



Australian
Human Rights
Commission

BB v

Commonwealth
of Australia

[2012] AusHRC 58

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**BB v Commonwealth
of Australia (Department of
Immigration and Citizenship)**

Report into arbitrary detention and the
right to be treated with humanity and
with respect for the inherent dignity of
the human person

[2012] AusHRC 58

Australian Human Rights Commission 2012



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Contents

1	Introduction	3
2	Summary of findings	3
3	Summary of recommendations	4
4	The complaint by BB	4
4.1	Background	4
4.2	Findings of fact	4
5	The Commission's human rights inquiry and complaints function	5
5.1	The Commission can inquire into acts or practices of the Commonwealth	5
5.2	'Human rights' relevant to this complaint	6
6	Forming my opinion	8
7	Arbitrary detention	8
8	Treatment in detention	9
9	Recommendations	9
9.1	Recommended policy changes	10
10	Department's response to the recommendations	10



**Australian
Human Rights
Commission**

March 2013

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

Dear Attorney

Pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) I attach a report by the previous President of the Australian Human Rights Commission, The Hon. Catherine Branson QC, into the complaint made by BB.

President Branson found that the acts and practices of the Commonwealth breached BB's right not to be arbitrarily detained.

By letter dated 1 August 2012, the Department of Immigration and Citizenship provided its response to President Branson's findings and recommendations. I have set out the response of the department in its entirety in part 10 of the report.

Yours sincerely

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

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1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission and the reasons for those findings following an inquiry by the Commission into a complaint lodged by BB that his treatment by the Commonwealth of Australia and Serco Australia Pty Limited involved acts or practices inconsistent with or contrary to human rights.
2. BB committed suicide on 26 October 2011. This complaint has been pursued on his behalf by his advocate.

2 Summary of findings

3. The previous President of the Commission, The Hon. Catherine Branson QC, found that the detention of BB on Christmas Island and in Villawood Immigration Detention Centre (VIDC) in the period 2 October 2009 until 22 June 2011 was not necessary and not proportionate to the Commonwealth's legitimate aim of protecting the Australian community from non-citizens who pose a risk to the community.
4. The failure of the Minister for Immigration and Citizenship (the Minister) to place BB into community detention or other less restrictive form of detention as soon as BB entered the custody of the Commonwealth was inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).
5. President Branson did not find that the placement of BB in the Blaxland area of VIDC from about 17 November 2010 until 22 December 2010 constituted a breach of article 10(1) of the ICCPR.

3 Summary of recommendations

6. In light of President Branson's findings regarding the acts and practices of the Commonwealth, President Branson also recommended that the Department of Immigration and Citizenship (the department) amend its policies in the ways identified in section 9.1 of this report.

4 The complaint by BB

4.1 Background

7. In or about late 2010 BB lodged a complaint alleging that his placement in the Blaxland area from about 17 November 2010 until 22 December 2010 was a breach of article 10 of the ICCPR.
8. President Branson also considered whether BB's detention by the department was arbitrary within the meaning of article 9 of the ICCPR.
9. BB's representative, the department and Serco have had the opportunity to respond to President Branson's preliminary view of 24 May 2012 which set out the acts or practices raised by the complaint that appeared to be inconsistent with or contrary to human rights.
10. The President's function in investigating complaints of breaches of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with the human rights defined and protected by the ICCPR.
11. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of the international instruments and by international jurisprudence about their interpretation.

4.2 Findings of fact

12. President Branson considered the following statements about the circumstances which gave rise to BB's complaint to be uncontentious.
13. BB was a foreign national who arrived on Christmas Island as an irregular maritime arrival aboard suspected illegal entry vessel 59 'Glenroy' on 2 October 2009.
14. On 14 November 2009 BB lodged a request for a Refugee Status Assessment (RSA).
15. On 14 January 2010 BB was found not to be a refugee. On 25 January 2010 BB requested an independent merits review of the RSA decision.
16. On 27 March 2010 BB was transferred to VIDC. On 10 April 2010 an independent reviewer found BB not to be a refugee.
17. On 24 April 2010 BB was diagnosed with Post Traumatic Stress Disorder (PTSD).
18. On 11 November 2010 as a result of a decision of the High Court in a matter not involving BB, the department commenced a review of BB's RSA.
19. On 10 June 2011 BB was diagnosed with leprosy. On this date the department initiated a referral to the Minister so that that Minister might consider placing BB in community detention.

20. On 22 June 2011 the department sought advice from the Australian Security Intelligence Organisation (ASIO) as to whether BB could be placed in community detention.
21. The department states that on 6 July 2011 ASIO advised the department that ‘on the basis of the information available to ASIO at the time, ASIO formed the view that it would not be consistent with the requirements of security for (BB) to be released into community detention’.
22. On or about 13 July 2011 BB was moved to Sydney Immigration Residential Housing. On 10 August 2011 BB was found to be a refugee.
23. On 26 October 2011 BB committed suicide whilst detained in Sydney Immigration Residential Housing.

5 The Commission’s human rights inquiry and complaints function

24. Section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) gives the Commission the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right.
25. Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.

5.1 The Commission can inquire into acts or practices of the Commonwealth

26. The expressions ‘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 under an enactment.
27. Section 3(3) of the AHRC Act also provides that a reference to, or the doing of, an act includes a reference to a refusal or failure to do an act.
28. An ‘act’ or ‘practice’ only invokes the human rights complaints jurisdiction of the Commission where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.
29. As a judge of the Federal Court in *Secretary, Department of Defence v HREOC, Burgess & Ors*¹, Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Therefore, if a law requires that the act or practice be done by or on behalf of the Commonwealth, its officers or agents, and there is no discretion involved, the act or practice done pursuant to that statutory provision will be outside the scope of the Commission’s human rights inquiry jurisdiction.²
30. BB was detained by the Commonwealth from 2 October 2009, when he arrived on Christmas Island, until 26 October 2011 when he committed suicide whilst detained in Sydney Immigration Residential Housing.

31. Whilst on Christmas Island, BB was detained under section 189(3) of the *Migration Act 1958* (Cth) (Migration Act). Section 189(3) of the Migration Act states that ‘if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person’. There was no requirement for the Commonwealth to detain BB whilst he was on Christmas Island.
32. When BB was transferred from Christmas Island to the mainland he was detained under section 189(1) of the Migration Act. While section 189(1) of the Migration Act requires the detention of unlawful non-citizens, it does not require that unlawful non-citizens are detained in an immigration detention facility.
33. Section 197AB of the Migration Act states:

If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a **residence determination**) to the effect that one or more specified persons to whom this subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1).
34. Further, the definition of ‘immigration detention’ includes ‘being held by, or on behalf, of an officer in another place approved by the Minister in writing.’³ Accordingly, BB could have been placed in community detention or the Minister could have approved a place in the community as a place of detention for him.

5.2 ‘Human rights’ relevant to this complaint

35. The expression ‘human rights’ is defined in section 3 of the AHRC Act and includes the rights and freedoms recognised in the ICCPR, which is set out in Schedule 2 to the AHRC Act.
36. The articles of the ICCPR that are of particular relevance to this complaint are:
 - Article 9(1) (prohibition on arbitrary detention); and
 - Article 10(1) (humane treatment of people deprived of their liberty).

(a) Article 9(1) of the ICCPR

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

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
38. The requirement that detention not be ‘arbitrary’ is separate and distinct from the requirement that detention be lawful.⁴
39. In order to avoid the characterisation of arbitrariness, detention should not continue beyond the period for which a state party can provide appropriate justification.⁵
40. In *A v Australia*⁶ the United Nations Human Rights Committee (UNHRC) said:

[T]he Committee recalls that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.⁷

41. The UNHRC further stated:

... the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which justify detention for a period. Without such factors, detention may be considered arbitrary, even if entry was illegal.⁸

42. Moreover, detention which is otherwise lawful may still be arbitrary where there are less invasive means of achieving compliance with immigration policies.

43. In *C v Australia*⁹ the UNHRC found that the detention was arbitrary because:

[t]he State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition.¹⁰

(b) Article 10(1) of the ICCPR

44. Article 10(1) provides:

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

45. Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons.¹¹ However, a complainant must demonstrate an additional exacerbating factor beyond the usual incidents of detention.¹²

46. In *Brough v Australia*¹³ the UNHRC stated:

Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.¹⁴

47. The content of article 10(1) has also been developed with the assistance of a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty, including the Standard Minimum Rules for the Treatment of Prisoners¹⁵ (Standard Minimum Rules) and the Body of Principles for the Protection of all Persons under Any Form of Detention¹⁶ (the Body of Principles).

48. The Third Committee of the General Assembly in its 1958 report on the drafting of the ICCPR stated that the Standard Minimum Rules should be taken into account when interpreting and applying article 10(1).¹⁷ The UNHRC has also indicated that compliance with the Standard Minimum Rules and the Body of Principles is the minimum requirement for compliance with the obligations imposed by the ICCPR that people in detention are to be treated humanely under article 10(1).¹⁸

6 Forming my opinion

49. In forming an opinion as to whether any act or practice was inconsistent with or contrary to any human right Ms Branson carefully considered all of the information provided to her by the parties in connection with this matter.

7 Arbitrary detention

50. BB claimed that his detention by the department was arbitrary within the meaning of article 9(1) of the ICCPR.
51. The department denies that BB's detention was arbitrary. The department states that the Australian government's position is that the detention of individuals claiming protection is neither unlawful nor arbitrary per se under international law.
52. The department notes that detention may become arbitrary after a certain period of time without proper justification. The department claims that the determining factor, however, is whether the grounds for detention are justifiable. The department states that the Government's position is that the detention of BB was not arbitrary because he had not received security clearance.
53. The information before the Commission suggests that the department first considered placing BB in a less restrictive form of detention in June 2011. It appears that the department first attempted to obtain a security clearance in relation to BB on 22 June 2011.
54. From 2 October 2009 until 5 July 2011 the Minister had no information before him to suggest that it was necessary to detain BB in an immigration detention facility. It was inconsistent with BB's right to liberty that the the department detained him in an immigration detained facility for almost two years without any consideration of whether he could be detained in a less restrictive way.
55. The department advises that on 6 July 2011 it received advice from ASIO that it would not be consistent with the requirements of security for BB to be placed in the community. As the Commission has not been provided with the advice that the department received from ASIO, it is unable to determine whether, consistently with that advice, it might have been possible for BB to live in the community subject, for example, to strict reporting or other conditions.
56. For the reasons outlined above, I find that BB's detention by the department from 2 October 2009 until about 22 June 2011 was arbitrary within the meaning of article 9 of the ICCPR.

8 Treatment in detention

57. BB claimed that the department breached article 10(1) of the ICCPR by placing him in the Blaxland area from about 17 November 2010 until about 22 December 2010. BB claimed that there was no reason to place him in the Blaxland area and that being placed in this area had a more severe impact on him than it would have had on a detainee without PTSD.
58. The department states that BB was moved from the Fowler area to the Blaxland area for two periods from late September 2010 until early November 2010 and from about 17 November 2010 until about 22 December 2010. The department agrees that the Blaxland area is a more restrictive place of detention than the Fowler area.
59. Serco claims that BB was moved to the Blaxland area on 17 November 2010 after being involved in a violent disorder in the Fowler area on that day. In support of its claim, Serco provides a copy of contemporaneous incident notes which state that BB was throwing bricks at VIDC staff. Serco states that BB was moved back to Fowler on 22 December 2010 when a decision was made that no criminal action would be taken against those involved in the incident.
60. On 24 April 2010 BB was diagnosed with PTSD. Before being placed in the Blaxland area, BB had participated in hunger strikes and had experienced suicidal ideation. The medical information provided by the department suggests that BB experienced periods of low mood and anxiety throughout the time that he was detained in VIDC. BB appears to have experienced a period of low mood whilst he was detained in the Blaxland area.
61. The information provided to the Commission indicates that BB's health was regularly monitored throughout his detention by the department, including whilst he was detained in the Blaxland area.
62. The Blaxland area is a more restrictive place of detention than the Fowler area or than Sydney Immigration Residential Housing, where BB was later detained. However, taking into account BB's individual circumstances, I am not satisfied that it was a breach of BB's right to be treated with humanity and with respect for his dignity, for Serco to detain him in the more restrictive conditions of the Blaxland area.

9 Recommendations

63. 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.¹⁹ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²⁰
64. The Commission may also recommend:
 - the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.²¹
65. BB committed suicide in Sydney Immigration Residential Housing on 26 October 2011. No claim for compensation in respect of his death has been made. In light of the fact that BB has no family in Australia and that his parents are deceased, President Branson made no recommendation relating to compensation or an apology.

66. However, Ms Branson recommended that the department should amend its policies in the ways outlined below.

9.1 Recommended policy changes

67. The need to detain in an immigration detention facility should be assessed on a case-by-case basis taking into consideration individual circumstances. That assessment should be conducted when a person is taken into immigration detention or as soon as possible thereafter. A person should only be held in an immigration detention facility if they are assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved.
68. The department should conduct regular reviews of detention for all people in immigration detention facilities. This review should focus on whether continued detention in an immigration detention facility is necessary, reasonable and proportionate in each individual's specific circumstances.
69. The guidelines relating to the Minister's residence determination power should be amended to provide that, unless the department is satisfied that a person in an immigration detention facility is a flight risk or poses an unacceptable risk to the Australian community that cannot be addressed through the imposition of conditions on community detention, the department should refer all persons to the Minister for consideration of making a residence determination. The department should make the referral as soon as practicable and in no circumstances later than 90 days after the individual is placed in an immigration detention facility.

10 Department's response to the recommendations

70. By letter dated 20 July 2012, the department was requested to advise the Commission whether it had taken or is taking any action as a result of Ms Branson's findings and recommendations and, if so, the nature of that action.
71. By letter dated 1 August 2012, the department provided the following response to Ms Branson's notice and recommendations:

Department of Immigration and Citizenship's response to a notice under section 29(2)(a) of the Australian Human Rights Commission Act 1986

Complaint by BB against the Commonwealth of Australia (Department of Immigration and Citizenship) and Serco Australia Pty Limited

Recommendations

- 1. The need to detain in an immigration detention facility should be assessed on a case-by-case basis taking into consideration individual circumstances. That assessment should be conducted when a person is taken into immigration detention or as soon as possible thereafter.**

A person should only be held in an immigration detention facility if they are assessed as posing an unacceptable risk to the Australian community and that risk cannot be met in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved.

DIAC's response

The Department notes your recommendation. The Department would like to highlight that detention placement is currently based on individual circumstances and is reviewed periodically as these circumstances change. With regard to irregular maritime arrivals, mandatory detention is utilised for the purposes of managing health, identity and security risks. On completion and satisfaction of those checks, however, they are considered for alternate management strategies including either temporary visa options or a community detention placement.

- 2. DIAC should conduct regular reviews of detention for all people in immigration detention facilities. This review should focus on whether continued detention in an immigration detention facility is necessary, reasonable and proportionate in each individual's specific circumstances.**

DIAC's response

The Department conducts regular reviews of detention for all people in immigration detention facilities. These reviews are focussed on the appropriateness of both the accommodation and the services provided and do consider the specific circumstances of each individual.

- 3. The guidelines relating to the Minister's residence determination power should be amended to provide that, unless DIAC is satisfied that a person in an immigration detention facility is a flight risk or poses an unacceptable risk to the Australian community that cannot be addressed through the imposition of conditions on community detention, DIAC should refer all persons to the Minister for consideration of making a residence determination. DIAC should make the referral as soon as practicable and in no circumstances later than 90 days after the individual is placed in an immigration detention facility.**

DIAC's response

The Department notes your recommendation and can advise that your comments have been referred for consideration to the responsible area that is currently reviewing the existing Ministerial Guidelines on Residence Determination.

72. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

March 2013

- 1 (1997) 78 FCR 208.
- 2 Ibid.
- 3 *Migration Act 1958* (Cth), s 5.
- 4 In *Van Alphen v the Netherlands*, the UNHRC said '[A]rbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime' Communication no 305/1988, UN Doc CCPR/C/39/D/305/1988.
- 5 *C v Australia* Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999 [8.2], *D and E v Australia* Communication No 1050/2002 UN Doc CCPR/C/87/D/1050/2002 [7.2], *Omar Sharif Baban v Australia* Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001 [7.2], *Bakhtiyari v Australia* Communication No 1069/2002 UN doc CCPR/C/79/D/1069/2002 [9.2].
- 6 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993.
- 7 Ibid [9.2].
- 8 Ibid [9.4].
- 9 Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999.
- 10 Above, n 5.
- 11 United Nations Human Rights Committee, General Comment 21, Article 10 (Forty-Forth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 153.
- 12 *Jensen v Australia* Communication No 762/1997 UN Doc CCPR/C/71/D/762/1997.
- 13 Communication no 1184/03 CCPR/C/86/D/1184/2003.
- 14 Ibid [9.2].
- 15 The Standard Minimum Rules were approved by the UN Economic and Social Council in 1957. They were subsequently adopted by the UN General Assembly in resolutions 2858 of 1971 and 3144 of 1983: U.N. Doc.A/COMF/611, Annex 1.
- 16 The Body of Principles were adopted by by General Assembly resolution 43/173 of 9 December 1988.
- 17 United Nations, Official Records of the General Assembly, Thirteenth Session, Third Committee, 16 September to 8 December 1958, pages 160-173 and 227-241.
- 18 Human Rights Committee General Comment No 21 (1992),[5]. See also *Mukong v Cameroon* (1994) Communication No 458/1991, UN Doc CCPR/C/51/458/1991 [9.3].
- 19 *Australian Human Rights Commission Act 1986* s 29(2)(a).
- 20 *Australian Human Rights Commission Act 1986* s 29(2)(b).
- 21 *Australian Human Rights Commission Act 1986* s 29(2)(c).

- Further Information

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