals being considered (those whose removal was not practicable in the reasonably foreseeable future) had been released from detention following the High Court's decision in *NZYQ*.¹⁴¹ Consideration was being given to different groups of people, which included those whose removal remained practicable, but the process had become protracted for a variety of reasons, such as delays in processing travel documents.

759. The Commission is concerned that this may be an indication that the Department is taking an overly narrow approach to considering who may be eligible for an alternative to held detention. It is the Commission's view that in order for the Department to comply with the Commonwealth's international obligations, all unlawful non-citizens should be considered for an alternative to held detention, unless for reasons particular to their individual situation, such alternatives are not suitable. Bearing in mind the comments of the High Court in *NZYQ*, detention must be for the purpose of removal from Australia.

760. At October 2024, there were 989 people in immigration detention.¹⁴² The Commission understands that this number has reduced further as the Department identified additional detainees affected by *NZYQ*. Unless

removal of a detainee is imminent, the Commission would like to see the Department consider an alternative to held detention for each of these.

Recommendation 1

The Commission recommends that the Department progress the Alternatives to Held Detention program including:

- revised risk assessment tools
- the Independent Assessment Capability
- increased community placements
- a 'step-down' model.

The Department should ensure that it does not adopt an overly narrow approach to detainees eligible for the program, but rather aim to adopt the approach that all unlawful non-citizens are to be considered for an alternative to held detention, unless their removal is imminent, or their individual circumstances indicate that only held detention is appropriate.

11.2 Ministerial guidelines

761. At paragraph 71 of this report, the High Court's decision in *Davis* is identified as the reason for the Department reviewing the ministerial guidelines on intervention powers vested in the Minister, permitting the Minister to grant visas or make residence determinations in certain circumstances, including for unlawful non-citizens in immigration detention.
762. In particular, it is no longer open to the Minister to give the Department the ability *not* to refer cases on the basis that the Department has formed the view that the cases do not have 'unique or exceptional circumstances' or that it is otherwise not in the public interest for the Minister to exercise these powers.
763. Any revised guidelines issued by the Minister should contain clear, objective criteria for referral.¹⁴³ It also appears from the documents published by the Department as part of the Alternatives to Held Detention program, identified above, that some intractable cases will only be able to be resolved by the Minister. As a result, there is a real need to ensure that these cases are brought to the Minister's attention so that decisions can be made by the Minister about the potential exercise of the personal intervention powers.

764. The Commission understands from discussions with the Department that it has recently taken steps, in conjunction with the Minister, to ensure that the cases of long term and vulnerable detainees are referred to the Minister for consideration,¹⁴⁴ even if they may not have met previously issued guidelines in relation to referral.
765. The cohorts of people identified in submission MS22-002407, dated 31 October 2022, released through freedom of information laws, as being referred to the Minister for intervention are:
- detainees assessed as low risk of harm to the community through the Community Protection Assessment Tool
 - detainees in respect of whom a protection finding has been made, have no ongoing immigration matters and where it is currently not reasonably practicable to effect their removal to third countries
 - detainees who are confirmed to be stateless and have no identified right to reside in another country
 - detainees in Tier 4 health related specialised held detention placements and/or with complex care needs
 - detainees who have been in immigration detention for five years or more (where not already included in any of the above cohorts)
 - detainees who are the subject of a Residence Determination (for more than 6 months).¹⁴⁵
766. The Commission welcomes these steps, which it understands has led to the exercise of intervention powers in a significant number of cases, even prior to the release of *NZYQ* affected detainees. While it is hoped that these interventions will have a positive impact on the number of people subject to prolonged, and potentially arbitrary, detention, the Commission reiterates previous recommendations it has made for amendment of the guidelines for referral to the Minister¹⁴⁶ to ensure that the cases of all detainees whose detention has become protracted or may continue for a significant period are referred to the Minister for consideration given the temporary nature of this measure.

Recommendation 2

The Commission recommends that the Minister's s 195A and s 197AB guidelines be amended to provide that:

- all people in closed immigration detention are eligible for referral under s 195A and s 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period, regardless of whether they have had a visa cancelled or refused
- in the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility, the Department include in any submission to the Minister:
 - a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment
 - an assessment of whether an identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment.
- in the event that the Minister decides not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every 6 months and re-refer the case to the Minister to ensure that detention does not become protracted.

11.3 Risk assessments

767. The Commission understands that the Department is currently reviewing its risk assessment tools. The Commission has previously made recommendations to the Department for improvement of its tools, and specifically the CPAT, in its report *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*.¹⁴⁷
768. The complainants to this report have not all had visas cancelled or refused under s 501 of the Migration Act, but the case of Mr WA above shows clearly why it is inappropriate that a detainee's individual circumstances

not be thoroughly considered in assigning them with a high risk rating for criminal offending.

769. The recommendations therefore made previously by the Commission remain relevant, and it is appropriate to repeat them for consideration in the Department's current review.

Recommendation 3

The Commission recommends that the CPAT be amended to not automatically recommend Tier 3 – Held Detention for individuals who have had their visa refused or cancelled under s 501 of the Migration Act.

Recommendation 4

The Commission recommends that the CPAT be amended to include an assessment of whether any risks to the community identified can be mitigated by conditions including but not limited to:

- adhere to a curfew
- reside at a specified place
- report to a specified place at specified periods or times in a specified manner
- provide a guarantor who is responsible for the person's compliance with any agreed requirements and for reporting any failure by the person to comply with the requirements
- not violate any law
- be of good behaviour
- not associate or contact a specified person or organisation
- not possess or use a firearm or other weapon
- wear an electronic monitoring device.

11.4 Case reviews

770. Similarly, the Commission has previously made recommendations in relation to the process by which the Department reviews a person's

detention through the monthly case reviews. To remedy the issue discussed above at paragraph 90, the Commission has recommended that case managers start with the presumption that a person should be considered for an alternative to held detention, unless their individual circumstances warrant ongoing detention.

771. The Department disagreed with the Commission's recommendation on this subject.¹⁴⁸

Recommendation 5

The Commission recommends that monthly case reviews be amended to require the departmental case manager to review the necessity for an individual's continued detention and whether any risk factors could be mitigated in the community.

11.5 Legislative change to the Migration Act

772. Contraventions of article 9 of the ICCPR have been the significant focus of the Commission's human rights complaints jurisdiction for the last 20 years. In addition, the UNHRC has issued 27 opinions finding contraventions of article 9 against Australia since 2013.

773. In those opinions, the UNHRC has called for the Australian Government to amend the Migration Act to be consistent with Australia's commitments made under international law.

774. In the Commission's view, the reasons why the Migration Act so frequently is used to justify the arbitrary detention of unlawful non-citizens can be simply put as:

- the mandatory detention regime created by s 189 of the Migration Act placing a duty on officers of the Department to detain
- the discretionary powers placed solely within the Minister's remit to end the detention of the majority of detainees (specifically, unauthorised maritime arrivals, those whose visas have been refused or cancelled pursuant to s 501, and those subject to other legislative bars on making visa applications).

775. The Commission considers that the Minister should propose to the Australian Parliament that it conduct a review into the Migration Act and its conformity with Australia's international obligations.

776. Parliamentary inquiries into ministerial discretions in 2004,¹⁴⁹ and immigration detention in 2012,¹⁵⁰ elicited concerns which remain valid, and recommendations which have not been adopted. In light of significant changes which have occurred since then, including the High Court's decision in *NZYQ*, it is time that these issues be revisited.

Recommendation 6

The Commission recommends that a review of the Migration Act be conducted to consider the following principles and processes, many of which are common across the jurisdictions considered in the Commission's report, and the way these have been embedded into the legislative schemes of Canada, Germany, New Zealand, the United Kingdom or the United States of America:

- a) a presumption against detention whereby a person must be released unless a specified ground not to do so exists
- b) alternatives to detention, such as residence determination or bridging visas, must be considered prior to consideration of held detention
- c) for any person who is considered by the Minister to warrant being held in immigration detention, an application should be required to be made to a competent authority who is tasked with balancing the risk to the community and/or the likelihood that the person will not comply with efforts towards their removal, against the impact on the individual to be detained
- d) decisions to detain, or to continue to detain, must be subject to merits and/or judicial review
- e) grounds for detention must continue to be balanced against the overall length of the person's detention to ensure that detention does not become prolonged or disproportionate to the reason behind the detention
- f) detention for the purpose of removal can only take place where removal is practicable in the reasonably foreseeable future, and

where arrangements are in progress and being executed with due diligence

g) a maximum time limit on detention

h) any person held in immigration detention must have their detention reviewed at regular intervals.

11.6 Recommendations with respect to individual complainants

(a) Apologies

777. Each of the 10 complainants considered in this report have been subjected to significantly protracted periods of detention. Mr WG remains in held detention at the time of this report.

778. Professor Croucher considered this warranted an apology from the Commonwealth for the delays and failures to act to end their detention sooner in view of the clear evidence of compelling circumstances and the significant impact prolonged immigration detention has had on their health and mental health. Professor Croucher recommended such an apology be made.

Recommendation 7

The Commission recommends that the Commonwealth provide a written apology to each of the complainants for the delays and failures to act identified in this report with respect to each.

(b) Mr WA

779. The Department informed the Commission in response to Professor Croucher's preliminary view that a submission was being prepared for the Minister to consider intervening under ss 46A and 48B to permit Mr WA to make a fresh application for a protection visa. This is critical in light of the changes to Mr WA's country of origin, Afghanistan, since a previous Minister decided to refuse his protection visa application on the basis of his criminal offending.

Recommendation 8

The Commission recommends that the Department refer Mr WA's case as a priority to the Minister, for the Minister to consider intervening under ss 46A and 48B of the Migration Act.

(c) Mr WG

780. It is constructive to note that Mr WG has been referred to the Minister as part of the Department's Detention Status Resolution Review, and that the Minister has indicated his willingness to consider him under s 195A for the grant of a Bridging E visa. According to the Department, this was in September 2023. Professor Croucher urged the Minister to consider the exercise of his powers in relation to Mr WG as a priority.

Recommendation 9

The Commission recommends that the Minister consider the exercise of his personal powers under s 195A of the Migration Act in relation to Mr WG as a priority.

12 The Department's response to the Commission's findings and recommendations

781. On 12 April 2024, Professor Croucher provided the Department with a notice of findings and recommendations.

782. On 16 August 2024, the Department provided the following response to Professor Croucher's 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 identified in this report and the recommendations made by the President of the Commission.

The Department does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, Article 9 of the International Covenant on Civil and Political Rights (ICCPR) at any stage of the 10 complainants' periods of held detention.

Recommendation 1 – Partially agree

The Commission recommends that the Department progress the Alternatives to Held Detention program including:

- *revised risk assessment tools*
- *the Independent Assessment Capability*

- *increased community placements*
- *a 'step-down' model.*

The Department should ensure that it does not adopt an overly narrow approach to detainees eligible for the program, but rather aim to adopt the approach that all unlawful non-citizens are to be considered for an alternative to held detention, unless their removal is imminent, or their individual circumstances indicate that only held detention is appropriate.

The Department partially agrees to recommendation one.

The Department continues to consider the Alternatives to Held Detention (ATHD) model and the impact of the High Court judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37 (NZYQ) on the ATHD model.

In response to NZYQ, the Community Protection Board (CPB) was established to provide informed, impartial and evidence-based recommendations to the Minister or Delegate regarding certain individuals released into the community on a Bridging Visa (Removal Pending) visa (BVR). The CPB comprises of members with expertise in the fields of law enforcement, corrections, academia, mental health, clinical psychology and the community and multicultural sector as well as, senior public servants with responsibility of law enforcement, compliance, legal and status resolution.

Enhanced Status Resolution Support Services were also implemented for the NZYQ-affected cohort. The cohort is eligible for enhanced services, including intensive case management, accommodation and employment support, and connecting individuals to community services and programs, such as offender targeted rehabilitation and adjustment programs.

The impact of the High Court's judgment has led the Department to contemplate how ATHD initiatives may be applied to individuals who fall outside the scope of the NZYQ decision. For example, in cases where removal is practicable but the process has been protracted due to a variety of reasons, such as judicial appeal.

The Department has considered an Independent Assessment Capability (IAC) as part of the ATHD model, to advise on risk mitigation (including support needs) for detainees being considered for community placement. The IAC pilot was to be supported by a Step-down Model (SDM) that would have expanded the use of Residence Determination or Bridging Visas to enable individuals in held detention to reside in the community, while a status resolution outcome was progressed. Planning for the IAC and SDM has paused while the Department considers the implications of NZYQ on the direction and priorities of ATHD.

The Department continues to actively review processes and assess individual cases as appropriate. Potential ATHD options that remain under development

may require changes to legislative and policy settings, and will be subject to policy authority from Government.

Recommendation 2 – Partially agree

The Commission recommends that the Minister's s 195A and s 197AB guidelines be amended to provide that:

- *all people in closed immigration detention are eligible for referral under s 195A and s 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period, regardless of whether they have had a visa cancelled or refused*
- *in the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility, the Department include in any submission to the Minister:*
 - *a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment*
 - *an assessment of whether an identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, and a description of the inquiries undertaken by the Department in forming its assessment.*
- *in the event that the Minister decides not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every 6 months and rerefer the case to the Minister to ensure that detention does not become protracted*

The Department partially agrees to recommendation two.

The Minister accepts that, because of the resulting High Court judgment in *Davis v Minister for Immigration; DCM20 v Secretary of Department of Home Affairs* [2023] HCA 10, 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 Department is preparing new ministerial instructions for the Minister following the High Court's decision in *Davis*. Further information about the Department's approach will be made available in due course.

The Department will provide the Commission's recommendations for the Minister's consideration when briefing the Minister on options to review the sections 195A and 197AB Ministerial Intervention guidelines.

The Department notes sub points i) and ii), relate also to risk assessment processes that are currently being refined through the ATHD Program (see response to recommendation one).

Recommendation 3 – Partially agree

The CPAT be amended to not automatically recommend Tier 3 – Held Detention for individuals who have had their visa refused or cancelled under s 501 of the Migration Act.

The Department partially agrees to recommendation three.

The Department is currently undertaking a thorough review of each aspect contained within the Community Protection Assessment Tool (CPAT) and as part of the review; the Department is considering amendments to the rating thresholds that are a facet of the recommended placement outcome.

When completing a CPAT, it is the Status Resolution Officers (SROs) discretion to consider a substituted placement. For example, where the CPAT recommends a held detention placement, the SRO considers additional factors, which might support a community placement, notwithstanding whether an individual's visa was cancelled or refused under section 501 of the *Migration Act 1958* (the Act).

The CPAT review being undertaken will ensure that it maintains the option for SROs to consider a substituted placement and amend the placement based on a variety of strength-based factors including the detainee's age, health, length of time in Australia, education history, community support and employable skills.

Recommendation 4 –Partially agree

The CPAT be amended to include an assessment of whether any risks to the community identified can be mitigated by conditions, including but not limited to:

- *adhere to a curfew*
- *reside at a specified place*
- *report to a specified place at specified periods or times in a specified manner*
- *provide a guarantor who is responsible for the person's compliance with any agreed requirements and for reporting any failure by the person to comply with the requirements*
- *not violate any law*

- *be of good behaviour*
- *not associate or contact a specified person or organisation*
- *not possess or use a firearm or other weapon*
- *wear an electronic monitoring device.*

The Department partially agrees to recommendation four.

The CPAT is a decision support tool to assist officers to assess the most appropriate placement for an unlawful non-citizen (held immigration detention or community) while status resolution processes are being undertaken. As per above, the Department is currently undertaking a thorough review of each aspect contained within the CPAT. Therefore, the Department partially agrees to recommendation 4 as part of the review of the CPAT and notes that this recommendation also relates to the risk assessment processes that are currently being refined through the ATHD Program (see response to Recommendation One).

Recommendation 5 – Accepted – already addressed

Monthly case reviews be amended to require the departmental case manager to review the necessity for an individual's continued detention and whether any risk factors could be mitigated in the community.

The Department accepts and has already addressed to recommendation five

The Department undertakes regular reviews, escalations and referrals for persons in immigration detention to ensure the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status.

Through these reviews, escalations and referrals, the Department considers the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention.

Recommendation 6 – For Government Consideration

The Commission recommends that a review of the Migration Act be conducted to consider the following principles and processes, many of which are common across the jurisdictions considered in the Commission's report, and the way these have been embedded into the 9 legislative schemes of Canada, Germany, New Zealand, the United Kingdom or the United States of America:

- *a presumption against detention whereby a person must be released unless a specified ground not to do so exists*
- *alternatives to detention, such as residence determination or bridging visas, must be considered prior to consideration of held detention*
- *for any person who is considered by the Minister to warrant being held in immigration detention, an application should be required to be made to a competent authority who is tasked with balancing the risk to the community and/or the likelihood that the person will not comply with efforts towards their removal, against the impact on the individual to be detained*
- *decisions to detain, or to continue to detain, must be subject to merits and/or judicial review*
- *grounds for detention must continue to be balanced against the overall length of the person's detention to ensure that detention does not become prolonged or disproportionate to the reason behind the detention*
- *detention for the purpose of removal can only take place where removal is practicable in the reasonably foreseeable future, and where arrangements are in progress and being executed with due diligence*
- *a maximum time limit on detention*
- *any person held in immigration detention must have their detention reviewed at regular intervals.*

Legislative reform is a matter for the Australian Government. Noting that:

The Department is committed to humane and risk-based immigration detention policies. Immigration detention is an integral part of strong border control and supports the integrity of Australia's migration program.

Under the Act, an unlawful non-citizen must be detained. However, immigration detention is used as a last resort and where possible, non-citizens are managed in the community pending resolution of their status.

The Department always seeks to resolve the status of detainees in the shortest timeframe practicable. However, this is dependent upon a number of factors, including the level of cooperation of detainees towards immigration processes, or case complexity in relation to health, character or security matters.

The Department ensures that all detainees are accommodated in facilities most appropriate to their needs, circumstances and risk profile. Judicial review of the lawfulness of the detention is available.

The length and conditions of immigration detention are subject to regular review by senior officers of the Department, as well as external independent

review by the Commonwealth Ombudsman. These reviews consider the lawfulness and appropriateness of a person's detention, their detention arrangements and placement, health and welfare and other matters relevant to their ongoing detention and case resolution.

In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37 (NZYQ) the High Court found that unlawful non-citizens cannot continue to be kept in immigration detention for the purpose of their removal from Australia once there is no real prospect of their removal becoming practicable in the reasonably foreseeable future.

To give effect to the High Court's decision, the Department has established a process for the continuous assessment of the detention cohort for the potential release of individuals who may be impacted by the judgment. This includes robust legal and quality assurance processes to ensure that decisions to release are lawful, appropriate and consistently documented.

Recommendation 7 –Disagree

The Commission recommends that the Commonwealth provide a written apology to each of the complainants for the delays and failures to act identified in this report with respect to each.

While the Department acknowledges the circumstances raised by the complainants, the Department does not consider it appropriate to issue an apology at this time.

Recommendation 8 –Accepted – already addressed

The Commission recommends that the Department refer Mr WA's case as a priority to the Minister, for the Minister to consider intervening under ss 46A and 48B of the Migration Act.

The Department accepts and has already addressed recommendation eight.

The Department has already commenced a submission for the Minister's consideration under sections 46A and 48B of the Act to allow him to lodge a further protection visa application.

Recommendation 9 – Accepted – already addressed

The Commission recommends that the Minister consider the exercise of his personal powers under s 195A of the Migration Act in relation to Mr WG as a priority.

On 2 April 2024, the Minister considered Mr WG's case and declined to intervene under section 195A of the Act.

783. I report accordingly to the Attorney-General.

A handwritten signature in black ink, appearing to read 'H. de Kretser', with a long horizontal line extending to the right.

Hugh de Kretser

President

Australian Human Rights Commission

December 2024

13 List of acronyms

Administrative Appeals Tribunal (AAT)

Alternative Place of Detention (APOD)

Australian Federal Police (AFP)

Australian Security Intelligence Organisation Act 1979 (Cth) (ASIO Act)

Australian Human Rights Commission Act 1986 (Cth) (AHRC Act)

Australian Security Intelligence Organisation (ASIO)

Commonwealth Director of Public Prosecutions (DPP)

Community Protection Assessment Tool (CPAT)

Department of Foreign Affairs and Trade (DFAT)

Federal Circuit Court (FCC)

Full Court of the Federal Court (FCAFC)

Immigration Assessment Authority (IAA)

Immigration Detention Centre (IDC)

Immigration Transit Accommodation (ITA)

International Covenant on Civil and Political Rights (ICCPR)

International Health Medical Service (IHMS)

International Treaties Obligations Assessment (ITOA)

Liberation Tigers of Tamil Eelam (LTTE)

Procedural Advice Manual (PAM)

Safe Haven Enterprise visa (SHEV)

Security Risk Assessment Tool (SRAT)

Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS)

Temporary Protection visa (TPV)

United Nations (UN)

United Nations Human Rights Committee (UNHRC)

Endnotes

- ¹ As at 31 March 2024 or the date of their release, whichever is earlier.
- ² As at 31 March 2024 or date of their release, whichever is earlier.
- ³ As at 31 March 2024 or date of their release, whichever is earlier.
- ⁴ 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.
- ⁵ 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.
- 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). 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*).
- ⁷ *Manga v Attorney-General* [2000] 2 NZLR 65 [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 (1990) (*Van Alphen v The Netherlands*); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Views: Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) (*Spakmo v Norway*).
- ⁸ 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]; 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); *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 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).
- ¹⁰ UN Human Rights Council Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, UN Doc A/HRC/7/4 (7 February 2018) <https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf>.
- ¹¹ 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). *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.
- ¹² *Migration Act 1958* (Cth) ss 189, 196 & 198.
- ¹³ *Al-Kateb v Godwin* (2004) 219 CLR 562.
- ¹⁴ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [70].
- ¹⁵ *Migration Act 1958* (Cth) ss 5AA, 46A.
- ¹⁶ Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'* (Report, July 2019) 39 <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

- ¹⁷ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017).
- ¹⁸ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017).
- ¹⁹ *Migration Act 1958* (Cth) s 197AB.
- ²⁰ *Immigration detention following visa refusal or cancellation under s 501 of the Migration Act 1958* (Cth) [2021] AusHRC 141, 93-94, 103.
- ²¹ Immigration Transit Accommodation sites are technically alternative places of detention designated under s 5(1)(b)(v) of the Migration Act.
- ²² *Migration Act 1958* (Cth), s 197AB(2)(b).
- ²³ This is also clear from s 197AB(2)(a) of the *Migration Act 1958* (Cth). This s provides that the residence determination must specify the person covered by the determination by name, and not by description of a class of persons. It can, however, be made in respect of more than one person, such as a family unit.
- ²⁴ [2021] AusHRC 141, 24 [5.2(c)].
- ²⁵ Pursuant to s 41(1) of the *Migration Act 1958* (Cth).
- ²⁶ These conditions can be applied to a Bridging E (General) (subclass 050) (BVE) visa.
- ²⁷ [2021] AusHRC 141, 24 [5.2(c)].
- ²⁸ Subcl 070.612(1) of Schedule 2 to the Migration Regulations 1994 (Cth).
- ²⁹ The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 18 February 2014. The guidelines are incorporated into the Department's Procedures Advice Manual on LEGENDcom.
- ³⁰ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the Department's Procedures Advice Manual on LEGENDcom.
- ³¹ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 21 October 2017. The guidelines are incorporated into the Department's Procedures Advice Manual on LEGENDcom.
- ³² The Hon Chris Bowen MP, *Minister for Immigration and Citizenship, Minister's guidelines on ministerial powers* (s 345, s 351, s 417 and s 501J), 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the department's Procedures Advice Manual on LEGENDcom.
- ³³ Department of Home Affairs, 'Immigration Detention and Community Statistics Summary' (Webpage, 27 February 2023), 3 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2022.pdf>>.
- ³⁴ *Immigration detention following visa refusal or cancellation under s 501 of the Migration Act 1958* (Cth) [2021] AusHRC 14, 87.
- ³⁵ *Migration Act 1958* (Cth), s 196.
- ³⁶ United Nations Committee against Torture, *Concluding observations on the sixth periodic report of Australia*, 5 December 2022, UN Doc CAT/C/AUS/CO/6, at [28(c)].
- ³⁷ Department of Immigration and Border Protection, 'Detention Capability Review: Final Report' August 2016, <<https://www.homeaffairs.gov.au/reports-and-pubs/files/dcr-final-report.pdf>>.

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- ³⁸ Department of Home Affairs, 'Immigration Detention and Community Statistics Summary' (Webpage, 21 March 2024), 8 < <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31dec-2023.pdf>>.
- ³⁹ Department of Home Affairs, 'Immigration Detention and Community Statistics Summary' (Webpage, 27 November 2024), < <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-community-statistics-summary-31-oct-2024.pdf> >.
- ⁴⁰ Department of Home Affairs, 'Immigration Detention and Community Statistics Summary' (Webpage, 21 December 2023), 12 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-oct-2023.pdf>>.
- ⁴¹ Department of Home Affairs, 'Immigration Detention and Community Statistics Summary' (Webpage, 27 February 2023), 12 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-december-2022.pdf>>.
- ⁴² Government of Canada, 'Annual detention statistics: 2012 to 2023', *Government of Canada* (Webpage, 15 September 2023), <<https://www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2023-eng.html>>.
- ⁴³ Paula Hoffmeyer-Zlotnik, 'Duration of detention: Germany', *European Council on Refugees and Exiles Asylum Information Database*, (Webpage, 6 April 2023) <<https://asylumineurope.org/reports/country/germany/detention-asylum-seekers/legal-framework-detention/duration-detention/>>.
- ⁴⁴ UK Home Office, 'National statistics: how many people are detained or returned?', *UK Home Office* (Webpage, 7 December 2023), <<https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-september-2023/how-many-people-are-detained-or-returned>>.
- ⁴⁵ The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Guidelines on Minister's Detention Intervention Power under s 195A of the Migration Act 1958* (24 March 2012). The guidelines are incorporated into the Department's Procedures Advice Manual.
- ⁴⁶ Senator the Hon Chris Evans, Minister for Immigration and Citizenship, *Minister's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958* (1 September 2008). The guidelines are incorporated into the Department's Procedures Advice Manual.
- ⁴⁷ *Migration Act 1958* (Cth), s 198.
- ⁴⁸ *Al-Kateb v Godwin* (2013) 219 CLR 562, [226] - [228].
- ⁴⁹ *Commonwealth v AJL20* (2021) 273 CLR 43 at [44] (Kiefel CJ, Gageler, Keane and Steward JJ).
- ⁵⁰ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [28], [48].
- ⁵¹ Joint statement, 'Joint statement from refugee law organisations in response to the Migration Amendment (Clarifying International Obligations for Removal Bill) 2021, *Kaldor Centre for International Refugee Law*, (Webpage, 13 May 2021) <<https://www.kaldorcentre.unsw.edu.au/news/joint-statement-refugee-law-organisations-response-migration-amendment-clarifying-international>>.
- ⁵² *ASF17 v Commonwealth of Australia* [2024] HCA 19.
- ⁵³ *Migration Amendment (Removals and Other Measures)* Bill 2024
- ⁵⁴ The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 18 February 2014. The guidelines are incorporated into the Department's Procedures Advice Manual; The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958* (29 March 2015). The guidelines are incorporated into the Department's Procedures Advice Manual.
- ⁵⁵ Human Rights Council, *Report of the Working Group on Arbitrary Detention: Revised Deliberation No 5 on deprivation of liberty of migrants*, UN Doc A/HRC/7/4 (7 February 2018)

<https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf>.

- ⁵⁶ Human Rights Council, *Report of the Working Group on Arbitrary Detention: Revised Deliberation No 5 on deprivation of liberty of migrants*, UN Doc A/HRC/7/4 (7 February 2018).
- ⁵⁷ Human Rights Council, *Report of the Working Group on Arbitrary Detention: Revised Deliberation No 5 on deprivation of liberty of migrants*, UN Doc A/HRC/7/4 (7 February 2018).
- ⁵⁸ Human Rights Council, *Report of the Working Group on Arbitrary Detention: Opinion No 74/2019 concerning Sayed Akbar Jaffarie (Australia)*, UN Doc A/HRC/WGAD/2019/74 (27 January 2020) [69]–[70], and *Opinion No 35/2020 concerning Jamal Talib Abdulhussein (Australia)*, UN Doc A/HRC/WGAD/2020/35 (6 October 2020) [90]–[91].
- ⁵⁹ Human Rights Council, *Report of the Working Group on Arbitrary Detention, Opinion No 1/2019 concerning Premakumar Subramaniam (Australia)*, UN Doc A/HRC/WGAD/2019/1 (12 June 2019) and *Opinion No 7/2019 concerning Ebrahim Toure (Canada)*, UN Doc A/HRC/WGAD/2019/7 (7 June 2019).
- ⁶⁰ The *Immigration and Refugee Protection Act* SC 2001 and the *Immigration and Refugee Protection Regulations* SOR 2002.
- ⁶¹ *Sahin v Canada (Minister of Citizenship and Immigration)* [1995] 1 FC 214.
- ⁶² *Immigration and Refugee Protection Act* SC 2001 s 57. For more information, see Government of Canada, ‘ENF 3 Admissibility Hearings and Detention Reviews’ (Policy Manual, March 2022) <[https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf-3-admissibility-\(en\)-final.pdf](https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf-3-admissibility-(en)-final.pdf)>.
- ⁶³ *Immigration and Refugee Protection Act* SC 2001 s 58 and *Immigration and Refugee Protection Regulations* SOR 2002, Part 14. See also Government of Canada, ‘ENF20 (Detention)’ (Policy Manual, March 2022) 14 – 28 <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf20a-en.pdf>>.
- ⁶⁴ For more information, see Government of Canada, ‘ENF20 (Detention)’ (Policy Manual, March 2022), 27 [6.14].
- ⁶⁵ Government of Canada, ‘ENF 3 Admissibility Hearings and Detention Reviews’, (Policy Manual, March 2022) 61.
- ⁶⁶ *Immigration and Refugee Protection Act* SC 2001 s 58(1).
- ⁶⁷ Government of Canada, ‘ENF 34 Alternatives to Detention’, (Policy Manual, June 2018) 6-16, 2 <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf34-eng.pdf>>
- ⁶⁸ *Immigration and Refugee Protection Act* SC 2001 s 50 and *Immigration and Refugee Protection Regulations* SOR 2002, Division 3.
- ⁶⁹ Canada Border Services Agency, ‘Removal from Canada’ (Webpage, February 2022) <<https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>>. Also ‘Overview of the Removals Program’ (Webpage, March 2021) <<https://www.cbsa-asfc.gc.ca/transparency-transparence/pd-dp/bbp-rpp/pacp/2020-11-24/orp-vpr-eng.html>>.
- ⁷⁰ Canada Border Services Agency, ‘Removal from Canada’, (Webpage, 27 April 2023) <<https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>>. Also ‘Overview of the Removals Program’ (Webpage, 24 March 2021) <<https://www.cbsa-asfc.gc.ca/transparency-transparence/pd-dp/bbp-rpp/pacp/2020-11-24/orp-vpr-eng.html>>.
- ⁷¹ *Immigration and Refugee Protection Regulations* SOR 2002 r 230.

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- ⁷² Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals [2008] OJ L 348/98, Art 14 and 15.
- ⁷³ Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory (Germany), 2008 s 62 (1) ('Residence Act')
- ⁷⁴ Residence Act, s 62(4).
- ⁷⁵ Residence Act, s 62(2).
- ⁷⁶ Residence Act, s 62(3).
- ⁷⁷ The General Administrative Regulation to the Residence Act provides examples of such behaviour, including failing to assist in providing or obtaining travel documents, breaching the requirement to surrender a passport, and refusing to contact the diplomatic mission of their country of origin. See Global Detention Project, 'Immigration Detention in Germany' (Report, August 2020) 21.
- ⁷⁸ The General Administrative Regulation relating to the Residence Act, s 46. See Paula Hoffmeyer-Zlotnik, 'Grounds for detention: Germany', *European Council on Refugees and Exiles Asylum Information Database* (Webpage, 8 April 2022) <<https://asylumineurope.org/reports/country/germany/detention-asylum-seekers/legal-framework-detention/grounds-detention/>>.
- ⁷⁹ Immigration Act 2009 (NZ) s 316.
- ⁸⁰ Immigration Act 2009 (NZ) ss 317(2)-(4) and 318.
- ⁸¹ *Tesimale v Manukau District Court* [2021] NZHC 2599 [54]-[66].
- ⁸² *Tesimale v Manukau District Court* [2021] NZHC 2599 [65].
- ⁸³ Immigration Act 2009 (NZ) ss 317(1)(b)(ii) and 320.
- ⁸⁴ Under s 323(10) of the *Immigration Act 2009* (NZ), exceptional circumstances do not include the period of time a person has already been detained or the possibility that a person's deportation or departure may continue to be prevented by some action or inaction of the person.
- ⁸⁵ Immigration Act 2009 (NZ) s 323(3).
- ⁸⁶ Immigration Act 2009 (NZ) s 315(2).
- ⁸⁷ Immigration Act 2009 (NZ) s 315(5)-(6).
- ⁸⁸ Immigration Act 2009 (NZ), s 321.
- ⁸⁹ Immigration Act 2009 (NZ) s 172.
- ⁹⁰ Immigration Act 2009 (NZ) s 309(2). See also New Zealand Immigration, Immigration Instructions, C7.5 and C5.20 <<https://www.immigration.govt.nz/about-us/policy-and-law/how-the-immigration-system-operates/immigration-instructions>>.
- ⁹¹ Immigration Act 2009 (NZ) s 137(2).
- ⁹² Immigration Act 2016 (UK) s 61 and Schedule 10 item 1 (1)-(3) and 11(1)(b).
- ⁹³ UK Home Office, 'Detention: General instructions', (Manual, 14 January 2022) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046288/Detention_General_instructions.pdf>.
- ⁹⁴ UK Home Office, 'Immigration detention bail' (Webpage) <<https://www.gov.uk/bail-immigration-detainees/apply-for-bail>>.
- ⁹⁵ UK Home Office, 'Immigration detention bail' (Webpage) <<https://www.gov.uk/bail-immigration-detainees/apply-for-bail>>.
- ⁹⁶ Immigration Act 2016 (UK) Schedule 10 Item 3(2). There is an explanation of these in the First Tier Tribunal 'Guidance on Immigration Bail for Judges of the First Tier Tribunal' (Guidance document, 8 March 2024) 7-10 <<https://www.judiciary.uk/guidance-and-resources/guidance-on-immigration-bail-for-judges-of-the-first-tier-tribunal-immigration-and-asylum-chamber/>>.
- ⁹⁷ Immigration Act 2016 (UK) Schedule 10 Item 3 (4).

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- ⁹⁸ *Immigration Act 2016* (UK) Schedule 10. See also: UK Home Office, 'Immigration bail', (Manual, 31 January 2022) 11
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051204/immigration_bail.pdf>.
- ⁹⁹ UK Home Office, 'Immigration bail', (Manual, 31 January 2022) 41.
- ¹⁰⁰ *Immigration and Nationality Act* SCA 8 USC §1231
<<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-s1231&num=0&edition=prelim>>
- ¹⁰¹ *Immigration and Nationality Act* SCA 8 USC §1231(a)(3).
- ¹⁰² *Zadvydas v Davis* 533 US 678, [2].
- ¹⁰³ *Zadvydas v Davis* 533 US 678, [3].
- ¹⁰⁴ The complainants who arrived prior to 20 May 2013 were known as offshore entry persons rather than unauthorised maritime arrivals, but the relevant statutory bar existed for both categories of complainants, so the Commission has adopted this term for the sake of clarity.
- ¹⁰⁵ *Migration Act 1958* (Cth) s 46A.
- ¹⁰⁶ 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].
- ¹⁰⁷ The date of the Minister's signature is 28 February 2013 but from context it has been presumed that this should have been 28 February 2014.
- ¹⁰⁸ Australian Human Rights Commission, *Background paper: Human rights issues raised by visa refusal or cancellation under s 501 of the Migration Act* (Report, June 2013)
<<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/background-paper-human-rights-issues-raised-visa>> 6.
- ¹⁰⁹ Section 500(1)(b) of the Migration Act allows review to the Administrative Appeals Tribunal only in respect of decisions made by a delegate of the Minister.
- ¹¹⁰ Department of Foreign Affairs and Trade, *Afghanistan Country Information Report* (Report, 18 September 2017) and Department of Foreign Affairs and Trade, *Thematic Report Hazaras in Afghanistan* (Report, 18 September 2017) - copies provided by DFAT Country Information Service.
- ¹¹¹ Department of Foreign Affairs and Trade, *Afghanistan Country Information Report* (Report, 14 January 2022) <<https://www.dfat.gov.au/sites/default/files/country-information-report-afghanistan.pdf>> 13.
- ¹¹² *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 [9].
- ¹¹³ *DBB16 v Minister for Immigration and Border Protection* [2018] FCAFC 178.
- ¹¹⁴ *Mr AP v Commonwealth of Australia (Department of Home Affairs)* [2019] AusHRC 134, 13 [53].
- ¹¹⁵ PAM3: Act – Compliance and Case Resolution – Case resolution – Returns and removals – Removal from Australia, 18 August 2017, accessed through LEGENDcom on 3 March 2023.
- ¹¹⁶ *Mr AP v Commonwealth of Australia (Department of Home Affairs)* [2019] AusHRC 134, 13 [53].
- ¹¹⁷ Mr WE called and spoke to a member of the Commission's Investigation and Conciliation Section on 14 July 2021.
- ¹¹⁸ Department of Foreign Affairs and Trade, *Iran Country Information Report* (Report, 21 April 2016) - copy provided by DFAT Country Information Service.
- ¹¹⁹ Department of Foreign Affairs and Trade, *Afghanistan Country Information Report* (Report, 7 June 2018) - copy provided by DFAT Country Information Service.

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- ¹²⁰ Department of Foreign Affairs and Trade, *Iran Country Information Report* (Report, 21 April 2016) - copy provided by DFAT Country Information Service.
- ¹²¹ Department of Foreign Affairs and Trade, *Afghanistan Country Information Report* (Report, 7 June 2018) - copy provided by DFAT Country Information Service.
- ¹²² Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'* (Report, July 2019) [6.3] <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.
- ¹²³ *Six persons with adverse security assessments detained in immigration detention, and family members affected by their detention v Commonwealth of Australia (DIBP)* [2016] AusHRC 107.
- ¹²⁴ A qualified assessment generally means that ASIO has identified information relevant to security but is not making a recommendation in relation to the proposed action. For more information, see <<https://www.anao.gov.au/work/performance-audit/security-assessments-individuals>>.
- ¹²⁵ Migration Act, ss 5H(2)(a), 36(2)(a) and 36(2C)(a)(i).
- ¹²⁶ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, [9].
- ¹²⁷ *Immigration detainees with adverse security assessments v Commonwealth* [2013] AusHRC 64.
- ¹²⁸ *Mr Pjetri v Commonwealth of Australia (Department of Home Affairs)* [2024] AusHRC 170.
- ¹²⁹ Migration Act, s 48. Also on the basis of s 46A.
- ¹³⁰ Human Rights Council, *Report of the Working Group on Arbitrary Detention, Opinion No. 17/2021 concerning Mirand Pjetri (Australia)*, UN Doc A/HRC/WGAD/2021/17 (4 June 2021).
- ¹³¹ Australian Human Rights Commission, 'Tell me about: The 'Enhanced Screening Process'' (26 June 2013) <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/tell-me-about-enhanced-screening-process>>.
- ¹³² *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31.
- ¹³³ *Mr AP v Commonwealth of Australia (Department of Home Affairs)* [2019] AusHRC 134, 13 [53].
- ¹³⁴ *Sri Lankan refugees v Commonwealth of Australia* [2012] AusHRC 56.
- ¹³⁵ Human Rights Council, *Report of the Working Group on Arbitrary Detention, Opinion No. 17/2021 concerning Mirand Pjetri (Australia)* UN Doc A/HRC/WGAD/2021/17 (4 June 2021).
- ¹³⁶ *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- ¹³⁷ *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- ¹³⁸ *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
- ¹³⁹ Department of Home Affairs, *Alternatives to Held Detention Program, stakeholder meeting – briefing notes and presentation*, 8 August 2022, at <<https://www.homeaffairs.gov.au/foi/files/2022/fa-220901228-document-released.PDF>>.
- ¹⁴⁰ Robert Cornall AO, *Report to the Secretary for Home Affairs and the Commissioner of the Australian Border Force*, March 2020, released by the Department of Home Affairs, at <<https://www.homeaffairs.gov.au/foi/files/2023/fa-230300029-document-released.PDF>>, accessed 25 January 2024.
- ¹⁴¹ Australian Human Rights Commission, *Mr FF v Commonwealth of Australia (Department of Home Affairs)* [2024] AusHRC 156, 34.
- ¹⁴² Department of Home Affairs, 'Immigration Detention and Community Statistics Summary' (October 2024) 13 <<https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-community-statistics-summary-31-oct-2024.pdf>>.
- ¹⁴³ *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [17] (Kiefel CJ, Gageler and Gleeson JJ) and [99] (Gordon J), cf [219] (Steward J).
- ¹⁴⁴ See for example Australian Human Rights Commission, *Mr FF v Commonwealth of Australia (Department of Home Affairs)* [2024] AusHRC 156.
- ¹⁴⁵ Department of Home Affairs, 'Detention Status Resolution Review' <<https://www.homeaffairs.gov.au/foi/files/2023/fa-230300856-document-released.PDF>>.

¹⁴⁶ *AZ v Commonwealth (Department of Home Affairs)* [2018] AusHRC 122, [58]; *QA v Commonwealth (Department of Home Affairs)* [2021] AusHRC 140, [189]; *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, [576]–[578].

¹⁴⁷ [2021] AusHRC 141, 101-104.

¹⁴⁸ *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, 111.

¹⁴⁹ Parliament of Australia, *Senate Select Committee on Ministerial Discretion in Migration Matters* (March 2004)
<https://www.aph.gov.au/~media/wopapub/senate/committee/minmig_ctte/report/report_pdf.ashx>.

¹⁵⁰ Parliament of Australia, *Joint Select Committee on Australia's Immigration Detention Network*, (March 2012)
<https://www.aph.gov.au/~media/wopapub/senate/committee/immigration_detention_ctte/report/report_pdf.ashx>.