



Australian
Human Rights
Commission

HA, HB, HC, HD and HE v Commonwealth of Australia (DIBP)

[2014] AusHRC 87

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**HA, HB, HC, HD and HE v
Commonwealth of Australia
(Department of Immigration and
Border Protection)**

Report into arbitrary detention

[2014] AusHRC 87

Australian Human Rights Commission 2014



**Australian
Human Rights
Commission**

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**Australian
Human Rights
Commission**

September 2014

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my Report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into the complaints made by five men who are or were in immigration detention against the Commonwealth of Australia (Department of Immigration and Border Protection) (the Commonwealth).

I have found that the Commonwealth's failure to consider the complainants' individual circumstances and suitability for less restrictive forms of detention (if necessary, with conditions) was arbitrary and inconsistent with their right to liberty under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

I have also found that the practice of the Minister for Immigration and Border Protection that he would not consider individuals who are facing criminal charges for community detention was contrary to article 9(1) of the ICCPR.

In relation to three of the complainants, although I accept that detention had serious adverse effects on their mental health, I have not found that they have suffered such severe psychological impairment that their detention amounted to cruel, inhuman or degrading treatment or punishment.

By letter dated 9 September 2014, the Commonwealth provided a response to my findings and recommendations. This response is set out in Part 11 of the enclosed Report.

I enclose a copy of my Report.

Yours sincerely

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

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into complaints by five men who are or were in immigration detention. Each of the complainants alleges acts of the Commonwealth, in relation to their detention, to be inconsistent with their human rights, namely the rights recognised by the *International Covenant on Civil and Political Rights* (ICCPR).
2. This inquiry was undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. The complainants have each asked not to be referred to by name in this Report. Accordingly, I have directed that the identities of each of the complainants not be published in accordance with section 14(2) of the AHRC Act. For the purposes of this Report, each complainant whose identity has been suppressed has been given a pseudonym beginning with H.

2 Summary of findings and recommendations

4. As a result of conducting this inquiry, I have found that:
 - the Department's failure to consider the complainants' individual circumstances and suitability for less restrictive forms of detention (if necessary, with conditions) was arbitrary and inconsistent with their right to liberty under article 9 of the ICCPR; and
 - the practice of the Minister for Immigration and Border Protection (Minister) that he would not consider individuals who are facing criminal charges for community detention was contrary to article 9(1) of the ICCPR.
5. Although I accept that detention has had serious adverse effects on the mental health of Messrs HA, HC and HD, I have not found that they have suffered such severe psychological impairment that their detention amounted to cruel, inhuman or degrading treatment or punishment.
6. In light of my findings regarding the acts or practices of the Commonwealth, I recommend that the Commonwealth pay financial compensation to each of the complainants in the following amounts:
 - Mr HA: \$190,000
 - Mr HB: \$175,000
 - Mr HC: \$180,000
 - Mr HD: \$190,000
 - Mr HE: \$175,000.
7. I also recommend a number of policy changes in relation to consideration of individuals for community detention who are persons of interest to the AFP or facing criminal charges (discussed at paragraphs 116 to 119 of this Report).

3 Background

8. Messrs HA, HB, HC, HD and HE (the complainants) have made written complaints to the Commission.
9. The complainants arrived at Christmas Island by boat, in late 2009 to early 2010, and were detained by the Commonwealth pursuant to section 189(3) of the *Migration Act 1958* (Cth) (Migration Act) immediately on their arrival.
10. Each of the complainants was transferred from Christmas Island to Immigration Detention Centres on the mainland in 2010 and detained pursuant to section 189(1) of the Migration Act. Messrs HA, HC, HD and HE were transferred from Christmas Island to Villawood Immigration Detention Centre (VIDC). Mr HB was transferred from Christmas Island to Perth Immigration Detention Centre in February 2010 and then to Villawood Immigration Detention centre in August 2010.

(a) Protection applications

11. Messrs HA and HC claim to be stateless Kurds. Messrs HB and HE are nationals of Iran. Mr HD is a national of Afghanistan.
12. An officer of the Department assessed that none of the complainants are refugees within the meaning of the Convention Relating to the Status of Refugees. Each complainant sought an independent merits review (IMR) of this assessment and each was initially unsuccessful. Four of the complainants (Messrs HA, HB, HD and HE) sought judicial review of their IMR assessments. The applications of Messrs HA, HB and HD were dismissed and the application of Mr HE was upheld, the Federal Magistrates Court finding that his IMR process involved error.
13. Mr HE's second IMR¹ was finalised on 21 March 2012, when he was found to be a person to whom Australia owes protection obligations. He was granted a protection visa on 19 June 2013 and released from detention. The other four complainants remain in immigration detention or criminal custody.

(b) Criminal charges

14. In April 2011, each of the complainants allegedly took part in rooftop protests/riots at VIDC (April 2011 riots). Following the April 2011 riots, on 22 April 2011, Messrs HC, HD and HE were transferred to the Metropolitan Remand and Reception Centre at Silverwater Correctional Centre (MRRC). This transfer followed a request from the Department to transfer a number of detainees to an alternative place of detention to facilitate the restoration of public order at VIDC. During this time at MRRC, these complainants were in immigration detention for the purposes of the Migration Act.
15. Subsequently, each of the complainants was charged by the Australian Federal Police (AFP). They were initially refused bail and remanded in criminal custody at the MRRC. Bail was subsequently granted and each of the complainants was returned to immigration detention at VIDC. In early 2013, each of the complainants faced charges in the New South Wales Supreme Court in relation to their alleged role in the April 2011 riots.

16. The table below sets out, respectively:

- the date on which each of the complaints was charged by the AFP under the *Crimes Act 1900* (NSW);
- the date that each of the complainants was granted bail and returned to immigration detention; and
- where applicable, the date that each was sentenced.

Complainant	Charged by the AFP and held at the MRRC, bail refused	Granted bail and returned to immigration detention	Sentenced/sentence term
Mr HC	4 May 2011	7 March 2012	Convicted for affray. 17 April 2013 – sentenced to 2 years’ imprisonment (1 year non-parole).
Mr HB	4 May 2011	24 May 2012	Convicted of riot. 28 June 2013 – sentenced to 3 years’ imprisonment (1 year 10 months non-parole).
Mr HD	27 June 2011	8 March 2012	Convicted of riot. 28 June 2013 – sentenced to 20 months’ imprisonment (1 year 2 months non-parole).
Mr HE	12 January 2012	21 February 2012	Found not guilty of riot on 17 April 2013.
Mr HA	12 January 2012	5 April 2012	Convicted of affray. 5 April 2013 – sentenced to 16 months’ imprisonment (8 months non-parole).

4 The Complaints

17. The complainants have made complaints to the Commission alleging that their prolonged detention in immigration detention centres was arbitrary and interfered with their liberty in breach of article 9(1) of the ICCPR.
18. Messrs HA, HC and HD also appear to claim that their detention in immigration detention centres had an adverse impact on their mental health and amounts to cruel, inhuman or degrading treatment or punishment in breach of article 7 of the ICCPR.
19. I note that a number of the complainants also complain about their detention in the high security Blaxland compound, especially after each of them had been granted bail. In light of my findings (below) in relation to their detention in immigration detention centres generally, I have formed the view that it is not necessary to separately inquire into their placement within VIDC.

5 Legal framework

5.1 Functions of the Commission

20. Section 11(1)(f) of the AHRC Act provides that the Commission has a function to inquire into any act or practice that may be inconsistent with or contrary to any human right.

5.2 Scope of 'act' and 'practice'

21. The terms 'act' and 'practice' are defined in section 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
22. 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.
23. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken;² that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

6 Human rights relevant to this complaint

24. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.
25. The articles of the ICCPR that are of most relevance to this complaint are article 9(1) and article 7.

6.1 Article 9(1) of the ICCPR

26. 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.

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

- (a) ‘detention’ includes immigration detention;³
- (b) lawful detention may become arbitrary when a person’s deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth’s legitimate aim of ensuring the effective operation of Australia’s migration system;⁴
- (c) arbitrariness is not to be equated with ‘against the law’; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;⁵ and
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁶

28. The United Nations Human Rights Committee has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party’s immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.⁷
29. In the case of the present complainants, it will be necessary to consider whether their prolonged detention in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to each of them, and in light of the available alternatives to closed detention.

6.2 Article 7 of the ICCPR

30. Article 7 of the ICCPR provides:

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

31. In *C v Australia*,⁸ the United Nations Human Rights Committee found that the continued detention of C when the State party was aware of the deterioration of C's mental health constituted a breach of article 7 of the ICCPR. The Committee stated:

... the State party was aware, at least from August 1992 when he was prescribed the use of tranquilisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt) it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow.

32. The relevant question for the purposes of article 7 of the ICCPR is whether the complainants' detention has caused a level of mental impairment such that it amounts to cruel, inhuman or degrading treatment or punishment.

7 Article 9 of the ICCPR

7.1 Act 1: Failure to detain in the least restrictive manner possible and/or failure to consider less restrictive alternatives to closed immigration detention

33. All five of the complainants have spent prolonged periods in closed immigration detention facilities. Each of the complainants arrived on Christmas Island in late 2009 or early 2010 and was detained pursuant to section 189(3) of the Migration Act. At the time of their detention, section 189(3) of the Migration Act stated 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 the complainants while they were on Christmas Island.

34. Once the complainants were transferred from Christmas Island to the mainland, they were detained in VIDC pursuant to section 189(1) of the Migration Act. Although section 189(1) requires the detention of unlawful non-citizens, it does not require that unlawful non-citizens be detained in an immigration detention facility.

35. Under section 195A of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under section 189 of the Migration Act.

36. Under section 197AB of the Migration Act, if the Minister thinks that it is in the public interest to do so, the Minister may make a determination that particular persons are to reside at a specified place, instead of in immigration detention.

37. 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'.⁹

38. Accordingly, the complainants could have been placed in community detention or the Minister could have approved a place in the community as a place of detention.

(a) Mr HA

39. Mr HA arrived on Christmas Island on 19 December 2009 and was immediately detained. He was transferred to VIDC on the mainland on 17 July 2010.
40. Prior to the April 2011 riots, Mr HA had been detained in closed immigration detention facilities for approximately 16 months. During this period of time, the Department did not consider Mr HA's suitability for community detention and did not refer Mr HA's case to the Minister for consideration of the exercise of his powers under section 195A or section 197AB of the Migration Act. The Department has provided no explanation for its failure to consider less restrictive alternatives to closed detention during this extended period of time.
41. On 12 January 2012, Mr HA was charged by the AFP for his alleged involvement in the April 2011 riots and was transferred into criminal custody at the MRRC, where he spent approximately three months. Bail was granted on 5 April 2012 and Mr HA was returned to immigration detention at VIDC.
42. Mr HA remained in immigration detention at VIDC from 5 April 2012 until 5 April 2013, when he was convicted of a criminal offence and transferred into criminal custody.
43. The information before me suggests that the Commonwealth first considered placing Mr HA in a less restrictive form of detention in September 2011. The Department advises that:
- on 26 September 2011, Mr HA's case was found to meet the guidelines for referral to the Minister for consideration of community detention pursuant to section 197AB of the Migration Act;
 - on 7 December 2011, the Department was advised by the AFP that Mr HA was to be formally charged as a consequence of his involvement in the April 2011 riots; and
 - on the basis of his status as a person to be charged, Mr HA was no longer suitable for community detention consideration, in line with the then Minister's advice to the Department dated 23 December 2011.
44. It appears that the decision not to consider Mr HA for community detention once it was known that he was to be charged by the AFP was not made on the basis of an assessment of Mr HA's individual circumstances or the risk that he may pose to the community; rather, the Department was acting on the basis of a direction given by the then Minister in relation to all detainees with ongoing criminal proceedings. I consider this practice separately below.
45. It is of significant concern that the first time the Department considered Mr HA for community detention was in September 2011, 21 months after he had been placed in immigration detention. This delay is inconsistent with the Commonwealth's obligation to detain Mr HA in the least restrictive manner possible.
46. Mr HA was granted bail on 5 April 2012. The fact that bail was granted indicates that the Court considered that remand in criminal custody prior to trial was not necessary. I invited the Department to provide the Commission with a copy of Mr HA's bail conditions, however, at the time my Notice of Decision was finalised the Commission had not been provided with this information.
47. I find that the Department's failure to consider Mr HA's individual circumstances and suitability for less restrictive forms of detention (if necessary with conditions), either in the 20 months prior to September 2011 or in the 12 months after he had been granted bail, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR.

(b) Mr HB

48. Mr HB arrived on Christmas Island on 14 September 2009 and was immediately detained. He was transferred to Perth Immigration Detention Centre on 6 February 2010 and on 6 August 2010 he was transferred to VIDC.
49. Prior to the April 2011 riots, Mr HB had been detained in closed immigration detention facilities for approximately 19 months. During this period of time, the Department did not consider Mr HB's suitability for community detention and did not refer Mr HB's case to the Minister for consideration of the exercise of his powers under section 195A or section 197AB of the Migration Act. The Department has provided no explanation for its failure to consider less restrictive alternatives to closed detention during this extended period of time.
50. On 4 May 2011, following Mr HB's alleged involvement in the April 2011 riots, he was charged by the AFP and transferred to criminal custody in the MRRC. He was held in criminal custody for approximately 12 months, until bail was granted on 24 May 2012.
51. On being granted bail, Mr HB was transferred to VIDC. He remained in immigration detention at VIDC from 25 May 2012 until June 2013, when he was convicted of a criminal offence and transferred into criminal custody.
52. I understand from Mr HB's complaint that the grant of bail contemplated him being released into the community, on conditions that included him not leaving NSW and reporting to Police each week. It appears to me that these bail conditions addressed any risk the Court considered Mr HB may have posed by residing in the community. Similar conditions could have been imposed on a residence determination. It is therefore of concern that Mr HB was not referred for consideration of community detention after he was granted bail and returned to VIDC on 25 May 2012. I invited the Department to provide the Commission with a copy of Mr HB's bail conditions, however, at the time my Notice of Decision was finalised the Commission had not been provided with this information.
53. In his complaint to the Commission, Mr HB claims that he first requested to be considered for community detention in January 2010. The information before me suggests that the Commonwealth first contemplated placing Mr HB in a less restrictive form of detention in or around May 2011. The Department advises that 'On 5 May 2011, Mr [HB's] case was referred for consideration of residence determination. As Mr [HB] had been charged with criminal offences and was in criminal custody at the time (at the Silverwater Corrections Centre (MRRC)), the referral was not assessed against the Department's guidelines.'
54. It appears that the decision not to consider Mr HB for community detention once he had been charged by the AFP was not made on the basis of an assessment of Mr HB's individual circumstances or the risk that he may pose to the community; rather, the Department was acting on the basis of a direction given by the then Minister in relation to all detainees with ongoing criminal proceedings. I consider this practice separately below.
55. It is of significant concern that the first time the Department considered Mr HB for community detention was in May 2011, 20 months after he had been placed in immigration detention. This delay is inconsistent with the Commonwealth's obligation to detain Mr HB in the least restrictive manner possible.
56. I find that the Department's failure to consider Mr HB's individual circumstances and suitability for less restrictive forms of detention (if necessary with conditions), either in the 19 months prior to the April 2011 riots or in the 13 months after he had been granted bail, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR.

(c) Mr HC

57. Mr HC arrived on Christmas Island on 31 January 2010 and was immediately detained. He was transferred to VIDC on the mainland on 17 July 2010.
58. Prior to the April 2011 riots, Mr HC had been detained in closed immigration detention facilities for approximately 15 months. During this period of time, the Department did not consider Mr HC's suitability for community detention and did not refer Mr HC's case to the Minister for consideration of the exercise of his powers under section 195A or section 197AB of the Migration Act. The Department has provided no explanation for its failure to consider less restrictive alternatives to closed detention during this extended period of time.
59. On 22 April 2011, following Mr HC's alleged involvement in the April 2011 riots, he was transferred to the MRRC as an alternative place of detention. On 4 May 2011 he was charged by the AFP and was subsequently held in criminal custody for a combined total of approximately 10 months, initially at the MRRC and from 2 August 2011 at the Nowra Correctional Centre.
60. Mr HC was granted bail on 7 March 2012 and was then transferred to VIDC. He remained in immigration detention at VIDC from 8 March 2012 until April 2013, when he was convicted of a criminal offence and transferred into criminal custody.
61. The fact that bail was granted indicates that the Court considered that remand in criminal custody prior to trial was not necessary. I invited the Department to provide the Commission with a copy of Mr HC's bail conditions, however, at the time my Notice of Decision was finalised the Commission had not been provided with this information.
62. The information before me suggests that the Commonwealth has not considered placing Mr HC in a less restrictive form of detention. In its response to the complaint, the Department advises that:
- on 7 February 2012, case management was advised that the then Minister would not consider a placement in community detention or a Bridging Visa for any clients in immigration detention who are facing criminal charges;
 - subsequently, in September 2012, the Minister indicated that he would consider community detention for clients who have been charged by the AFP with offences committed in immigration detention;
 - following this advice, the complex case resolution section of the Department has been assessing such cases against the section 197AB guidelines;
 - where a case has been assessed as meeting the section 197AB guidelines, a submission is referred to the Minister for his consideration. 'To date, a submission has not been referred to the Minister'.
63. It appears that the decision not to consider Mr HC for community detention once he had been charged by the AFP was not made on the basis of an assessment of Mr HC's individual circumstances or the risk that he may pose to the community; rather, the Department was acting on the basis of a direction given by the then Minister in relation to all detainees with ongoing criminal proceedings. I consider this practice separately below.

64. At the time I issued my Notice of Decision, I did not know whether the Department had reassessed Mr HC under the section 197AB guidelines since he finished serving the non-parole period of his sentence on 31 May 2013. I invited the Department to provide further information on this point, however, at the time that my Notice of Decision was finalised the Commission had not been provided with this information. In this regard, I note particularly the observations by Justice Hulme, the trial sentencing judge, that 'there are special circumstances [in Mr HC's case] ... and they comprise the aggregate matter disclosed in the presentation of the offender's subjective case, particularly his anxiety and depression; his return to gaol after having been in immigration detention for a significant period; and that custody will be more onerous for him in the ways I have described. ... I consider that he, and the community, will be better served by him being supervised over a lengthier parole period, particularly in relation to treatment for his psychological issues'.
65. Based on the material before the Commission, I find that the Department's failure to consider Mr HC's individual circumstances and suitability for less restrictive forms of detention (if necessary with conditions), either in the 15 months prior to the April 2011 riots or in the 13 months after being granted bail, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR.

(d) Mr HD

66. Mr HD arrived on Christmas Island on 27 November 2009 and was immediately detained. He was transferred to VIDC on the mainland on 27 March 2010. Some two months earlier, on 28 January 2010, the Australian Security Intelligence Organisation (ASIO) had issued Mr HD with a non-prejudicial security assessment, pursuant to section 40 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (Security Clearance).
67. Prior to the April 2011 riots, Mr HD had been detained in closed immigration detention facilities for approximately 17 months. During this period of time, the Department did not consider Mr HD's suitability for community detention and did not refer Mr HD's case to the Minister for consideration of the exercise of his powers under section 195A or section 197AB of the Migration Act. This is particularly concerning in light of the fact that ASIO had issued Mr HD with a Security Clearance. The Department has provided no explanation for its failure to consider less restrictive alternatives to closed detention during this extended period of time.
68. On 22 April 2011, following Mr HD's alleged involvement in the April 2011 riots, he was transferred to the MRRC as an alternative place of detention. On 27 June 2011 he was charged by the AFP and was subsequently remanded in criminal custody for approximately 8 months, until bail was granted on 8 March 2012. On being granted bail, Mr HD was returned to immigration detention at VIDC. The following bail conditions were imposed:
1. Reside at such place as may be determined by the Minister.
 2. If he is to be housed in the community then the following conditions are to apply:
 - a. They are to notify the court of their residential address within 24 hours of being released into the community;
 - b. Report to the police station closest to their residential address within 24 hours of being released into the community;
 - c. Not to apply for any international travel documents;
 - d. Not to approach within half a kilometre of any international departure points;
 - e. Not depart Australia. An appropriate person is to enter into agreement to forfeit \$500 on breach of bail; and
 - f. The accused is to enter into an agreement to forfeit \$1,000 on breach of bail.

69. Mr HD then remained in immigration detention at VIDC from 8 March 2012 until 28 June 2013, when he was convicted of a criminal offence and transferred into criminal custody. In this 15 month period that Mr HD was held in closed detention, the Department did not consider Mr HD's suitability for community detention or another less restrictive form of detention (if necessary, with appropriate conditions imposed to mitigate any identified risks). Nor did the Department refer Mr HD's case to the Minister for the consideration of the exercise of his powers under section 195A or section 197AB of the Migration Act.
70. The Department stated, by way of explanation, that 'the Minister previously indicated that he will not consider exercising his powers under section 195A and section 197AB of the Migration Act for clients with ongoing criminal proceedings'. It appears that the decision not to consider Mr HD for community detention once he had been charged by the AFP was not made on the basis of an assessment of Mr HD's individual circumstances or the risk that he may pose to the community; rather, the Department was acting on the basis of a direction given by the then Minister in relation to all detainees with ongoing criminal proceedings. I consider this practice separately below.
71. I note that Mr HD had been granted bail on 7 March 2012 on terms that contemplated his release into the community (subject to conditions). These bail conditions addressed any risk the Court considered Mr HD may have posed by residing in the community. After considering Mr HD's circumstances, the Court did not find that detention prior to trial was necessary.
72. I find that the Department's failure to consider Mr HD's individual circumstances and suitability for less restrictive forms of detention (if necessary with conditions), either in the 17 months prior to the April 2011 riots or in the 15 months after being granted bail, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR.

(e) Mr HE

73. Mr HE arrived on Christmas Island on 31 January 2010 and was immediately detained. He was transferred to VIDC on the mainland on 17 July 2010.
74. Prior to the April 2011 riots, Mr HE had been detained in closed immigration detention facilities for approximately 15 months. During this period of time, the Department did not consider Mr HE's suitability for community detention and did not refer Mr HE's case to the Minister for consideration of the exercise of his powers under section 195A or section 197AB of the Migration Act. The Department has provided no explanation for its failure to consider less restrictive alternatives to closed detention during this extended period of time.
75. On 22 April 2011, following Mr HE's alleged involvement in the April 2011 riots, he was transferred to the MRRC as an alternative place of detention. Subsequently, on 11 May 2011, he was transferred to Maribyrnong Immigration Detention Centre (MIDC). He was charged by the AFP on 12 January 2012 and thereafter remanded in criminal custody at the MRRC.
76. On 21 February 2012, Mr HE was granted bail and returned to immigration detention at VIDC. Thereafter he was detained at MIDC and on 21 August 2012 he was transferred to Melbourne Immigration Transit Accommodation (MITA), where he appears to have been detained until he faced charges in January – March 2013. In April 2013 he was found not guilty of riot and in June 2013 he was released from immigration detention on a protection visa.
77. The Commission does not have a copy of Mr HE's bail conditions. However, the fact that bail was granted indicates that the Court considered that remand in criminal custody prior to trial was not necessary. I invited the Department to provide the Commission with a copy of Mr HE's bail conditions, however, at the time that my Notice of Decision was finalised the Commission had not been provided with this information.

78. The information before me suggests that the Commonwealth first considered placing Mr HE in a less restrictive form of detention in May 2011. The Department advises that:
- Mr HE's case was referred for consideration of community detention on 20 May 2011. He was assessed as not meeting the guidelines to be considered for community detention on 27 September 2011;
 - Mr HE's case was re-referred for consideration of community detention on 20 March 2012, when 'he was assessed as not meeting the guidelines to be considered for community detention. ... This consideration was in line with the Minister's advice of 7 February 2012 that he will not consider community detention or bridging visas for clients who are facing criminal charges';
 - Mr HE's case was referred for consideration under section 197AB guidelines on 4 October 2012.¹⁰
79. It appears that in at least one of these instances, the decision not to consider Mr HE for community detention once he had been charged by the AFP was not made on the basis of an assessment of Mr HE's individual circumstances or the risk that he may pose to the community; rather, the Department was acting on the basis of a direction given by the then Minister in relation to all detainees with ongoing criminal proceedings. I consider this practice separately below. It is also of significant concern that the first time the Department referred Mr HE's case for consideration of community detention was in May 2011 and an assessment against the guidelines was not completed until September 2011, 20 months after he had been placed in immigration detention. This delay is inconsistent with the Commonwealth's obligation to detain Mr HE in the least restrictive manner possible.
80. I find that the Department's failure to consider Mr HE's individual circumstances and suitability for less restrictive forms of detention (if necessary with conditions), either in the 16 months up until May 2011 or in the 16 month period after he was granted bail, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR.

7.2 Practice 1: Policy not to consider individuals who are facing criminal charges for community detention

81. I understand that on 7 February 2012 the then Minister advised the Department that he will not consider individuals who are facing criminal charges for community detention or bridging visas. I am concerned that as a result of this policy the individual circumstances of detainees facing criminal charges are not being taken into account in assessing whether community based detention (or some other less restrictive form of detention than detention in an immigration detention facility) is appropriate, even in situations where bail has been granted.
82. The United Nations Human Rights Committee has recently reconsidered its views on article 9.¹¹ It has highlighted that detention of asylum-seekers beyond a brief initial period to record their claims and determine identity (if in doubt), would be arbitrary
- absent particular reasons specific to the individual, such as individualised likelihood of absconding, danger of crimes against others, or 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.¹²

83. I find that this policy is a practice contrary to article 9 of the ICCPR in that it results in ongoing detention, in immigration detention facilities, of individuals facing criminal charges without adequate consideration of:
- their individual circumstances;
 - the extent to which they pose any particular risk to the Australian community;
 - the individualised likelihood of absconding; or
 - the extent to which any such risk could be mitigated, through such means as reporting obligations or bail conditions.

8 Article 7

8.1 Act 1: Failure to detain in the least restrictive manner possible and/or failure to consider less restrictive alternatives to closed immigration detention in circumstances of deteriorating mental health

84. Messrs HA, HC and HD appear to claim that the adverse impact of detention on their mental health amounts to a breach of their human rights.
85. As stated above, the relevant question for the purposes of article 7 of the ICCPR is whether the complainants' detention has caused a level of mental impairment such that it amounts to cruel, inhuman or degrading treatment or punishment.

(a) Mr HA

86. On arrival at Christmas Island, Mr HA disclosed a history of torture and trauma. From January 2010, he accessed IHMS Mental Health for Torture and Trauma counselling and other therapy.
87. In August 2011, the Mental Health Unit at VIDC referred Mr HA to STARTTS for an assessment and report regarding his mental health state. In her report of 26 September 2011, psychologist Larisa Zilenkov made a provisional diagnosis of post-traumatic stress disorder (PTSD), clinical depression and anxiety. Ms Zilenkov noted Mr HA's traumatic experiences of immigration detention, particularly witnessing the suicide of two detainees. She also noted that one of his main difficulties is being unable to fall asleep due to intrusive traumatic memories and the anxiety associated with the fear of his forced return to Iran.
88. Ms Zilenkov formed the view that Mr HA's symptoms of trauma, related to his reported persecution and torture, 'have been further exacerbated by the fact that [Mr HA] remains in an environment that he perceives as punitive and unsafe'. She recommended treatment to strengthen coping strategies, including psycho-education and psycho-therapy, and stated that 'given his symptoms have been exacerbated as a result of the extended duration of his detention, he would benefit from being released into the community ... his continued detention is likely to increase the severity of his symptoms'.
89. In late 2011, Mr HA expressed suicidal and self-harm ideation and IHMS placed him on a Psychological Support Program on an ongoing basis.

90. Due to Mr HA's mental health deterioration, the Mental Health Unit of VIDC referred him for a further mental health assessment in February 2013. In the report dated 7 March 2013, clinical psychologist S. Momartin found that Mr HA's depressive symptoms have remained high and that his mental health is frail. He/she noted that 'a lengthy detention would exacerbate his current condition, rendering him vulnerable, exposing him to emotional decline, receptive to developing further symptoms'.
91. It is of significant concern to me that the Department was apprised of these psychological assessments and apparently did not bring them to the then Minister's attention in relation to a proposed alternative placement, as a result of the Minister's policy of not considering individuals facing criminal charges for community detention. This reinforces my finding with regard to a breach of Mr HA's rights under article 9.
92. In considering this matter under article 7, I have had particular regard to the most recent findings of S. Momartin. That is, although Mr HA's PTSD score has remained on a 'high level', indicating that his mental health problems still cause him 'considerable mental stress', it was not as elevated as previously reported in late 2011. I also note that S. Momartin records Mr HA's firm confirmation that at the time he had no suicidal thoughts or ideation. For these reasons, although I accept that detention has had serious adverse effects on Mr HA's mental health, it does not appear that he has suffered such severe psychological impairment that his detention amounted to cruel, inhuman or degrading treatment or punishment.
93. I therefore find that the failure to consider less restrictive alternatives to closed detention for Mr HA was not inconsistent with article 7.

(b) Mr HC

94. Mr HC has accessed the IHMS Mental Health services from early March 2012, after he was granted bail and returned to immigration detention in VIDC. At approximately this time, IHMS placed him on an ongoing basis into the Psychological Support Program at VIDC.
95. IHMS records in relation to Mr HC's mental health examination assessments reveal that:
- Mr HC has a history of torture and trauma, recounting an incident of being arrested, stripped and beaten over the head with an iron bar in Kharizak, Iran;
 - he has been involved in past self-harm activities, by cutting the back of his neck;
 - in March 2012, he was scheduled under the *Mental Health Act 2007* (NSW) and admitted to Bankstown Hospital for psychiatric assessment. He was diagnosed with a schizoaffective disorder, marked by perceptual disturbance, auditory hallucinations and visualisations, and commenced anti-psychotic medication;
 - he has poor sleep and nightmares of time spent in jail;
 - he has developed major depression and anxiety in detention; and
 - he has consistently denied suicidal or self-harm thoughts.
96. The IHMS mental health records indicate that Mr HC's schizoaffective disorder was something which he also experienced prior to his detention in Australia, as he has reported a history of similar hallucinations during his early adulthood in Iran.

97. I also note a psychiatrist's assessment of 6 February 2013, stating that Mr HC's previous mood and psychotic symptoms have improved.
98. Although I accept that detention has had a negative impact on Mr HC and he has been affected by depression and anxiety during his time in immigration detention and criminal custody, it does not appear that he has suffered such severe psychological impairment that his detention amounted to cruel, inhuman or degrading treatment or punishment.
99. I therefore find that the failure to consider less restrictive alternatives to closed detention for Mr HC was not inconsistent with article 7.

(c) Mr HD

100. On arrival at Christmas Island, Mr HD disclosed a history of torture and trauma. From time to time, during his detention at VIDC, Mr HD accessed IHMS Mental Health for Torture and Trauma counselling. He was also prescribed medication to assist with difficulties sleeping.
101. In early 2012, the Mental Health Unit at VIDC referred Mr HD to STARTTS for an assessment and a report regarding his mental health. Dr Askovic's report of 24 June 2012 diagnosed Mr HD with PTSD, anxiety and depression. Dr Askovic formed the view that Mr HD's current psychological difficulties were a consequence of the series of traumatic events he lived through in his country of origin, during his journey to Australia and in the detention centre. The traumatic events to which Mr HD referred in the detention facilities were his witnessing two of his fellow detainees committing suicide. He reported that these memories are triggered when he passes the locations where the events occurred. Dr Askovic recommended supportive counselling and psychiatric assessment and treatment to assist with Mr HD's symptoms of depression and PTSD. Dr Askovic also 'highly recommended to transfer Mr HD to another section of the detention centre to reduce the triggers he is currently exposed to on a daily basis'.
102. In July 2012, Mr HD requested a move to Hughes compound at VIDC. This move was approved in September 2012, however Mr HD decided not to accept the transfer. There is no material before me as to whether Mr HD's request to move to Hughes compound was in response to Dr Askovic's recommendations. I invited the Department to provide further information on this point, however, at the time that my Notice of Decision was finalised the Commission had not been provided with this information.
103. In any event, although I accept that Mr HD witnessed highly traumatic events during his detention and found his time in detention very distressing, it does not appear that he has suffered such severe psychological impairment that his detention amounted to cruel, inhuman or degrading treatment or punishment.
104. I therefore find that the failure to consider less restrictive alternatives to closed detention for Mr HD was not inconsistent with article 7.

9 Opportunity to respond to the Commission's preliminary view

105. On 10 March 2014, the Commission issued the Department and the complainants with its preliminary view in relation to these complaints. Pursuant to section 27 of the AHRC Act, where it appears to the Commission as a result of an inquiry that the respondent has engaged in an act or practice that is inconsistent with or contrary to any human right, the Commission is required to give the respondent a 'reasonable opportunity' to make submissions before the Commission reports to the Attorney-General. The Commission requested that the Department provide any submissions by 7 April 2014.
106. On 19 March 2014, the Commission received an email from the Department requesting an extension for response until 29 April 2014, 'given that there are 5 cases to undertake at once.' Later that day, the Commission responded to the Department stating that it was agreeable to an extension until the end of April 2014.
107. On 29 April 2014, the Commission received an email from the Department stating that in relation to each of the complaints 'responses are currently being legally cleared, however, it is anticipated that they may not be finalised until end of May 2014'. Later that day, the Commission responded to the Department stating that it was agreeable to an extension until the end of May 2014.
108. On 30 May 2014, the Commission received an email from an officer of the Department stating 'I regret that the responses are not yet finalised, however, they are progressing. I seek further time to complete the department's comments on these five cases and would be grateful if you would agree to a finalisation date of Tuesday 30 June 2014.'
109. On 5 June 2014, I instructed an officer of the Commission to indicate to the Department that this was a final deadline and any response received after 30 June 2014 may not be taken into account by the Commission. I consider that a period of more than three and a half months for the Department to provide a response to my preliminary views in this matter is more than a 'reasonable opportunity'.
110. By the final deadline, no response had been received to my preliminary view.

10 Recommendations

10.1 Power to make recommendations

111. 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.¹³ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁴
112. 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.¹⁵

10.2 Recommendation that alternatives to closed detention be considered

113. Mr HB requested that I recommend that he be released into community detention or be granted a bridging visa. He noted that he is now married to an Australian citizen and that separation from his wife is putting considerable strain on each of them and their relationship.
114. Messrs HA, HB, HC and HD have either already served the custodial periods of their respective sentences or are nearing the end the custodial period. As each of them completes the non-custodial period of their sentence, I recommend that the Department refer their cases to the Minister so he may consider exercising his powers to grant a bridging visa or release into community detention.
115. I further recommend that the Department amend its policies in the ways outlined below.

10.3 Recommended policy changes

116. I recommend that the Minister advise the Department that he will consider individuals for community detention who are persons of interest to the AFP or facing criminal charges. This will allow the individual circumstances of detainees to be taken into account in assessing whether community based detention (or some other less restrictive form of detention than detention in an immigration detention facility) is appropriate.
117. 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 pose a flight risk or are assessed as posing an unacceptable risk to the Australian community and that risk cannot be mitigated in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved.
118. 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.
119. 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 which 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.

10.4 Consideration of compensation

120. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
121. However, in considering the assessment of a recommendation for compensation under section 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.

122. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.
123. The tort of false imprisonment is a more limited action than an action for breach of article 9(1). This is because an action for false imprisonment cannot succeed where there is a lawful justification for the detention, whereas a breach of article 9(1) will be made out where it can be established that the detention was arbitrary irrespective of legality.
124. Notwithstanding this important distinction, the damages awarded in false imprisonment provide an appropriate guide for the award of compensation for a breach of article 9(1). This is because the damages that are available in false imprisonment matters provide an indication of how the courts have considered it appropriate to compensate for loss of liberty.
125. The principal heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).¹⁶
126. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,¹⁷ Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Siopis J referred to the case of *Nye v State of New South Wales*:¹⁸
- ...the *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach recognized by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.¹⁹
127. Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).²⁰ In that case, at first instance,²¹ the New South Wales District Court awarded the plaintiff, Mr Taylor, the sum of \$116,000 in damages in respect of wrongful imprisonment, consequent upon his detention following the cancellation of his permanent residency visa on character grounds.
128. Mr Taylor was detained for two separate periods. The first was for 161 days and the second was for 155 days. In that case, because Mr Taylor's convictions were in relation to sexual offences against children, Mr Taylor was detained in a state prison under a 'strict protection' regime and not in an immigration detention centre. The detention regime to which Mr Taylor was subjected was described as a 'particularly harsh one'.
129. The Court also took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.²²
130. On appeal, the New South Wales Court of Appeal considered that the award was low but in the acceptable range. The Court noted that 'as the term of imprisonment extends, the effect upon the person falsely imprisoned does progressively diminish'.²³

131. Although in *Fernando v Commonwealth of Australia (No 5)*, Siopis J ultimately accepted the Commonwealth's argument that Mr Fernando was only entitled to nominal damages,²⁴ his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando's claim if his findings in respect of the Commonwealth's argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre. Siopis J accepted Mr Fernando's evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando's evidence did not suggest that in immigration detention he was subjected to the harsh 'strict protection' regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of inmates in the same way that Mr Nye did while he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando the sum of \$265,000 in respect of his 1,203 days in detention.²⁵

10.5 Recommendation that compensation be paid

132. I have found that the Department's failure to consider the complainants' individual circumstances and suitability for less restrictive forms of detention (if necessary, with conditions), in the period prior to the April 2011 riots or in the period after being granted bail, was arbitrary and inconsistent with their right to liberty under article 9 of the ICCPR.
133. In determining the appropriate amount of compensation for Mr HA, I have taken into account the psychological assessments discussed at paragraphs 87 to 90 of this Report and the fact that his symptoms of trauma have been exacerbated as a result of the prolonged duration of his detention.
134. In determining the appropriate amount of compensation for Mr HC I have taken into account his mental health examination assessments, which reveal that he has developed major depression and anxiety in detention.
135. In determining the appropriate amount of compensation for Mr HD, I have taken into account that he has been diagnosed in detention with PTSD, anxiety and depression.
136. I have also considered the periods in which I have found the complainants' detention to be arbitrary:
- Mr HA: approximately 2 years and 8 months;
 - Mr HB: approximately 2 years and 8 months;
 - Mr HC: approximately 2 years and 4 months;
 - Mr HD: approximately 2 years and 8 months; and
 - Mr HE: approximately 2 years and 8 months.
137. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Taking into account the guidance provided by the decisions referred to above, I recommend that the Commonwealth pay to each of the complainants the following amounts by way of compensation:
- Mr HA: \$190,000
 - Mr HB: \$175,000
 - Mr HC: \$180,000
 - Mr HD: \$190,000
 - Mr HE: \$175,000

11 The Commonwealth's response to my findings and recommendations

138. On 12 August 2014, I provided a Notice to the Minister and the Department under section 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to this complaint.
139. By letter dated 9 September 2014, the Department provided a response to my findings and recommendations:

Findings

The department notes President Triggs' findings that:

'... the Department's failure to consider the complainants' individual circumstances and suitability for less restrictive forms of detention (if necessary, with conditions) was arbitrary and inconsistent with their right to liberty under article 9 of the ICCPR.'

'the practice of the Minister for Immigration and Border Protection (Minister) that he would not consider individuals who are facing criminal charges for community detention was contrary to article 9(1) of the ICCPR.'

The department notes the above findings.

We regret the inability of the department to provide the requested responses to President Triggs' preliminary findings within the agreed timeframes.

Recommendations

Recommendation that alternatives to closed detention be considered

Recommendation 1

'Messrs HA, HB, HC and HD... I recommend that the Department refer their cases to the Minister so he may consider exercising his powers to grant a bridging visa or release into community detention'

On 7 July 2014, the department lodged a submission with the Minister on behalf of Mr HD, for the Minister to consider exercising his non-delegable, non-compellable authority to:

- Grant Mr HD a Bridging E visa (BVE) under section 195A of the *Migration Act 1958* (the Act); or,
- Make a residence determination under section 197AB of the Act, allowing Mr HD to be accommodated in community detention,

if he considers either option to be in the public interest.

On 30 July 2014, the department also lodged submissions with the Minister on behalf of Messrs HA, HB and HC, for the Minister to consider exercising his non-compellable, non-delegable authority to make residence determinations under section 197AB of the Act to allow these men to reside in community detention, if he considers it to be in the public interest.

Recommended policy changes

Recommendation 2

'I recommend that the Minister advise the department that he will consider individuals for community detention who are persons of interest to the AFP or facing criminal charges. This will allow the individual circumstances of detainees to be taken into account in assessing whether community based detention (or some other less restrictive form of detention than detention in an immigration detention facility) is appropriate.'

The department notes this recommendation and will direct President Triggs' Report to the Minister for his consideration.

Recommendation 3

'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 pose a flight risk or are assessed as posing an unacceptable risk to the Australian community and that risk cannot be mitigated in a less restrictive way. Otherwise, they should be permitted to reside in the community while their immigration status is resolved.'

The department notes this recommendation.

...

Immigration detention supports a well-managed migration system and is used to enable the identification and management of potential risks to the Australian community, including national security, health and character risks. When a UNC [unlawful non-citizen] is detained some consideration is given to their personal circumstances in determining where they will be accommodated within the immigration detention network. For example, in the case of Illegal Maritime Arrivals (IMAs) information relating to health, age, family composition and cultural or religious considerations is obtained in arrival interviews and through initial health screening. This information is used to help determine what is the appropriate initial placement given the detainee's health and welfare needs.

...

A detainee's ongoing placement is formally reviewed by their assigned case manager through regular individual case and placement reviews. The immigration cases of all detainees are streamed into the case management service (with the exception of those eligible for removal within 28 days of being detained). Case managers are required to comprehensively assess a detainee's individual circumstances within 14 days of detention, and then review changes to these circumstances every month at a minimum. This review includes consideration of whether the detainee's health and welfare needs can continue to be adequately met in the facility where they are accommodated. The case manager is informed of these needs through regular communication with the detainee, departmental and detention and health service provider staff. Detainees may also request for their detention placement to be reviewed.

Where a case manager identifies vulnerabilities which may indicate the ongoing placement of a detainee within held immigration detention may no longer be appropriate, they can refer that case for consideration against the section 195A (Bridging E visa) or 197AB (residence determination) Ministerial intervention guidelines.

...

Recommendation 4

'The department should consider 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.'

Section 196 of the Act requires that an unlawful non-citizen must be detained until removed from Australia, transferred to a Regional Processing Country, deported or granted a visa. The immigration cases of all detainees are streamed into the case management service (with the exception of those eligible for removal within 28 days of being detained.)

The case manager's role is to ensure that an immigration outcome is reached in a timely, fair and reasonable manner. The cases of individual detainees are assigned to case managers once initial screening and induction processes are completed – this includes initial health and welfare assessments. As noted above, detainees meet with their case managers regularly for case and placement reviews.

The Ministerial intervention guidelines set out the circumstances under which a detainee can be referred to the Minister for consideration of a Bridging E visa (BE) grant or a residence determination (community detention, CD) under section 195A or 197AB respectively. A detainee's individual circumstances are considered when making an assessment of their case against the Ministerial intervention guidelines.

Recommendation 5

'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... the department should refer all persons to the Minister for consideration of making a residence determination. The department should make a referral as soon as practicable and in no circumstances later than 90 days after the individual is placed in an immigration detention facility'.

The department notes this recommendation and will direct President Triggs' Report to the Minister for his consideration.

Consideration of compensation

Recommendation 6

'I recommend that the department pay financial compensation to each of the complainants, in the following amounts:

- **Mr HA: \$190 000**
- **Mr HB: \$175 000**
- **Mr HC: \$180 000**
- **Mr HD: \$190 000**
- **Mr HE: \$175 000'**

The department does not accept this recommendation.

The Commonwealth maintains its position that the complainants' immigration detention was authorised under section 189(3) and section 189(1) of the Act and carried out in accordance with applicable policy and procedure. Given their detention was required by Australian migration law for the purpose of ensuring the integrity of Australia's migration framework and reviewed on a regular basis in an individualised manner, their detention was not arbitrary within the meaning of article 9(1) of the *International Covenant on Civil and Political Rights (ICCPR)*.

...the department advises that no further action will be taken in relation to this recommendation.

140. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

September 2014

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- 1 Following the High Court's ruling in *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth* (2010) 243 CLR 319, Mr HE was granted a second IMR.
 - 2 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
 - 3 UNHRC, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).
 - 4 UNHRC, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
 - 5 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UNHRC in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
 - 6 *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community with not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
 - 7 *C v Australia*, Communication No. 900 of 1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Shams & Ors v Australia*, Communication No. 1255 of 2004, UN Doc CCPR/C/90/D/1255/2004 (2007); *Baban v Australia*, Communication No. 1014 of 2001, UN Doc CCPR/C/78/D/1014/2001 (2003); *D and E v Australia*, Communication No. 1050 of 2002, UN Doc CCPR/C/87/D/1050/2002 (2006).
 - 8 *C v Australia* Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
 - 9 *Migration Act 1958* (Cth) s 5.
 - 10 At the time the Department provided its response in December 2012, this assessment remained ongoing.
 - 11 See UN Human Rights Committee, Draft General Comment 35 (2013).
 - 12 UN Human Rights Committee, Draft General Comment 35 (2013) at [18].
 - 13 *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) s 29(2)(a).
 - 14 AHRC Act s 29(2)(b).
 - 15 AHRC Act s 29(2)(c).

- 16 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].
- 17 [2013] FCA 901.
- 18 [2003] NSWSC 1212.
- 19 [2013] FCA 901 at [121].
- 20 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 21 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 22 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
- 23 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 24 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 25 The court awarded nominal damages of one dollar for the unlawful detention of Mr Fernando because as a non-citizen, once he committed a serious crime, he was always liable to have his visa cancelled: *Fernando v Commonwealth of Australia* (No 5) [2013] FCA 901 [98]-[99].

Further Information

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