



Australian
Human Rights
Commission

Mr DL and Mr DM v
Commonwealth of Australia
(Department of Home Affairs)

[2024] AusHRC 160

April 2024

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Report into arbitrary detention

Australian Human Rights Commission 2024

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

Dear Attorney

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into the human rights complaints of Mr DL and Mr DM, alleging a breach of their human rights by the Department of Home Affairs (Department).

Mr DL and Mr DM are brothers who were born in Sudan, and were brought to Australia from an Egyptian refugee camp on refugee Humanitarian visas in 2003. The brothers were later convicted of assault and, as a consequence, their humanitarian visas were cancelled. Mr DL and Mr DM were taken into closed immigration detention in 2015, to be removed from Australia.

Mr DL and Mr DM could not be returned to South Sudan without contravening Australia's non-refoulement obligations. As a result, they faced the prospect of indefinite administrative detention. Mr DL and Mr DM complained that their detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the detention of Mr DL and Mr DM in closed immigration detention facilities could not be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. As a result, I found that their detention was arbitrary, contrary to article 9 of the ICCPR.


On 15 September 2023, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 26 February 2024. That response can be found in Part 6 of this report. The Department agreed in whole or in part with each of the four recommendations made.

After I provided the notice of my findings and recommendations to the Department, Mr DL and Mr DM were released from immigration detention

pursuant to the High Court of Australia's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37. The report below uses the same language as the notice of findings in September 2023, at which time Mr DL and Mr DM were still detained.

I enclose a copy of my report.

Yours sincerely,

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

Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

April 2024

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1 Introduction to this Inquiry

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into complaints made by Mr DL and Mr DM against the Commonwealth of Australia, specifically the Department of Home Affairs (Department). The complainants alleged that the Department is breaching their human rights by detaining them arbitrarily.
2. It is the function of the Commission to inquire into any act or practice that may be inconsistent with or contrary to any human right, pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. Mr DL and Mr DM are brothers. They were both born in Sudan in 1986 and 1990 respectively. In 2003, they were granted Refugee Humanitarian visas and brought to Australia from a refugee camp in Egypt along with their mother and three other siblings. At the time, they were 16 and 13 years old.
4. In March 2012, they were convicted in relation to an assault. Mr DL was sentenced to 4 years and 4 weeks imprisonment (with a non-parole period of 3 years and 3 weeks) and Mr DM was sentenced to 2 years and 50 weeks imprisonment (with a non-parole period of 18 months). Before the expiration of Mr DL's sentence, his Humanitarian visa was cancelled and after his release from prison he was taken into immigration detention. Mr DM was released early on parole and was living in the community for 18 months before his Humanitarian visa was also cancelled and he was taken into immigration detention.
5. Mr DL and Mr DM applied for protection visas. A delegate of the Minister found that they were both stateless (as they were no longer citizens of Sudan and not recognised as citizens of the newly formed South Sudan). The delegate also found that they were both refugees because they faced a real risk of harm if taken from Australia to South Sudan.
6. Mr DL has been in immigration detention since 23 October 2015. Mr DM has been in immigration detention since 1 July 2015, other than a further period of 8 months imprisonment for an offence committed while in immigration detention. Both Mr DL and Mr DM have been administratively detained for far longer than the original sentence of imprisonment imposed by the court which led to their visas being cancelled. In the case

of Mr DM, he has spent more than twice as long in immigration detention as his original sentence of imprisonment.

7. While they were in detention, their brother passed away. If, like their mother and their two sisters, they were now Australian citizens, they would be free in the community with no restrictions on their movement.
8. Mr DL and Mr DM cannot be sent to South Sudan because Australia has international non-refoulement obligations not to send refugees to a place where they are at real risk of harm. They can only be released from immigration detention if the Minister exercises a non-compellable power to either grant them a visa or place them into community detention. Unless such a power is exercised, they face the prospect of indefinite administrative detention.
9. For the reasons discussed above, I find that the continued detention of Mr DL and Mr DM in closed detention facilities cannot be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. As a result, I find that their continued detention is arbitrary, contrary to article 9 of the ICCPR.
10. While this does not form part of my reasons for finding that there has been a breach of article 9 of the ICCPR, I note that according to figures provided to the Minister by the Department, the continued detention of both Mr DL and Mr DM for more than seven years has likely come at a cost to taxpayers of more than \$5 million, and could be expected to be in excess of \$850,000 per annum on an ongoing basis. By contrast, the cost of managing a person on a bridging visa was most recently identified as being less than \$4,000 per annum (see paragraphs 108 and 122 below).
11. This report sets out my findings and recommendations in relation to these complaints. My recommendations are set out in section 5 below.

2 Background

2.1 Entry into Australia

12. Mr DL was born in Kober, Sudan in 1986 and Mr DM was born in Khartoum, Sudan in 1990.

13. From 2001 to 2003, Mr DL and Mr DM were living with their mother and three siblings (one brother and two sisters) in a refugee camp in Egypt. In December 2002, the United Nations High Commissioner for Refugees (UNHRC) wrote to the Australian Embassy in Cairo, seeking their resettlement in Australia.
14. According to the UNHRC, their mother was born near Rombaik, in what is now South Sudan. In 1984, she moved to Khartoum, in what is now Sudan, following the death of her father. She claimed to have been persecuted by the Sudanese authorities on the ground of her political opinion and to fear further persecution if she were to return to Sudan. According to findings by the Department in a 2017 decision on a protection visa application by Mr DL, his mother fled from Sudan to Egypt because her Dinka heritage and political activities resulted in her and her family 'being viewed as opposed to the Sudanese government'. UNHRC identified her as a 'Woman at Risk' and asked that her case be treated as a priority.
15. Their mother was granted a Refugee Humanitarian (XB-200) visa. On 26 August 2003, Mr DL, Mr DM and their three siblings were granted the same visa as members of the family unit of their mother, who was the primary applicant. A Refugee Humanitarian (XB-200) visa is a permanent visa that allows the holder to remain in Australia indefinitely. The family arrived in Australia on 22 October 2003. At the time, Mr DL and Mr DM were 16 and 13 years old respectively.
16. One way to qualify for a Refugee Humanitarian (XB-200) visa is by demonstrating that the person is outside their country of origin and subject to persecution should they return.¹
17. Since arriving in Australia, Mr DL and Mr DM's mother and their three siblings were each granted Australian citizenship. I understand that Mr DL and Mr DM's brother passed away while they were in immigration detention. Of the family of six, only Mr DL and Mr DM are not Australians. As at the date of my notice of findings, the family has lived continuously in Australia for almost 20 years. The majority of Mr DL and Mr DM's life has been spent in Australia.

2.2 Resettlement of refugees from Sudan

18. On World Refugee Day in 2002, the then Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Phillip Ruddock MP, issued a press release urging Australians to 'think of those refugees who languish in appalling conditions in refugee camps around the world and who still remain at risk'. He continued:

World Refugee Day was declared by a special UN General Assembly on 20 June 2001 as an expression of solidarity with Africa, which hosts most of the world's refugees.

For many refugees in those camps, there is no prospect of going home, but their lives remain at risk and so resettlement programs such as run by Australia will be their only hope.

With an annual program of 12,000 places, Australia is one of only nine countries that pro-actively seeks out refugees at risk and offers them sanctuary.

...

In the past year, the top four countries of origin of people settled under the refugee and humanitarian program were Iran, Afghanistan, the former Yugoslavia and Sudan.

Regional priority in the 2002–2003 Humanitarian Program will be given to Africa and the Middle East regions.²

19. In March 2003, Minister Ruddock announced 12,000 places in the humanitarian program for 2003–04, including an estimated 4,000 places for refugees settled from offshore. Again, the Minister said that regional priority would 'continue to be given to Africa and the Middle East as recommended by the United Nations High Commissioner for Refugees'.³
20. In the 2002–03 year, 47% of offshore visas were granted to people from Africa and this increased to 70.6% in 2003–04.⁴
21. At the time that Mr DL and Mr DM were resettled in Australia with their family in October 2003, the Department had in place guidelines that described the operation of the offshore humanitarian program. The guidelines noted that the refugee category of visa (including subclass 200 visas issued to this family):

provides resettlement opportunities for persons who are subject to persecution in their country of usual residence. The Department works closely with the UNHCR in selecting for this category people for whom resettlement in Australia is the most suitable durable solution.

...

The offshore component of the humanitarian program focuses on those in greatest need of the protection that resettlement offers.

It provides resettlement in Australia as a durable solution for refugees and others in humanitarian need overseas who do not have any other solution available to them.

Each financial (program) year, DIMIA CO allocates a number of places to particular posts, reflecting the regional focus identified by the Government. The regional focus of the offshore humanitarian program is determined in consultation with UNHCR.⁵

22. The guidelines identified an 'Africa allocation' for persons whose home country was in Africa, primarily Ethiopia, Sudan and Sierra Leone. The designated program posts included Cairo.
23. In May 2003, shortly before the family arrived in Australia, the Department published a Report on the Review of Settlement Services for Migrants and Humanitarian Entrants. The review examined data from a Longitudinal Survey of Immigrants to Australia (LSIA) and concluded that settlement outcomes for humanitarian entrants were generally poorer than for other groups of migrants. The report said:

This reflects the fact that many current entrants under the Humanitarian Program have experienced profound emotional, physical and psychological distress, along with disruptions to their education and working life.

The LSIA indicates that outcomes for humanitarian entrants have deteriorated in recent years and this appears to be largely as a consequence of changes within source countries for the Humanitarian Program, with the more recent intake appearing to have experienced greater instability and disruption to their lives before migrating to Australia. These entrants are finding it more difficult to establish themselves than their earlier counterparts and, in particular, are experiencing lower levels of employment, lower workforce participation rates, lower levels of income, and more health problems and

psychological distress. More needs to be done to target settlement assistance towards this group if they are to achieve full and active participation in Australian society ...⁶

24. The LSIA followed two cohorts: one that arrived in Australia between 1993 and 1995 and another that arrived in Australia between 1999 and 2000. The proportion of people arriving in Australia from Africa in these cohorts (primarily Ethiopia, Eritrea, Somalia and Sudan) increased from around 7% in the first cohort to 14% in the second cohort.⁷
25. The 2001 census recorded just under 5,000 people who had been born in Sudan. This had increased to 19,000 by 2006, making Sudanese Australians the fourth largest group of people resident in Australia who were born in Africa.⁸ Professor Jakubowicz argues that this rate of growth 'put enormous pressures on the fragile community structures established by earlier arrivals' and that, as a result, 'many newly arrived refugees and humanitarian entrants had only limited community support to ease them into their new environment'.⁹
26. In April 2006, an interdepartmental committee of Australian Government agency heads was convened to develop a whole of government strategy to 'improve settlement outcomes for humanitarian entrants'. The fact that such a strategy was required appeared to recognise prior deficiencies in settlement strategies to that point. A discussion paper produced by the Australian Government acknowledged that:

The African caseload generally has greater settlement needs than people from previous source regions, reflecting their experiences and circumstances prior to arriving in Australia. Some of these pre-migration experiences include higher levels of poverty, larger families, lower levels of education and English proficiency, lower levels of literacy in their own languages, higher incidence of health issues, longer periods spent in refugee camps, little experience of urban environments, and higher rates of torture and trauma.¹⁰
27. One of the 'critical areas' identified by the Australian Government as requiring action was 'targeting support to assist at risk youth'.¹¹
28. The unmet settlement needs identified by the Government in its 2006 discussion paper were reflected in an independent study examining the resettlement experience of migrants from the Horn of Africa (and particularly South Sudan) in Australia. That study concluded:

While the participants in the study came from a diverse range of backgrounds and had been in Australia for different lengths of time, the findings from each grouping were remarkably similar. Problems in learning English, finding secure and appropriate housing, and finding employment which paid an adequate wage and afforded a level of dignity were discussed by all participants as the biggest challenges they had to face. ... A deeply felt disappointment expressed by nearly 50 per cent of participants was what they perceived as a lack of acceptance by the Australian community and feeling of not belonging.¹²

29. In 2007, one response of the Australian Government to difficulties experienced with settlement of humanitarian migrants from Africa was simply to take fewer migrants from this region. For the 2007–08 year, the component of Australia’s offshore humanitarian program that was reserved for people from Africa was reduced from around 50% the previous year to around 30%.¹³ In October 2007, the then Minister for Immigration and Citizenship, the Hon Kevin Andrews MP, reportedly explained the reduction by saying:

I have been concerned that some groups don’t seem to be settling and adjusting into the Australian way of life as quickly as we would hope and therefore it makes sense to put the extra money in to provide extra resources but also to slow down the rate of intake from countries such as Sudan.¹⁴

30. In 2008, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) published a report about the experiences of Australian-Sudanese young people. VEOHRC heard from young Australian-Sudanese people that:

the biggest issue facing them is their experience of policing. They reported a general feeling that the police treat them unfairly because of their race. The Multicultural Youth Action Group (MYAG) has also identified the relationship between police and young people as an issue and has established a working group.

The most commonly reported complaints to the Commission’s researchers were:

- young people being regularly stopped and questioned by police in public, sometimes several times in a single day

- police asking young people to ‘move on’ without citing a legitimate reason
- alleged racist comments made by police
- young people being searched in public
- police allegedly refusing to provide their details if young people requested them – in some cases, these requests acted as a trigger for police aggression
- police allegedly refusing to respect young people’s right to silence, beyond submitting name and address – allegations that, in some cases, the assertion of this right acted as a trigger for police aggression.

31. In 2010, the Australian Human Rights Commission published a report dealing with the human rights and social inclusion of African Australians.¹⁵ This report was based on community meetings with over 2,500 African Australians in 50 locations across the country, consultations with over 150 government and non-government stakeholders, and over 100 written and oral submissions. One of the issues dealt with was the relationship between young people and the police:

African Australians, especially young people, raised a number of concerns about their relationship with police and law enforcement agencies, including:

- perceptions of being targeted by police, security guards and transit officers
- feelings of being ‘over policed’ in public spaces where young African Australians gather
- the extended surveillance on African Australian Muslims by federal police.

Young African Australians gave examples of being regularly stopped and questioned by police in public, police asking them to move on without any legitimate reason and racist comments being made to them by police officers.

Participants in community forums in other states and territories also raised concerns about perceived stereotyping of African Australians by police and law enforcement officials.

There was a widespread view that further efforts were needed to counter what community members viewed as 'entrenched stereotypes' among police – often perpetuated by the media – of young African Australian men belonging to gangs. They believed this had been a significant factor in undermining relations between police and African Australian communities.

Mutual distrust between African Australian communities and law enforcement agencies was identified as a significant barrier by community members, service providers and other stakeholders:

That trust is probably not there for a number of reasons, including the fact that a lot of Africans have come from countries where the legal systems and police were corrupt. But there is also the fact that police haven't always behaved fairly towards many Africans in the community.

Stakeholder consultation, NSW

Community members expressed the view that some law enforcement officials, especially police and sheriffs, lacked cultural awareness.

While acknowledging these concerns, service providers and stakeholders stressed that significant time and effort has recently been invested by police across a range of jurisdictions to address tensions between police and young African Australians.

The Justice for Refugees Program administered through the Victorian Department of Justice, and the appointment of a Sudanese community liaison officer with the NSW Attorney General's Department, were also identified as contributing to more positive and informed interactions between African Australian communities and the justice system as a whole.

Relationship building activities with young people, particularly through sport and arts-based programs, were viewed as positive strategies for improving community understanding and interaction with police.

Participants agreed there was a clear need to bolster training and education initiatives for police and those working in the justice system. Of particular importance was the need to build understanding about the pre-arrival experiences of people coming to Australia as refugees and

humanitarian entrants, as well as the need for police to appreciate the key differences between different African Australian communities.¹⁶

2.3 Criminal record

32. As young men, Mr DL and Mr DM were convicted of a significant number of offences. In almost all cases, they were either sentenced to pay a fine or no penalty was imposed.
33. Mr DL's offences included driving offences, failure to comply with bail conditions, disorderly behaviour, use of offensive language, refusal to state name and address to police, consume liquor in a public place, carry an offensive weapon, damage property, trespassing, failure to comply with a 'move on' direction from police, loitering, hindering police, assault, fighting, damage a building or vehicle, and resisting police.
34. Mr DM's offences included refusal to state name and address to police, throw a missile to cause injury or damage to property, failure to comply with bail conditions, loitering, resist police and disorderly behaviour.
35. It appears from their records that many of their offences arose directly from their interactions with the police.
36. In July 2010, Mr DL was convicted of three counts of 'assaulting' police on 4 October 2009 and five counts of aggravated assault on 17 October 2009. According to sentencing remarks from the magistrate, the first incident took place when police attended a disturbance at Adelaide Railway Station. Mr DL was arrested and was found to have been verbally abusive and to have acted in a threatening manner towards the police three times during his arrest.
37. The second incident took place during a bus journey on 17 October 2009. Mr DM was 'boisterous and intoxicated'¹⁷ and in the presence of his younger brother and a friend. Two of the passengers spoke angrily to Mr DM and asked him to be quiet. Mr DM responded by punching five passengers. Four of them sustained no serious injuries, but the fifth received a cut to his face and a bloodied nose. The magistrate described the conduct as 'completely unacceptable' and said that it 'must have been terrifying' for the passengers. For all eight offences, Mr DM was sentenced to imprisonment for 12 months and 21 days, with a non-parole period of three months.

38. In March 2012, both Mr DL and Mr DM were convicted of a serious aggravated offence, apparently under s 24 of the *Criminal Law Consolidation Act 1935* (SA) of causing harm to another person, with intention to cause harm. The maximum penalty for this offence is 13 years imprisonment.
39. The sentencing remarks from the trial judge described the offence as follows:
- During the course of the afternoon, a group of you were drinking and became somewhat intoxicated. [Mr DM] commenced to bully and pester the victim to fight him. When the victim saw that he was not welcome and sought to leave, you and your brother pursued him some several hundred meters to [an] intersection ... and there you assisted your brother to chase and catch him and smash a baseball bat on his head, causing him to suffer a fractured skull.
40. While Mr DM struck the blow, he was 19 at the time of the offending and his brother Mr DL was 25. As a result, the judge said that he did not distinguish between them in relation to the degree of culpability. The judge described the attack as cowardly, because the two brothers were armed and the victim was not. The judge also described the offence as despicable because the victim was a guest and the brothers had abused the duties of a host.
41. Mr DL was sentenced to 4 years imprisonment and a previously suspended sentence of 4 weeks was also applied to him. A non-parole period of three years and three weeks was set. Mr DM was sentenced to two years and 50 weeks imprisonment (a reduction of two weeks on the sentence that would otherwise have been imposed, to account for two weeks spent in custody).
42. While they were in custody for these offences, a Minister for Immigration and Border Protection made a personal decision to cancel their Humanitarian visas on the basis that they had a 'substantial criminal record' and did not pass the character test in s 501(6) of the Migration Act.

3 Legal Framework

3.1 Functions of the Commission

43. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with or contrary to any human right.
44. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.
45. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.
46. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.¹⁸

3.2 Scope of ‘act’ and ‘practice’

47. The terms ‘act’ and ‘practice’ are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
48. 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.
49. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or those acting on its behalf.¹⁹

3.3 Arbitrary detention

50. 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.

51. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
- 'detention' includes immigration detention;²⁰
 - 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;²¹
 - 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;²² and
 - detention should not continue beyond the period for which a State party can provide appropriate justification.²³
52. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee found detention for a period of 2 months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.²⁴ Similarly, the Human Rights Committee considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was 'considerably in excess of what is necessary'.²⁵
53. The 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.²⁶
54. Relevant jurisprudence of the Human Rights Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.²⁷

55. Under international law, the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, continuing immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth of Australia) in order to avoid being 'arbitrary'.²⁸
56. It will be necessary to consider whether the detention of Mr DL and Mr DM in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. If their detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system, and therefore 'arbitrary' under article 9 of the ICCPR.

4 Consideration

4.1 Visa cancellation

57. Mr DL and Mr DM each had their Humanitarian visas cancelled while they were in prison serving the sentences imposed on them in March 2012 described in section 2.3 above. The process of visa cancellation and review of relevant visa decisions is set out separately for each of them below.

(a) *Mr DL's visa cancellation process*

58. As noted in paragraph 41 above, in March 2012, Mr DL was sentenced to four years and four weeks imprisonment.
59. In September 2013, the Department issued Mr DL with a Notice of Intention to Consider Cancellation of his Humanitarian visa. In April and June 2014, the Department conducted two International Treaties Obligations Assessments (ITOAs) to determine whether Australia had protection obligations to Mr DL that would prevent it from sending him to South Sudan.
60. The ITOAs found that Mr DL was a Christian of Dinka ethnicity who was born in Khartoum and had never visited or resided in South Sudan. Significantly, the ITOAs made findings about Mr DL's citizenship and the risk of harm that he faced if sent to South Sudan. These findings were important integers of the decision to cancel his visa.²⁹ However, different conclusions on both issues were reached after his visa had already been cancelled.
61. In relation to citizenship, the ITOAs noted that the Republic of South Sudan became an independent country on 9 July 2011. After that date, Sudan announced that people who acquired citizenship of South Sudan 'de jure or de facto' would no longer be citizens of Sudan. Reports from Human Rights Watch suggested that, in practice, people in Sudan with relatives in South Sudan, or from a South Sudanese ethnic group, would lose their Sudanese citizenship irrespective of whether they had acquired South Sudanese citizenship. There were also news reports of people from South Sudan who resided outside of Sudan during the war against Khartoum experiencing difficulties and delays in obtaining citizenship from South Sudan. The two ITOAs concluded that Sudan would no longer accept Mr DL as a citizen. More controversially, they both concluded that South Sudan *would* accept Mr DL as a citizen therefore the delegates were satisfied that he *was* a citizen of South Sudan. The departmental officers do not appear to have considered the possibility that Mr DL may have been stateless.
62. In relation to risk of harm, the first ITOA noted that there was a civil war in South Sudan that commenced in December 2013. It noted that since that time, Dinka people had frequently been the target of ethnic and tribal based violence in the states of Upper Nile, Jonglei and Lakes. The

departmental officer concluded that it was ‘not feasible for [Mr DL] to relocate to one of these places, including his mother’s home region of Akot in Lakes state’. However, the officer found that it *was* reasonable for Mr DL to relocate to Juba, the capital of South Sudan. The officer said:

I accept that, in common with other Dinka residents of Juba, [Mr DL] may face a degree of risk of significant harm in relation to possible indiscriminate violence or opportunist crimes, however, I am satisfied that this risk is one faced by the population of Juba generally and is not one which is faced by [Mr DL] personally.

63. In relation to the risk of harm in Juba, the author of the second ITOA noted again the risk of possible indiscriminate violence, but concluded ‘I do not consider that this risk of harm in Juba is of such a density or degree that practically any resident of Juba is exposed to serious personal threat solely on account of his or her presence there’. Both ITOAs concluded that Australia did not have obligations not to send Mr DL to Juba in South Sudan.
64. Mr DL’s visa was cancelled personally by the Hon Scott Morrison MP, Minister for Immigration and Border Protection, on 23 October 2014. At the time that Mr DL’s visa was cancelled:
- the Department was of the view that Mr DL was a citizen of South Sudan
 - the Department was of the view that Mr DL was not owed protection obligations and could be returned to South Sudan
 - the Minister did not consider that it was appropriate to afford Mr DL a higher level of tolerance in light of the length of time he had spent in Australia or in recognition of what his advocate described as the strong humanitarian considerations present in his case.
65. Because Mr DL’s visa was cancelled by the Minister personally, and not by a departmental delegate, the decision could not be reviewed on the merits by the Administrative Appeals Tribunal.³⁰ Mr DL’s application for judicial review of the cancellation decision was dismissed by the Federal Court³¹ and, on appeal, by the Full Court of the Federal Court.³² In those cases, the courts were limited to assessing whether there were legal errors in the Minister’s decision making. Significantly, the Federal Court noted that it

was not able to assess for itself whether it was reasonable for Mr DL to relocate to Juba.³³

66. The Full Court ultimately formed the view that there was no legal error in the Minister's decision making:

In our view, it was open to the Minister to rely upon [the ITOA] assessments regarding Australia's protection obligations to the appellant and to reject the appellant's contention that he might remain in immigration detention indefinitely if he could not be returned to South Sudan. We respectfully agree with the primary judge's finding at [46] that the Department's assessments set out a rational basis for the conclusion that the appellant could be returned to Juba in South Sudan.³⁴

67. In October 2016, after judgment by the Full Court of the Federal Court, Mr DL applied for a protection visa. On 9 October 2017, a delegate of the Minister refused the application for a protection visa. However, the delegate who assessed this application came to different conclusions about two of the critical matters that had supported the decision to cancel Mr DL's Humanitarian visa.

68. First, in relation to citizenship, the delegate had regard to updated information published by the US Department of State, and concluded that Mr DL was stateless. The delegate said:

Persons of South Sudanese origin who lived for many years in the Republic of Sudan were stripped of their Sudanese nationality by law, irrespective of the strength of their connections to the new state of South Sudan or Sudan and their views on which state to which they wished to belong. Other populations who risked being adversely affected included individuals with one parent from Sudan and one from South Sudan; members of cross-border ethnic groups; and persons separated from their families by war, including unaccompanied children. Some persons of South Sudanese origin living in Sudan risked ending up stateless, without either a Sudanese or South Sudanese nationality, and losing their basic rights.³⁵

As the applicant has no documents to prove his identity as a South Sudanese citizen, was separated from his extended family during the war and lived his entire life in Sudan prior to his arrival in Australia; I believe he meets the above criteria of being stateless.

69. Secondly, the delegate found that Mr DL was a refugee, in that he had a well-founded fear of persecution if he were to be sent to South Sudan on the basis of his ethnicity, an imputed political opinion, and his membership of a particular social group described as ‘South Sudanese ethnic Dinka men returning to South Sudan without family support’. The delegate also found that Australia owed Mr DL complementary protection obligations as described in s 36(2)(aa) of the Migration Act.
70. These findings of risk of persecution had regard to updated country information including:
- reports that by August 2015, tens of thousands of people had been killed and 1.6 million people displaced, in what was described as ‘an all-out ethnic conflict’ between Dinka and Nuer groups
 - despite a ‘shaky peace agreement’ in August 2015, there was subsequent violence in Juba in July 2016 in which more than 300 people were killed, including many civilians
 - DFAT’s assessment in October 2016 that ‘Dinkas living in conflict-affected areas face a high risk of societal discrimination and violence, given the significant ethnic dimensions of the current conflict as well as their geographic proximity to the conflict’
 - DFAT’s assessment that returnees may be regarded with suspicion about their loyalty to the current government or to the Sudan People’s Liberation Army.
71. If either of these two findings had been made at the time that the cancellation of Mr DL’s visa was being considered by the Minister, there is a real chance that his Humanitarian visa would not have been cancelled. However, now that his visa had been cancelled, it was not enough that Mr DL was a refugee. Section 36(1C) of the Migration Act provided that he would not qualify for the grant of a protection visa if:
- he had been convicted of a ‘particularly serious crime’ (which included an offence of violence for which the maximum term of imprisonment was at least 3 years), and
 - the delegate considered on reasonable grounds that Mr DL was ‘a danger to the Australian community’.

72. The crime for which Mr DL was sentenced satisfied the first criterion and the delegate formed the view that Mr DL was a danger to the Australian community. As a result, the delegate held that Mr DL did not satisfy the criteria for the grant of a protection visa. On 25 May 2018, this decision was upheld by the AAT.³⁶
73. The AAT recognised the significant consequences for Mr DL of an adverse decision in relation to the danger he posed to the community. The Member said: 'The gravity of this decision cannot be understated. The applicant has been found to otherwise be a person to whom Australia would owe protection obligations'. While this was not a factor directly relevant to the test to be applied, 'the real risk to the applicant on being sent to South Sudan means that the legislation must be applied with appropriate rigour having regard to the gravity of the outcome for the applicant'.³⁷
74. Ultimately the Member placed a large degree of weight on the fact that Mr DL felt that he was subject to racial discrimination in Australia. In his evidence, Mr DL described having eggs thrown at him from a passing car and being stopped by police while running for the bus. He said that he felt 'constantly judged' in Australia. The AAT decision records the following evidence from Mr DL:
- He said he did not know he would be called names in Australia and that it would be hard to fit in, as he thought Australia was a country with opportunities and equality, but he did not see this when he arrived. He did not feel welcome and did not feel comfortable and this resulted in him drinking. He says he has learned to accept this, and that if he takes action he will end up in prison. He said if he has to take whatever people throw at him without responding, he will do that for his own good. ...
- The applicant states discrimination was a big factor in his offending, as was alcohol. He said he had a lot of difficulty talking to anyone about his problems, and lost hope for life. It was difficult for him to find a job and these struggles led him to drink and do bad things to other people. He states he has now decided to let go of anger and start a better life.³⁸
75. Mr DL's evidence is consistent with the experiences of other Australian-Sudanese youth, particularly their interactions with police, recorded in detailed studies conducted by VEOHRC and the Commission described in paragraphs 30 and 31 above. However, it appears that the Member took the view that Mr DL's description of the discrimination he faced in

Australian meant that Mr DL had not taken sufficient responsibility for his own actions. The key reasoning of the Member in relation to Mr DL's future risk was as follows:

It would not be realistic to say that this discrimination does not occur in the Australian community, or that the applicant has not experienced discrimination. However it is the applicant's readiness to attribute adverse events as discrimination and his reaction to perceived discrimination that remains a problem. He feels aggrieved by his detention and his treatment by the Australian community. Given in the past he has resorted to carrying weapons, in assisting his brother in assault and seriously injuring another person, **it is his sense of having been aggrieved and discriminated against that results in him being a danger to the Australian community** even in light of his abstinence from alcohol in the latter stages of his imprisonment and in while in detention.³⁹

[emphasis added]

76. With respect to the learned Member, it appears that other conclusions were open on this evidence. It is highly likely that when Mr DL arrived in Australia from Egypt in 2003 at the age of 16, he would have felt like an outsider. This view is reinforced by studies such as the one referred to in paragraph 28 above which found that almost half of the humanitarian entrants that participated in the study felt a lack of acceptance by the Australian community and that they did not belong. These feelings were magnified for young Australian-Sudanese people as a result of their interactions with police.
77. In the sentencing remarks in 2012 in relation to his most serious criminal conviction, the trial judge said:

You migrated to Australia in 2003 without your father. You fell in with the wrong crowd here in Australia and experienced depressive symptoms related to reduced self-esteem, shame and guilt, and you had difficulty coping with the lifestyle.

You became an abuser of alcohol and marijuana. The employment you obtained was in low-skill labouring positions. I am told that you are quick to anger if you feel slighted due to racial vilification you claim you suffered in Sudan, in Egypt and later in Australia. You meet the diagnostic criteria for an Adjustment Disorder with Mixed Depressed Mood and Disturbance of Conduct.

78. The trial judge rightly concluded that '[y]our unfortunate background in Sudan does not give you a right to commit offences with impunity in this country'. At the same time, it appears that the AAT member in 2018 placed too much weight on Mr DL's (believable) claims that he was subject to racial discrimination as *demonstrating* that he was a danger to the Australian community. Further, a fair reading of Mr DL's evidence also suggests a recognition by him of the need to change his behaviour.

79. Mr DL did not seek judicial review of the 2018 decision of the AAT. As a result, he faced the prospect of indefinite detention. He could not be returned to South Sudan because that would be contrary to Australia's non-refoulement obligations. The only way he could be released from detention was if a relevant Minister decided to exercise a non-compellable power to grant him a visa or to place him into community detention. The consideration of less restrictive alternatives to detention is considered in more detail in section 4.2 below.

(b) *Mr DM's visa cancellation process*

80. As noted in paragraph 41 above, in March 2012, Mr DM was sentenced to two years and 50 weeks imprisonment.

81. In July 2013, the Department issued Mr DM with a Notice of Intention to Consider Cancellation of his Humanitarian visa.

82. In January 2014, Mr DM was released on parole and moved back in with his family. A report provided to the Department by the South Australian Department of Correctional Services in November 2014 noted that Mr DM was in full time employment. His parole expired in February 2015 and thereafter he lived in the community, subject only to the conditions of his Humanitarian visa. In March 2015 he moved out of home and started living with a friend in shared accommodation.

83. In January 2015, the Department conducted an ITOA to determine whether Australia had protection obligations to Mr DM that would prevent it from sending him to South Sudan. As with the earlier ITOAs in relation to Mr DL, the departmental officer found that South Sudan *would* accept Mr DM as a citizen and that he therefore *was* a citizen of South Sudan. The departmental officer also found that 'while ongoing civil conflict complicates any assessment of the risk of arbitrary or indiscriminate violence' in South Sudan, and while Mr DM 'may face a degree of risk of

significant harm in relation to possible indiscriminate violence' in Juba, this was a risk that he would face in common with other Dinka residents of Juba and Australia did not have obligations not to send him there.

84. On 23 June 2015, Mr DM's visa was cancelled personally by the Hon Peter Dutton MP, Minister for Immigration and Border Protection. The findings made in the ITOA referred to above were important integers of the decision to the cancel his visa. Because the decision was made by the Minister personally, no merits review was available in the AAT.
85. On 1 July 2015, Mr DM was taken into immigration detention.
86. Mr DM missed the 35-day time limit to seek judicial review of the decision to cancel his visa and was unsuccessful in his application to the Federal Court for an extension of time because the court held that his case did not have sufficient merit to proceed. In the course of its reasons, the Court held that it was not able to reassess whether or not Mr DM was or would be accepted as a citizen of South Sudan. That was an issue that could only be considered as part of a merits review (which was not available to him) and could not be considered as part of a judicial review.
87. In November 2017, Mr DM was convicted of participating in a riot that occurred while he was detained in Christmas Island Immigration Detention Centre in October 2015. He was sentenced to 8 months imprisonment, which he spent in a Western Australian correctional facility between November 2017 and July 2018 before being returned to immigration detention.
88. Mr DM lodged an application for a protection visa in February 2017. On 9 October 2017, a delegate of the Minister found that Mr DM was a refugee. However, the delegate held that, despite being a refugee, Mr DM was ineligible for a protection visa because he did not satisfy s 36(1C)(b) of the Migration Act.
89. The reasons for decision on Mr DM's application for a protection visa were produced on the same date and were substantially the same as the reasons for decision on Mr DL's application for a protection visa referred to in paragraphs 67 to 70 above. Mr DM was found to be stateless and to have a well-founded fear of persecution if he were to be sent to South Sudan, but the delegate of the Minister found that he was ineligible for a

protection visa because he had been convicted of a 'particularly serious crime' and was assessed as being 'a danger to the Australian community'.

90. If either of the first two findings had been made at the time that the cancellation of Mr DM's visa was being considered by the Minister, there is a real chance that his Humanitarian visa would not have been cancelled.
91. In considering whether Mr DM was a danger to the Australian community, the delegate found that the applicant's refugee background and the difficulties that this had caused him, along with his alcohol intake had contributed to his past offending. The delegate noted the view of a treating psychologist that he had 'good prospects' of rehabilitation. While in prison and on parole, Mr DM had consistently tested negative for alcohol and on release he was ineligible for a substance abuse program given his long period of abstinence and confidence in his ability to continue to abstain from alcohol. The delegate also noted that Mr DM had expressed remorse for his past offending and stated that he will not reoffend. The delegate noted that Mr DM had a family and a partner in Australia, was involved in the Sudanese community and had aspirations for his future which may assist in his rehabilitation. Ultimately, however, the delegate found that Mr DM poses 'a risk' of reoffending and that *if* he reoffended in a similar manner to his most serious offence it 'could cause physical and/or psychological harm to a member of the Australian community'. On this basis, the delegate found that Mr DM constitutes 'a danger to the Australian community'. This reasoning seems to be little more than acknowledgment of past serious offending.
92. Unlike judicial schemes for continuing detention of violent offenders in a number of State jurisdictions, the delegate was not required to have regard to any expert evidence about Mr DM's future risk (such as the use of actuarial tools to predict the future risk of violent offenders, or tools assisting in forming a structured professional judgement about future risk). Little weight seems to have been given to the only expert evidence, which was to the effect that he had 'good prospects' of rehabilitation.
93. Mr DM sought merits review of this visa refusal decision in the AAT but was unsuccessful.⁴⁰ Mr DM conceded that he had been convicted of a 'particularly serious crime' as defined in s 5M of the Migration Act. The only issue on review was whether he was a danger to the Australian community. Significantly, the AAT emphasised that its decision did not

involve a discretionary balancing of the risk that Mr DM may pose to the Australian community with the risk that Mr DM may face if returned to South Sudan, or the prospect that he may face indefinite detention in Australia. Nor was it necessary for the AAT to be satisfied that there was a 'probability' of harm to the Australian community.⁴¹ The only question was whether Mr DM constitutes 'a danger to the Australian community'. The kind of balancing exercise unavailable to the AAT could only be done by a Minister exercising non-compellable discretionary powers referred to in section 4.2 below.

94. Mr DM missed the 35-day time limit to file an application for judicial review of the AAT's decision. He filed an application for leave to seek review of the decision out of time and represented himself at the hearing. At the review, the court was limited to considering whether there were any legal errors in the AAT's decision and it could not reconsider the merits of Mr DM's protection visa application. The Federal Court refused the application for judicial review on the basis that the review grounds put forward by Mr DM on his own behalf did not have any prospects of success.⁴²
95. Following the dismissal of his judicial review application, Mr DM faced the prospect of indefinite detention. He could not be returned to South Sudan because that would be contrary to Australia's non-refoulement obligations. The only way he could be released from detention was if a relevant Minister decided to exercise a non-compellable power to grant him a visa or to place him into community detention. The consideration of less restrictive alternatives to detention is considered in more detail in section 4.2 below.

4.2 Consideration of less restrictive alternatives

(a) Available alternatives

96. Following the cancellation of their visas, Mr DL and Mr DM became unlawful non-citizens within the meaning of s 14 the Migration Act. As a result, they were required to be detained under s 189 of the Migration Act.
97. Mr DL and Mr DM are precluded from applying for any visa (including a Bridging visa) due to the operation of s 501E of the Migration Act.

Therefore, the only way that they can be granted a visa is through the personal intervention of the Minister.

98. There are a number of powers that the Minister could have exercised – either to grant a visa, or to allow the detention in a less restrictive manner than in a closed immigration detention centre.
99. Section 197AB of the Migration Act permits the Minister, where the Minister thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A ‘specified place’ may be a place in the community. The residence determination may be made subject to other conditions such as reporting requirements.
100. In addition to the power to make a residence determination under s 197AB, the Minister also has a discretionary non-compellable power under s 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
101. In the context of detainees who had visas cancelled or refused, and the legislative framework within the Migration Act regarding the character test, these powers were outlined in the Commission’s 2021 report *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*.⁴³
102. There are a number of steps involved in the Minister considering the exercise of the powers available under ss 195A or 197AB. The first step involves a decision by the Department about whether to refer a case to the Minister for consideration. These departmental decisions are made having regard to guidelines issued by the Minister. If the Department decides that a detainee’s case meets the guidelines and should be referred to the Minister, the case is initially referred as a ‘first stage’ submission. This submission asks the Minister whether they wish to *consider* the exercise of one of the available Ministerial powers. If the Minister indicates that they wish to consider the exercise of one of those powers, the Department prepares a ‘second stage’ submission asking the Minister whether they *will* exercise one of those powers.
103. The application of the Ministerial guidelines by the Department involves an evaluative exercise in determining whether a detainee’s case meets the

Ministerial guidelines and should be referred to the Minister for consideration. As a result, the decision to refer or not to refer is an 'act' for the purposes of the AHRC Act.

104. Similarly, the decision by the Minister to consider or not to consider exercising a discretionary power (following a 'first stage' submission from the Department), and a decision by the Minister to exercise or not exercise a discretionary power (following a 'second stage' submission from the Department) are also 'acts' for the purposes of the AHRC Act.

(b) Consideration of less restrictive alternatives for Mr DL

105. On 4 July 2019, the Department found that Mr DL's case met the guidelines for referral to the Minister for consideration of less restrictive alternatives to detention. The Department noted that, '[a]s [Mr DL] has no viable visa pathway and his removal is not reasonably practicable, his detention will result in protracted detention'.
106. In a submission to the Minister dated 25 September 2019, the Department noted that Mr DL's case had been referred to the Minister to consider the grant of a bridging visa because:
- he had been found to be owed protection by Australia
 - he was ineligible for a protection visa because of a finding that he was considered to be a risk to the Australian community
 - he could not be involuntarily removed to Sudan without breaching Australia's non-refoulement obligations.
107. The Department observed that Mr DL 'faces possible indefinite detention' and that 'there is a legal risk the lawfulness of his detention could be challenged in the courts'. The Department put forward three options for future management of Mr DL's case:
- The first option was the grant of a Bridging visa E which would enable him to reside lawfully in the community, with work rights.
 - The second option was the grant of a Bridging (Removal Pending) visa, also with work rights. He would remain in Australia until his removal was reasonably practicable. Noting his current circumstances, departure related conditions would not be enforced.

- The third option was to decline to consider exercising Ministerial powers. In relation to this option, the Department noted:

If you decline to consider intervening in [Mr DL's] case, he will remain in immigration detention until he voluntarily departs Australia. As [Mr DL] has been found to be owed protection, it is likely his continued detention would be protracted and may be subject to criticism from external scrutiny bodies.

108. There were significant cost differences between continuing to hold Mr DL in detention and granting him a bridging visa. The Department estimated that the average cost of managing a person in held detention was approximately \$360,000 per annum, while the average cost of managing a person on a bridging visa was approximately \$10,250 per annum.
109. On 4 October 2019, the Hon David Coleman MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, declined to consider exercising his power under s 195A to grant Mr DL a visa.
110. On 5 June 2020, the Department found that Mr DL's case did not meet the guidelines for referral to the Minister. This was based on an assessment by a departmental officer that 'the risk to the community if [Mr DL] reoffends is greater than any other consideration'. As with previous assessments of risk, there was no attempt to quantify the likelihood of the future risk or its magnitude, nor was any expert evidence about risk relied on such as would have been required in a continuing detention order application under a State-based judicial regime.
111. In response to my preliminary view in this inquiry, the Department acknowledged that the guidelines assessment should not have stated that 'the risk to the community if [Mr DL] reoffends is greater than any other consideration'. The Department said that a guidelines assessment should take all factors of a case into consideration. The Department said that it had addressed this with all case officers in the Ministerial Intervention section via an all-staff meeting and followed up in writing to all staff. This advice emphasised that staff must balance all factors set out in the guidelines when undertaking a guidelines assessment and that one factor alone cannot outweigh all other factors. The Department said that this direction has also been updated in the relevant operating manuals and training materials.

112. In March 2021, the Department sent a ‘first stage’ submission to the Hon Alex Hawke MP, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs for him to indicate whether he wished to consider exercising his intervention powers. The context for this referral was that in September 2020 in the case of *AJL20 v Commonwealth* (2020) 279 FCR 549, the Federal Court had ordered that a person in immigration detention be released because the Department had failed to comply with its obligation in s 198 of the Migration Act to remove him from Australia ‘as soon as reasonably practicable’. Mr DL had made an application to the Federal Court on similar grounds in the case of *ALT21 v Commonwealth* (proceeding NSD122/2021) and the Commonwealth’s defence was due to be filed on 31 March 2021. The Department sought a response from the Minister prior to the filing of that defence.
113. The Department was concerned about taking steps to remove Mr DL from Australia for two reasons. First, the Department noted that Mr DL could not be removed from Australia without breaching Australia’s non-refoulement obligations. Secondly, it noted that a necessary preliminary step to removal—applying to South Sudanese officials for a travel document—may give rise to risks to Mr DL’s family members who remained in South Sudan. It appears that the Department wanted to be able to say to the Court that other alternatives were being considered in Mr DL’s case: namely, Ministerial consideration of less restrictive forms of detention.
114. The Department also noted in its submission that a Bill had been introduced on 25 March 2021 to amend s 197C of the Migration Act.⁴⁴ If that Bill was passed, the Act would no longer require a non-citizen without a visa to be removed from Australia if there had been a finding that Australia had protection obligations to that person. However, until that Bill was passed, the Department had an obligation to remove Mr DL from Australia ‘as soon as reasonably practicable’, despite owing him protection obligations. The Department was very clear about the risks involved for Mr DL, saying:

If you decline to intervene, the Department will be obliged to remove [Mr DL] as soon as reasonably practicable irrespective of the fact he engages Australia’s protection obligations. This would be a significant step with substantial consequences for Australia, in particular in relation to our international reputation, in addition to the risk of harm to the person if he is returned. The Department is also concerned that the next step which

must be undertaken to effect removal—applying to South Sudanese officials for a travel document—may give rise to risks to family members of [Mr DL] who remain in South Sudan. *Refoulement* is regarded as a serious breach of international law.

The Government's long-standing position, consistent with our commitment to a rules-based international order, is that a person will not be removed where it would breach Australia's *non-refoulement* obligations. ...

Australia has consistently publicly affirmed that it complies with its *non-refoulement* obligations. To our knowledge, Australia has not previously refouled an immigration detainee in breach of *non-refoulement* obligations. Any decision to do so would be unprecedented for Australia. It would likely generate considerable criticism from the Australian community, the media and other countries, given the person would be returned to a place where Australia recognises they would face a real risk of being harmed. It would also likely cause significant damage to Australia's international reputation and ability to 'call out' other countries for breaches of their human rights obligations.

Accordingly, the Attorney-General's Department has indicated that any such decision should involve significant engagement with the Prime Minister, the Attorney-General, the Minister for Foreign Affairs, and their respective departments.

115. It appears that Mr Hawke took on board the serious warnings from his Department and made a decision on 31 March 2021 to *consider* exercising his powers under s 195A of the Migration Act to grant Mr DL a Bridging E visa for a period of three months. The effect of this decision was that a 'second stage' submission would be prepared by the Department and he would be asked to *actually* exercise the relevant power by making a decision to grant Mr DL a visa.
116. However, before a second stage submission was prepared, a number of events occurred.
117. First, I infer that the Commonwealth filed a defence in *ALT21 v Commonwealth* on or about 31 March 2021 indicating to the Federal Court that the Minister was considering exercising his power under s 195A of the Migration Act to grant Mr DL a visa. Such a consideration would provide a lawful basis for Mr DL's continued detention.⁴⁵

118. Secondly, on 25 May 2021, the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) commenced. This Act amended s 197C of the Migration Act, to provide that the Department was not required to remove a non-citizen without a visa from Australia if there had been a finding that Australia had protection obligations to that person.
 119. Thirdly, on 23 June 2021, the High Court delivered judgment in *Commonwealth v AJL20* (2021) 273 CLR 43, overturning the decision of the Federal Court. By majority, the Court held that ss 189(1) and 196(1) of the Migration Act validly authorise and require the detention of an unlawful non-citizen until they are *actually* removed from Australia or granted a visa.
 120. As a result of the second and third events, it was no longer necessary to continue to consider granting Mr DL a visa to justify his continued lawful detention, even in circumstances where there was no realistic possibility of his removal from Australia in the foreseeable future.
 121. The Department provided a ‘second stage’ submission to Minister Hawke in relation to Mr DL on 29 October 2021. The Department noted that it was still under an obligation to remove Mr DL from Australia ‘as soon as reasonably practicable’ but acknowledged that he would not be returned to South Sudan and the Department was not aware of any third countries willing to accept him.
 122. The second stage submission noted that the average cost of managing a person in immigration detention had increased and for the 2020–21 financial year was \$428,451. By contrast, the average annual cost of managing a person on a bridging visa in the community was less than \$4,000.
 123. On 22 November 2021, Minister Hawke decided not to exercise his power under s 195A to grant Mr DL a bridging visa. As a result, Mr DL remains in immigration detention.
- (c) *Consideration of less restrictive alternatives for Mr DM*
124. Mr DM was considered against the s 195A guidelines in November 2019 and against the s 195A and 197AB guidelines in December 2020. On each occasion, he was found by a departmental officer not to meet the

guidelines for referral to the Minister. In the second assessment, the officer correctly recorded that Mr DM could not be involuntarily removed to '[South] Sudan' and was 'at risk of ongoing and indefinite detention'. However, somewhat surprisingly, the officer said that Mr DM's continued detention was 'due to his refusal to voluntarily return to [South] Sudan'.

125. I am concerned that this officer appeared to consider that it was appropriate to expect people to whom Australia has protection obligations to volunteer to be taken to situations of persecution. The Department had held that Mr DM's 'country of former habitual residence' for the purpose of assessing his protection claims was South Sudan and that he faced a real chance of persecution should he be taken there. There should have been no expectation that Mr DM volunteer to be taken to a place where the Department recognised that he faced a real chance of persecution. Mr DM was not being detained because of a refusal to be voluntarily taken to South Sudan. He was being detained because he could not be taken to South Sudan and the Minister had not exercised a discretionary power to release him from detention.
126. In response to my preliminary view in this inquiry, the Department acknowledged that the officer 'should not have implied that [Mr DM's] continued detention was due to his refusal to voluntary depart to his 'country of reference (South Sudan)'. The Department said that it had taken a number of steps as a result of this finding:

The Department has addressed this with all case officers in the Ministerial Intervention section via an all staff meeting and followed up in writing to all staff. This advice emphasised that a client who has been found to engage Australia's protection obligations (such that a 'protection finding' for the purposes of section 197C of the Act has been made for them) is not expected to voluntarily return to the country in respect of which the protection finding was made. This direction has also been updated in the section's operating procedures and training materials.

As noted the additional Quality Assurance process over guidelines assessments, which will be implemented in the Ministerial Intervention section, will support identification of training needs and the overall quality and consistency of guidelines assessments. A trial is currently underway with a Quality Assurance question-set to be used by an Executive Level 1 officer to review a sample of Guidelines Assessments prepared and cleared by other officers to ensure the assessment is consistent with relevant policy and procedures. At the conclusion of this trial, a final

question-set will be proposed for inclusion in the Department's Quality Assurance system, Equip.

127. The Department submits that the finding by the departmental officer referred to above would not have made any difference to the guidelines assessment and that if the finding had not been made, the officer would still have reached the conclusion that Mr DM's case did not meet the guidelines, given the other factors taken into account in the assessment. Having reviewed the reasons given by the officer, I am not satisfied that this is the case. The finding that Mr DM could end his detention by volunteering to be taken to South Sudan was repeated four times over a five-page document. It appears that this was a material factor that the officer considered particularly significant and weighed against a referral being made. Further, it was the primary factor cited in the conclusion of the reasons, which was in the following form:

Noting that he has no health issues that cannot be managed in held detention, and it is open to him to voluntarily return to [South] Sudan, I find there are no compelling or compassionate circumstances that warrant the referral of [Mr DM's] case to the Minister.

128. The clear inference from the reasons is that any continued detention faced by Mr DM could immediately be ended by a decision on his part to be removed to South Sudan. I am not satisfied that it was inevitable that a decision against referral would have been made if this finding had not been made. Given the importance and prominence given to this finding in the reasons as a whole, I consider that it may have influenced the officer's decision that Mr DM's case should not be referred to the Minister for consideration of less restrictive alternatives to held detention.
129. Mr DM's case was eventually referred to Minister Hawke on 18 January 2022, along with 17 other long-term detainees who faced the prospect of indefinite detention. The cohort was described in the submission in the following way:

[T]he Department notes that all 18 clients are long term detainees who are unlikely to be able to be removed from Australia in the foreseeable future, and with no options for release from Immigration detention without Ministerial consideration under section 195A of the Act.

These detainees are either not eligible to be granted a visa due to having an application bar in effect or have had their visa cancelled due to their

criminality. Further, they cannot be removed without breaching Australia's non-refoulement obligations and there are unlikely to be any third country settlement options in the foreseeable future.

130. On 7 February 2022, the Minister indicated that he did not wish to consider the exercise of his powers in relation to any of the 18 detainees listed in the departmental submission. As a result, Mr DM also remains in immigration detention.
131. In response to my preliminary view in this inquiry, the Department said that Mr DM's case 'has been referred for consideration of a section 197D assessment to establish whether he still engages Australia's *non-refoulement* obligations'. If a person has had a protection visa refused, but has the benefit of a finding that Australia owes them protection obligations, the Minister or a departmental delegate may make a decision under s 197D(2) if the decision maker is satisfied that the person is no longer a person in respect of whom any protection finding would be made. Unless a decision under s 197D(2) is successfully reviewed, the effect is to remove from the person the benefit of having a protection finding. The person could then be removed to the country in respect of which Australia previously owed them protection.
132. As at the time of preparing my notice, the Department had not published any information about how it proposed to make decisions under s 197D(2) that would effectively reverse a protection finding.

4.3 Findings

133. I find that the continued detention of Mr DL and Mr DM in closed detention facilities cannot be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. As a result, I find that their continued detention arbitrary, contrary to article 9 of the ICCPR.
134. In this inquiry, I have focused on the following acts which appear to be the most determinative in relation to their continued detention:
 - the decision by Minister Coleman on 4 October 2019 not to consider exercising his power under s 195A of the Migration Act to grant Mr DL a visa – this was the first occasion on which a Minister was asked to consider Mr DL's particular circumstances (his case was later also

considered by Minister Hawke who decided not to exercise his power under s 195A on 22 November 2021)

- the decision by Minister Hawke on 7 February 2022 not to consider exercising his power under s 195A of the Migration Act to grant Mr DM a visa – this was the first occasion on which a Minister was asked to consider Mr DM's particular circumstances.

135. In focusing on these acts, I do not discount the potential for the detention of Mr DL and Mr DM to have become arbitrary at an earlier point in time. In particular, I consider that the Department could, and should, have made earlier referrals to a relevant Minister seeking the exercise of the Minister's discretionary powers.
136. For example, in Mr DL's case it was clear by 25 May 2018, when the AAT dismissed his application for review of the decision to refuse him a protection visa, that he faced the prospect of indefinite detention. However, it took more than a year for his case to be referred to the Minister for consideration of alternatives to held detention.
137. In Mr DM's case, the Department twice considered that he did not meet the guidelines for referral in 2019 and 2020, but in doing so on one occasion inappropriately suggested that it was reasonable to expect him to volunteer to return to a situation of persecution (see paragraphs 124 to 126 above).
138. The departmental submissions to the Minister in relation to each of the decisions referred to in paragraph 134 above are brief. This is particularly so in relation to the submission dealing with Mr DM. Mr DM's case was referred to the Minister along with the cases of 17 other detainees. The background circumstances of each detainee were described in a single page. In Mr DM's case, the material placed before the Minister included no submissions made on Mr DM's behalf, for example submissions from his representatives or advocates, or submissions by his family members. While there was a single sentence indicating that Australia owed Mr DM protection obligations, there was no discussion of why this was the case. Instead, the primary focus of the single page description of his circumstances was what was described as Mr DM's 'extensive criminal history'. By contrast, the ministerial submission in his brother's case, which resulted in ministerial approval for a second stage submission, contained five paragraphs dealing with the impact that his removal would have on

his Australian family and Australia's international obligations not to arbitrarily interfere with the family.

139. In response to my preliminary view in this inquiry, the Department said that Ministers expect the Department to bring to their attention in section 195A submissions any information that may be relevant, including information that could be perceived as adverse information. The Department submitted that '[t]he one page case summary for [Mr DM] included all the required information to be presented to the Minister as outlined in the section 195A Ministerial Information guidelines'. The Department said that there was no obligation on it to seek input from a detainee when preparing a submission to the Minister, but that if the Department had received a letter from a detainee or their representative in support of their case, it could be attached to a submission.
140. I find that in making the decisions referred to in paragraph 134 above, insufficient weight was given to the following important factors:
- Australia's obligations towards humanitarian entrants it has selected for resettlement in Australia
 - the differences between judicially-imposed sentences of imprisonment and subsequent administrative detention
 - the prospect that Mr DL and Mr DM faced indefinite detention in the absence of Ministerial intervention.

141. These points are expanded on briefly below.

(a) *Australia's obligations towards humanitarian entrants*

142. Mr DL and Mr DM arrived in Australia as teenagers, almost 20 years ago. They came as part of a program pursuant to which Australia 'pro-actively seeks out refugees at risk and offers them sanctuary' (see paragraph 18 above). For many people in their situation, 'resettlement programs such as run by Australia will be their only hope' (paragraph 18 above). The intention of resettlement was to provide a 'durable solution for refugees and others in humanitarian need overseas who do not have any other solution available to them' (paragraph 21 above). The durable solution came in the form of the grant of a visa that Australia described as 'permanent', that allowed the holder to remain in Australia indefinitely.

143. The decision by the Australian Government to resettle Mr DL and Mr DM and their family came with a responsibility to ensure that the family was adequately supported so that resettlement would be successful. However, it is clear from the history of resettlement of Sudanese humanitarian entrants over this period that many of them felt insufficiently supported.
144. Resettling refugees and humanitarian entrants is not a simple exercise. While many new entrants adapt quickly to their new circumstances and thrive, for others resettlement is difficult. It is clear that in the years immediately after resettling large numbers of people from Sudan, including Mr DL and Mr DM's family, the Australian Government realised that this group had 'greater settlement needs than people from previous source regions, reflecting their experiences and circumstances prior to arriving in Australia' and that the Government had a responsibility to improve initially poor settlement outcomes (see paragraph 26 above).
145. A particular issue highlighted in research by VEOHRC and the Commission between 2008 and 2010 was reports by Australian-Sudanese young people that they felt 'over policed' in public spaces. Some years prior to this, the Australian Government had recognised that it was 'critical' to target support to assist at-risk youth (see paragraph 27 above). It was during this period that Mr DL and Mr DM were convicted of a significant number of minor offences, predominantly involving interactions with police. I describe these offences as minor because, in almost all cases, when they were heard by a court, Mr DL and Mr DM were either sentenced to pay a fine or no penalty was imposed.
146. The general resettlement experiences of the Australian-Sudanese community, and Australia's responsibility to this community, appear to have formed no part of the ministerial consideration of whether Mr DL and Mr DM should remain in immigration detention. Of course, each of them must take responsibility for their own actions, including the serious assault they were involved in 11 years ago. This issue is considered in the following section. These initial comments seek to identify the reciprocal obligations that Australia had to each of them.
147. One way of demonstrating that Australia was serious about integrating newly arrived humanitarian entrants would be to treat them in the same way as Australians if they break the law. That would involve a court hearing to determine culpability, followed by the imposition of court

ordered sanctions. It would not involve superadded executive detention of indefinite duration.

148. Further, in this case it is appropriate to take into account the length of time that Mr DL and Mr DM have been part of the Australian community. They have both spent almost 20 years in Australia – more than half of their lives and all of their adult lives. When the Full Court of the Federal Court was considering Mr DL’s appeal against the refusal of his judicial review application, dealing with the Minister’s decision to cancel his visa, the Court began its unanimous judgment with this observation:⁴⁶

This is another in a long line of cases which have come before the Court arising from a decision of the Minister (or his or her delegate) to cancel a person’s visa under s 501(2) of the *Migration Act 1958* (Cth). It is not surprising that such decisions have given rise to so much litigation (in this Court and in the Administrative Appeals Tribunal (AAT)). Many of the decisions affect visa holders who have lived in Australia for a long time and have developed strong family and other connections here. In many cases the visa-holder’s family includes individuals who are Australian citizens and whose interests will be significantly and dramatically affected if the visa holder is removed from Australia. The potentially serious ramifications of cancelling a person’s visa were emphasised by Brennan J in *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247 at 255 when, as the foundation President of the AAT, his Honour said:

When an alien has been resident in this country for many years, when his roots are deep in Australia and the ties which bind him to Australia are strong, a clear case will be required to persuade the decision-maker that it is in the best interests of Australia to banish him from our shores.

(b) *The differences between judicially imposed imprisonment and administrative detention*

149. Mr DL and Mr DM were involved in a serious act of violence in 2012. They were convicted and sentenced to terms of imprisonment. In Mr DL’s case, the trial judge rightly concluded that ‘[y]our unfortunate background in Sudan does not give you a right to commit offences with impunity in this country’. The same comment applies equally to Mr DM.
150. Mr DL and Mr DM were sentenced to imprisonment for 4 years and 4 weeks, and 2 years and 50 weeks, respectively. Mr DL served his sentence

in full. Mr DM was released early on parole and was living in the community for 18 months before his visa was cancelled. After he was detained in immigration detention, Mr DM also served a subsequent period of imprisonment of 8 months. Since mid-2015, both men have spent more than 7 years in administrative immigration detention. This administrative detention has been far longer than their original sentence of imprisonment, does not have an end date, and at present appears likely to continue indefinitely.

151. The original sentences of imprisonment were imposed by the District Court of South Australia. The sentences followed a trial where evidence could be tested and where the obligation of the court following conviction was to impose a sentence within the range provided for by statute that was proportionate to the gravity of the offending.⁴⁷
152. South Australia has a legislative scheme pursuant to which conditions can be imposed on certain high risk offenders for a period of up to five years following the expiration of their sentences. The regime is contained in the *Criminal Law (High Risk Offenders) Act 2015 (SA)*. Relevantly, a 'high risk offender' includes a person who was convicted of causing serious harm to a person and who was sentenced to a period of imprisonment in respect of the offence.⁴⁸ The South Australian Attorney-General can apply to the Supreme Court of South Australia for an extended supervision order (ESO) in relation to a high risk offender. The application must be made within 12 months of the expiration of the person's sentence. Before determining whether to make an ESO, the Supreme Court must direct that one or more health professionals examine the respondent and provide a report to the Court about the likelihood of the respondent committing a further serious act of violence.⁴⁹ In determining whether to make an ESO, the paramount consideration of the Supreme Court must be the safety of the community.⁵⁰ The Supreme Court must also take into account a range of other matters, including:
 - the likelihood of the respondent committing a further serious offence of violence
 - the report from the health professional that the Court was required to obtain
 - any report prepared by the Parole Board

- other relevant reports, including the results of any statistical or other assessment of the likelihood of persons with histories and characteristics similar to those of the respondent committing a further relevant offence
- any relevant evidence or representations that the respondent may want to put to the Court
- any treatment or rehabilitation program in which the respondent has had an opportunity to participate, including his or her willingness to so participate and the extent of such participation
- the circumstances and seriousness of the respondent's offending and any pattern of offending behaviour
- any remarks made by the sentencing court in passing sentence.⁵¹

153. The regime also permits a continuing detention order to be made, that is, an order requiring the person to continue to be detained in custody following the expiration of their sentence. However, a continuing detention order may only be made where an ESO was first made and the person did not comply with the terms of the ESO.⁵² In those circumstances, the maximum term of a continuing detention order is the period of time remaining on the ESO.⁵³ The Supreme Court can only make a continuing detention order if it finds that the person 'poses an appreciable risk to the safety of the community if not detained in custody'.⁵⁴
154. The South Australian regime commenced on 25 January 2016, shortly after Mr DL and Mr DM were released from prison and taken into immigration detention, and so may not have been available in their case. However, regardless of whether the regime was available at that time, its enactment is clear indication from the Parliament of South Australia of the limited circumstances in which further restrictions could be placed on a person's liberty as a result of historical criminal conduct when there is a risk of future harm to the community. It is also a clear indication of the safeguards that should properly apply in such a situation.
155. The scheme for administrative detention under the Migration Act, particularly in circumstances where there is no prospect of removal from Australia in the foreseeable future and detention is sought to be justified on the basis of arguments grounded in the safety of the community, lacks

many of the important safeguards of the South Australian post-sentence regime. In particular:

- the powers are wholly at the discretion of the executive and are not subject to independent oversight by the judiciary
- the default position is detention rather than liberty
- there is no obligation on a Minister to consider the exercise of the discretionary powers that would permit the release of Mr DL and Mr DM from detention
- even if the exercise of these powers is considered, there is no obligation on a Minister to seek submissions from Mr DL or Mr DM about whether they should continue to be detained – indeed, as noted above, the departmental submission to the Minister in Mr DM’s case contained no reference to any submissions made on his behalf
- there is no obligation on the Minister to assess whether Mr DL or Mr DM pose a risk to the community
- to the extent that risk is considered, there is no obligation to obtain independent expert evidence that bears on that risk or to have regard to actuarial data about the risk of people in similar circumstances
- there is no limit to the period for which a person may continue to be administratively detained.

156. In the submission to Minister Coleman in relation to Mr DL, referred to in paragraph 134 above, the consideration under the heading ‘Risk to the community’ focuses entirely on the 2018 assessment by the AAT referred to in paragraphs 73 to 75 above that he was a danger to the community. For the reasons given in paragraphs 76 to 79 above, I have concerns with the reasoning process employed by the Member. The Member concluded that Mr DL was a danger to the Australian community *because* he had a sense that he had been discriminated against. That reasoning is extraordinary, both because the experience described by Mr DL was shared by many other Australian-Sudanese youth during the same period, and because the Commission is not aware of any credible risk prediction

model that identifies a causative correlation between a person feeling that they have been discriminated against and that person being a danger to the community.

157. It does not appear that the Member had the benefit of any of the kinds of objective evidence about risk that would have been required in a proceeding under the *Criminal Law (High Risk Offenders) Act 2015 (SA)*. I find that it was insufficient for the Minister to rely on the findings by the AAT, reproduced by the Department in its submission, when assessing the risk that Mr DL posed to the community.
158. The submission to the Minister also attached a statement from Mr DL that was in the following form:

My name is [DL], I am writing this letter in regards to my visa cancellation. My visa was cancelled on 25th October 2014, and now my residency status is in the consideration of the Minister.

I arrived in Australia in 2003 at the age of 16 along with my Mother and my Siblings. At the time I was young and vulnerable and got involved with the wrong crowd which led me to Prison, and after Prison I was transferred to Immigration Detention Centre here in Australia. While I was [in] Prison I rehabilitated and achieved certificates for Completion on various behavioural courses.

Currently my Mother is alone in the community, recently my older brother passed away and my younger siblings are settled with their families & unfortunately there is no one to support my Mother.

The Prison and Detention has made me realise for the privileges I had lost and I feel immense remorse for my actions in the past which led me to prison. I have learned a lot during this time and am seeking just one chance from the government to be able to live in the community and to prove myself that I am not here to break any laws rather abide by them to make a better future and to prove that I am not a danger to the community.

I am hoping that my current Visa situation would be sorted out based on the facts that I have changed for the better & I am hoping to be given a chance to prove it. I am also willing to accept any terms or conditions that would be given to me by the Home Affairs Minister in order for me to be in the Community once again.

159. The departmental submission identified a number of conditions that could be imposed if a visa were granted, for example, conditions that the visa holder must not engage in criminal behaviour or must not breach a Code of Behaviour. However, there is no substantive assessment of either individualised steps that could be taken to ensure his reintegration into the community, or the ability of such steps to mitigate any risk that he may pose to the community. I find that insufficient consideration was given in the submission to the Minister of the potential for effective risk mitigation.
160. The one-page summary of Mr DM's situation in the submission to Minister Hawke refers to the fact that his Community Protection Assessment Tool (CPAT) rating recorded a 'high risk of harm to the community'. It is clear from the CPAT that the determinative factor in this assessment was his prior criminal record. The preparation of the CPAT and the subsequent submission to the Minister did not involve obtaining independent expert evidence about Mr DM's future risk. It did not involve consideration of actuarial data about the risk of people in similar circumstances. Mr DM was not able to test the assessment of risk and was not given the opportunity to make any submissions about his risk. Any submissions previously made by him were not included in the departmental summary provided to the Minister. In all of the circumstances, I find that this process for assessment by the Minister of whether he should be granted a visa was seriously flawed because it did not involve the evaluation of all of the factors necessary for a decision properly to be made.

(c) *Prospect of indefinite detention*

161. When Mr DL's and Mr DM's visas were cancelled, the relevant Minister responsible for each cancellation decision was operating under the mistaken belief that Australia did not owe protection obligations to either of them, and that they could be removed to South Sudan (see paragraphs 64 and 84 above). As a result, the relevant Ministers were not informed that a likely outcome of visa cancellation would be indefinite detention. It may be that, had they been so informed, they would not have decided to cancel the visas.
162. Once the visas were cancelled, it became significantly more difficult for Mr DL and Mr DM to regain their former residency status. Despite being owed protection, there were both found to be ineligible for a protection visa as a result of their criminal convictions, meaning that any restoration of their

visa status depended on the exercise of non-compellable ministerial powers.

163. In *Commonwealth v AJL20* (2021) 273 CLR 43, the High Court found that the Migration Act authorises and requires the detention of an unlawful non-citizen until they are *actually* removed from Australia or granted a visa. The Court noted that the authority and obligation to detain was 'hedged about by enforceable duties', including the duty in s 198(6) to remove an unlawful non-citizen from Australia 'as soon as reasonably practicable'.⁵⁵ However, the fact that one of these duties was not complied with (for example, a failure to remove a person from Australia as soon as reasonably practicable), did not result in an obligation to release the person from immigration detention. In those cases, the remedy for failure to comply with a duty was a writ of mandamus compelling the executive to perform the duty.
164. The effect of s 197C of the Migration Act (as amended with effect from 25 May 2021) is that s 198 does not require or authorise an officer to remove Mr DL or Mr DM to South Sudan because protection findings were made in their favour as part of their applications for a protection visa (even though the protection visa applications were refused on other grounds).
165. The only options available to Mr DL and Mr DM to be removed from immigration detention are the grant of a visa by the Minister, or the identification of some safe third country to which they could be removed. As noted above, there is also the prospect that the Minister or a departmental delegate, if satisfied by relevant evidence, could make a decision under s 197D(2) that Mr DL and/or Mr DM are no longer persons in respect of whom any protection finding would be made. The Commission is not aware that any such decision has been made. In a November 2021 ministerial submission, the Department confirmed that 'the Department is not aware of any third countries that are willing to accept [Mr DL] to enter and reside. [Mr DL] is also not willing to consider third country options at this stage.' The Department concluded that it 'will likely not be able to effect the removal of [Mr DL] in the foreseeable future and therefore his detention will likely continue to be protracted, unless you decide to exercise your section 195A power to grant him a visa'. There is no reason to think that the position with respect to Mr DM is any different.

166. The same submission noted that there was a legal risk if Mr DL filed proceedings seeking the performance of the duty to remove him to a safe third country. The Department said:

Such cases will scrutinise the steps taken [by] the Department to investigate viable third country removal options. Where the Department is unable to adduce evidence of adequacy of removal efforts to the satisfaction of a court, this may lead to the grant of mandamus compelling the performance of the section 198 duty in circumstances where a viable third country to which removal could reasonably be effected, has yet to be identified for an individual. The constitutionality of the ongoing detention may also become an issue in dispute.

167. I accept that in both of the submissions relevant to the decisions referred to in paragraph 134 above, the Department identified that indefinite detention was a real possibility if the Minister did not exercise the discretionary power to grant a visa. However, for the reasons discussed above, I do not consider that the serious consequences of this outcome were properly weighed against the other factors described in sections (a) and (b) above including the obligations that Australia owed to them as humanitarian entrants and the risk that they pose to the community.
168. For the reasons discussed above, I find that the continued detention of Mr DL and Mr DM in closed detention facilities cannot be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. As a result, I find that their continued detention is arbitrary, contrary to article 9 of the ICCPR.

5 Recommendations

169. 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.⁵⁶ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.⁵⁷ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.⁵⁸

5.1 Referral for Ministerial consideration

170. On 23 June 2022, the lawyer acting for Mr DL and Mr DM wrote to the Minister for Immigration, Citizenship and Multicultural Affairs asking the Minister to exercise his power under ss 195A or 197AB of the Migration Act to release them from immigration detention, either through the grant of a visa or through placement in community detention.
171. On 2 March 2023, the Ministerial Intervention Section in the Status Resolution Branch of the Department replied, stating that the Minister had declined to consider intervening under either section in each case.
172. On 23 March 2023, I issued the parties and the Minister with a document setting out my preliminary views in relation to this inquiry. The Minister did not have the benefit of my preliminary views when assessing whether to consider exercising his intervention powers.
173. It has now been approximately six months since the complainants were informed of the outcome of that Ministerial Intervention referral assessment. Given the passage of time since then and the findings from this inquiry, I consider that it is appropriate for the Department to make a further referral to the Minister for consideration of intervention under either ss 195A or 197AB of the Migration Act.

Recommendation 1

The Commission recommends that the Department refer the cases of Mr DL and Mr DM to the Minister for consideration under ss 195A and 197AB, and include a copy of this notice with the referral.

174. Shortly before finalising my notice of findings and recommendations, the Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs wrote to me in relation to the preliminary view I had sent to him. The Minister said that, in light of the preliminary view, he had asked the Department to prepare a new Ministerial Intervention submission for his consideration under ss 195A or 197AB for Messrs DL and DM. I welcome the Minister's engagement with this inquiry and the proactive steps taken by him before the recommendation described above was made.

5.2 Alternatives to Held Detention program

175. Since mid-2015, both Mr DL and Mr DM have spent more than 7 years in administrative immigration detention. This is far longer than the sentence of imprisonment served by them which is the operative reason for their administrative detention. In the case of Mr DM, he has spent more than twice as long in administrative detention as his sentence of imprisonment. This administrative detention does not have an end date, and at present appears likely to continue indefinitely.
176. Mr DL and Mr DM are in immigration detention because they do not hold a valid visa. In October 2017, after their Humanitarian visas had been cancelled, they were refused protection visas because they were assessed by the Department as being 'a danger to the Australian community'. These findings were upheld by the AAT in 2018 and 2019. I have expressed my concern about the reasoning process adopted by the AAT in each case (see paragraphs 72 to 78 above in the case of Mr DL and paragraph 91 above in the case of Mr DM).
177. A person in Mr DL or Mr DM's situation, who is owed protection but does not meet all of the criteria for a protection visa, may nevertheless be granted a visa in the exercise of ministerial discretion. The current ministerial guidelines in relation to the exercise of the power under s 195A instruct the Department to provide, among other things, 'an assessment of the person's risk to the community'.⁵⁹ The Department considers the question of risk to the community when making a decision about referral to the Minister, and provides a description of a person's risk to the community in the submission provided to the Minister. In the case of Mr DL and Mr DM, the consideration was primarily focused on the assessments made by the AAT, and on the outputs of the Department's Community Protection Assessment Tool.
178. In July 2021, the Department commenced a program referred to as Alternatives to Held Detention (ATHD) that considered a range of initiatives designed to better assess the risk posed by people in immigration detention and, where possible, to mitigate that risk so that they could be released into the community. That program was prompted by two reviews:

- the Independent Detention Case Review conducted by Robert Cornall AO for the Department in March 2020
 - the Commission's report to the Attorney-General titled *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141 in February 2021.
179. In July 2022, the Department provided a submission to the Minister about the program and sought approval for a number of specific proposals, including:
- the engagement of external expertise to consider a revised risk assessment framework and dynamic risk assessment tools
 - the establishment of an independent panel to consider cases of individuals who are in held immigration detention but present with low to medium community protection risk factors
 - the exploration of Residence Determination and Bridging visa conditions including advice on the legal basis for electronic monitoring (and other monitoring alternatives) and case plan requirements for individuals transitioning from held detention to a community setting.⁶⁰
180. The submission attached a Phase 1 Program Report for the ATHD program. The report identified shortcomings in current risk assessment practices by the Department. It noted:
- Over time, a range of risk assessment and prioritisation tools have been developed to inform placement recommendations and assess the risk in relation to immigration detainees. The risk rating assigned by these tools have implications for detainees and the Department. Existing detainee risk assessments have not been academically validated and do not adequately assess, through the collection of both static and dynamic criteria, community protection risks posed by individual detainees.⁶¹
181. A number of key proposals were identified. The first proposal was the development of a new risk assessment framework. The Phase 1 Program Report said that the most effective way to do this would be:
- the appointment of appropriate experts to conduct an analysis and assessment of current risk assessment tools across the status resolution continuum. This analysis would then lead into the creation of a revised

risk tool(s) that would be consistent across the continuum and provide an accurate and nuanced assessment of the person's risk to the community.

...

A strong risk framework will also support policy decisions and objectives, and allow the Department to provide the Minister with the best possible advice in support of them exercising ministerial intervention powers and minimising community protection risk.⁶²

182. The second proposal was the establishment of an independent panel of experts, broadly along the lines of a parole board, to provide advice to the Minister about an individual's risk to the community. The Phase 1 Program Report said:

In Australia's immigration detention context, an independent panel could assess a range of information and provide advice to the Department on mitigating risks of an individual (be it community protection or risk of absconding) with strengthened conditions and monitoring, and based on dynamic factors. This is not a primary assessment that is currently undertaken within departmental processes whether in Ministerial Intervention (MI) processes or within the decision to grant a bridging visa. These processes currently consider information such as criminal history and behaviour in detention, but [are] not well-placed to assess a range of information to weigh up the detainee's overall risk level and the extent to which risks could be mitigated.

The independent panel would bring together expertise from a number of different disciplines, such as criminal justice, psychology and sociology, giving the panel the ability to make robust, defensible, evidence-based advice that would stand up to external scrutiny.

The independent panel role would be similar to that performed by parole boards in the criminal context. Where the panel members agree that individuals would be likely to comply with conditions and the risk to the community can be effectively managed, they would provide advice to the Department that would then inform internal decisions and form part of a MI submission for the Minister to consider.⁶³

183. The third proposal was for the imposition of individualised post-release conditions to manage risk, including the provision of supports (for example drug and alcohol rehabilitation courses), combined with enhanced monitoring and compliance of these conditions. The report

anticipated that these conditions would be recommended by the independent panel.⁶⁴

184. The report noted that most of these outcomes could be achieved within the existing legal and policy framework. This included updating risk assessment tools and constituting an independent panel. The report noted that legislative change would be required to introduce any new visa or community detention conditions (including electronic monitoring and individual post-release plans).⁶⁵
185. The July 2022, Ministerial submission indicated that work had begun on Phase 2 of the ATHD program.⁶⁶
186. In August 2022, the Department held a briefing with external stakeholders, including the Commission and non-government organisations, about the program. It noted Phase 2 of the program would focus on 'the development and design of options to better enable the management of detainees within a community setting, including comprehensively assessing community protection risk and mitigating against residual risk'. This would also include consideration of a 'step-down model' pursuant to which an individual would be transferred first from held detention into community detention, before consideration of the grant of a visa.⁶⁷
187. In October 2022, the Department met with the Minister to further discuss this program.⁶⁸
188. It appears that the scope of the ATHD program has since narrowed. In a recent response to an inquiry by the Commission under the AHRC Act in relation to another detainee, the Department said that it was no longer considering developing an internal dynamic risk assessment tool. Instead, it said that 'current thinking has progressed towards a revised approach for a future model, which seeks to leverage off existing risk assessment capability within the Criminal Justice System'.
189. The aspects of the ATHD program that were being pursued were:
 - establishing an independent assessment capability to advise on risk mitigation (including support needs) for detainees being considered for a community placement
 - developing a step-down model using residence determination and visa grant with tailored support services and conditions.

190. The Department also noted that the Minister had agreed to the Department referring identified cohorts for consideration under ss 195A and 197AB, regardless of whether they otherwise met the requirements of the relevant ministerial intervention guidelines. The Department refers to this program as the Detention Status Resolution Review, and terms of the ministerial approval are described in more detail in a departmental submission dated 31 October 2022.⁶⁹ The Commission understands that this Review commenced in November 2022 and is continuing. Two of the relevant cohorts identified for referral to the Minister are:
- detainees in respect of whom a protection finding has been made, have no ongoing immigration matters and where it is currently not reasonably practicable to effect their removal to third countries
 - detainees who have been in held detention for five years or more.
191. Mr DL and Mr DM fall into each of these categories. It is possible that the referral of their cases noted in paragraph 171 above was pursuant to the Detention Status Resolution Review.
192. The Commission welcomes the initiatives outlined in the ATHD program and the Detention Status Resolution Review which reflect and build on recommendations it has made in a number of previous reports.
193. The Commission considers that robust, accurate risk assessment that takes into account both static and dynamic criteria, will be vital so long as visa and detention decisions continue to be made on the basis of risk. This includes protection visa decisions that are made on the basis of whether a person is 'a danger to the Australian community', decisions about whether to refer a detainee's case for potential ministerial intervention that involve 'an assessment of the person's risk to the community', and decisions by a Minister in the exercise of those intervention powers taking into account the material they are briefed with.
194. If people have entered immigration detention from the criminal justice system and have previously had their risk assessed while imprisoned, then those assessments should be taken into account, to the extent that they are relevant, when making decisions about their placement in the immigration detention network and the application of alternatives to held detention. It will be important to have an alternative method for assessing risk when previous assessments by other bodies are not available. It will

also be important that any risk assessment is dynamic, in the sense that it responds to changes in circumstances over time.

195. The Commission welcomes the consultation with relevant sector organisations in relation to the ATHD program and encourages the Department to engage in similar consultation about its proposed future model in relation to risk assessment, which seeks to leverage off existing risk assessment capability within the Criminal Justice System.

Recommendation 2

The Commission recommends that the Department consult with the Commission, other relevant oversight bodies, and relevant non-government organisations in relation to the assessment of the risk posed by people in immigration detention, including:

- the proposal to leverage off existing risk assessment capability within the Criminal Justice System; and
 - how those assessments will be updated over time.
196. The Commission supports the establishment of an independent assessment capability to advise on risk mitigation (including support needs) for detainees being considered for a community placement. It also supports the expanded use of residence determinations as an alternative to held detention and as a step towards the grant of a visa, if necessary subject to conditions to mitigate risk.
197. The Commission encourages further work to be undertaken by the Department in these areas of the ATHD program that it has identified as continuing.

Recommendation 3

The Commission recommends that the Department progress the following elements of the Alternatives to Held Detention program:

- the establishment of an independent assessment capability to advise on risk mitigation (including support needs) for detainees being considered for a community placement

- the expanded use of residence determinations as an alternative to held detention and as a step towards the grant of a visa, if necessary subject to conditions to mitigate risk.

198. Implementation of these initiatives would increase the prospect that decisions to administratively detain an individual are limited to circumstances where detention is reasonable, necessary and proportionate on the basis of particular reasons specific to the individual, and in light of the available alternatives to closed detention.

5.3 Guidelines for referrals to the Minister

199. Following the High Court's recent judgment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, there will need to be amendments made to the guidelines issued by the Minister to the Department about the exercise of ministerial intervention powers. In particular, it is no longer open to the Minister to give the Department the ability *not* to refer cases on the basis that the Department has formed the view that the cases do not have 'unique or exceptional circumstances' or that it is otherwise not in the public interest for the Minister to exercise these powers. While *Davis* focused on referrals made under s 351 of the Migration Act, the Federal Court has recently indicated that it is reasonably arguable that similar principles will apply to referrals under s 195A,⁷⁰ and the Commission considers that this is likely to apply equally to referrals under s 197AB.
200. It seems clear that any revised guidelines issued by the Minister should contain clear, objective criteria for referral.⁷¹ It is also clear from the documents published by the Department as part of the ATHD program, identified above, that some intractable cases will only be able to be resolved by the Minister. As a result, there is a real need to ensure that these cases are brought to the Minister's attention so that decisions can be made by the Minister about the potential exercise of the personal intervention powers.
201. The Commission understands that the Department is currently considering potential amendments to the guidelines for referral in relation to ss 351, 417 and 501J of the Migration Act, and that it will then consider any amendments required in relation to the guidelines for referral in relation to ss 195A and 197AB.

202. The Commission reiterates previous recommendations it has made for amendment of the guidelines for referral.⁷²

Recommendation 4

The Commission recommends that the Department brief the Minister about amendments to the Minister's ss 195A and 197AB guidelines, and include in that briefing the Commission's proposal that the guidelines should be amended to provide that:

- all people in closed immigration detention are eligible for referral under ss 195A and 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period
- all people in immigration detention are eligible for referral under ss 195A and 197AB, whether or not they have had a visa cancelled or refused under s 501 of the Migration Act, or it appears they may fail the character test in s 501
- where the Minister has previously decided not to consider exercising the powers under either s 195A or s 197AB in relation to a person, or has considered exercising those powers and declined to do so, the Department may nevertheless re-refer that person to the Minister if the person has remained in closed detention for a further protracted period.

6 The Department's response to my findings and recommendations

203. On 15 September 2023, I provided the Department with a notice of my findings and recommendations.
204. On 26 February 2024, the Department provided the following response to my findings and recommendations:

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

The Department notes that Mr DL and Mr DM were assessed as being impacted by the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S28/2023)* [2023] HCA 37 (NZYQ) and were released from immigration detention as soon as reasonably practicable following the decision.

The Department does not accept the Commission's finding that the detention of Mr DL and Mr DM was arbitrary, contrary to Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR). Mr DL and Mr DM were lawfully detained as unlawful non-citizens under section 189 of the *Migration Act 1958* (the Act). At no point prior to their release did Mr DL's or Mr DM's detention become arbitrary. The Department maintains Mr DL's and Mr DM's placement in held immigration detention was reasonable, necessary and proportionate in the individual circumstances of their cases.

The Department undertakes regular reviews, escalations and referrals for persons in immigration detention to ensure the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. The Department maintains that its review mechanisms regularly consider the necessity of detention and, where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention.

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

Mr DL's detention was a result of the application of the Act in his individual circumstances that resulted in the outcome that he is an unlawful non-citizen.

- An unlawful non-citizen must be detained under section 189 of the Act.
- He had a visa cancelled under section 501 of the Act and as a result he is section 501E barred from making any onshore visa application other than for a Protection visa (PV).
- He made an application for a PV, which was refused. In the course of considering his PV application, a protection finding was made for Mr DL with respect to South Sudan, such that section 197C of the

Act prevents his removal to South Sudan and none of the circumstances in subsection 197C(3)(c) are currently applicable. He has no ongoing immigration matters.

- The effect of the section 501E bar is that he can only be released from immigration detention through the grant of a visa via Ministerial Intervention or through departure from Australia.
- Following the High Court's decision in *NZYQ*, Mr DL was identified as being *NZYQ*-affected and was released from immigration detention as soon as reasonably practicable. Mr DL is currently in the community on a Bridging (Removal Pending) visa (BVR).

Mr DM's detention was a result of the application of the Act in his individual circumstances that have resulted in the outcome that he is an unlawful non-citizen.

- An unlawful non-citizen must be detained under section 189 of the Act.
- He had a visa cancelled under section 501 of the Act and as a result he is section 501E barred from making any onshore visa application other than for a PV.
- He made an application for a PV, which was refused. In the course of considering his PV application, a protection finding was made for Mr DM with respect to South Sudan, such that section 197C of the Act prevents his removal to South Sudan and none of the circumstances in subsection 197C(3)(c) are currently applicable. He has no ongoing immigration matters.
- The effect of the section 501E bar is that he can only be released from immigration detention through the grant of a visa via Ministerial Intervention or through departure from Australia.
- Following the High Court's decision in *NZYQ*, Mr DM was identified as being *NZYQ*- affected and was released from immigration detention as soon as reasonably practicable. Mr DM is currently in the community on a BVR.

Referral for Ministerial Consideration

Recommendation 1 – Agree and already implemented

The Commission recommends that the Department refer the cases of Mr DL and Mr DM to the Minister for consideration under ss 195A and 197AB, and include a copy of this notice with the referral.

The Department has already addressed recommendation one. On 18 August 2023, the Department referred Mr DL and Mr DM to the Minister for consideration under section 195A and 197AB of the Act.

On 22 September 2023, the Commission’s section 29 Findings and Recommendations report was provided to the Minister’s office.

Mr DL was granted a BVR on 10 November 2023 and Mr DM was granted a BVR on 11 November 2023 and they were both released from immigration detention. As a result, consideration under section 195A and section 197AB is no longer required.

Alternatives to Held Detention Program

Recommendation 2 – Agree

The Commission recommends that the Department consult with the Commission, other relevant oversight bodies, and relevant non-government organisations in relation to the assessment of the risk posed by people in immigration detention, including:

- *the proposal to leverage off existing risk assessment capability within the Criminal Justice System; and*
- *how those assessments will be updated over time.*

Wherever possible, the proposed Alternatives to Held Detention (ATHD) model would rely on Criminal Justice System (CJS) processes to inform alternate placements to held detention, as individuals enter the status resolution system.

Increased engagement with the CJS will focus on the operational impacts that processes and decisions have on our respective frameworks and will aim to:

- enhance information sharing arrangements to better leverage existing information (including risk assessments) and inform community placement decisions;
- inform treatment of community protection risks, including recommended support services to enable individuals to successfully transition from prison and/or held detention into the community; and
- explore jurisdictional consistency relating to parole arrangements (including provision of support) for unlawful non-citizens.

Options for alternatives to held detention remain under development and will be subject to policy authority from Government. The Department is also considering the impact of the High Court decision in *NZYQ* on the future direction of the ATHD program.

Recommendation 3 –Partially Agree

The Commission recommends that the Department progress the following elements of the Alternatives to Held Detention program:

- *the establishment of an independent assessment capability to advise on risk mitigation (including support needs) for detainees being considered for a community placement*
- *the expanded use of residence determinations as an alternative to held detention and as a step towards the grant of a visa, if necessary subject to conditions to mitigate risk.*

The Department continues to progress the ATHD program though the ATHD model is being considered in light of the judgment in *NZYQ*.

Under the ATHD program the Department was considering an Independent Assessment Capability (IAC) to advise on risk mitigation (including support needs) for detainees being considered for community placement. Planning for the IAC has paused while the Department considers the implications of the High Court decision in *NZYQ* on the direction and priorities of the ATHD.

The Department continues to actively review processes and assess individual cases as appropriate.

The Minister for Immigration, Citizenship and Multicultural Affairs has agreed to the Department referring detainees in identified cohorts for

consideration under sections 195A and/or 197AB of the *Migration Act 1958* (known as the Detention Status Resolution Review). Consistent with this authority, the Department continues to progress cases for Portfolio Ministers' consideration.

Development of longer-term options for the ATHD may require changes to legislative and policy settings and would be subject to policy authority from Government.

Guidelines for referral to the Minister

Recommendation 4 –Agree

The Commission recommends that the Department brief the Minister about amendments to the Minister's ss 195A and 197AB guidelines, and include in that briefing the Commission's proposal that the guidelines should be amended to provide that:

- *all people in closed immigration detention are eligible for referral under ss 195A and 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period*
- *all people in immigration detention are eligible for referral under ss 195A and 197AB, whether or not they have had a visa cancelled or refused under s 501 of the Migration Act, or it appears they may fail the character test in s 501*
- *where the Minister has previously decided not to consider exercising the powers under either s 195A or s 197AB in relation to a person, or has considered exercising those powers and declined to do so, the Department may nevertheless re-refer that person to the Minister if the person has remained in closed detention for a further protracted period.*

The Department is currently considering the implications of the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 for ministerial intervention. Further information about the Department's approach will be made available in due course.

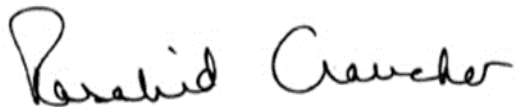
The Department has provided the Commission's recommendations to the Minister's office and will attach them for the Minister's consideration when briefing the Minister on options to review the sections 195A and 197AB

Ministerial Intervention guidelines. It is a matter for the Minister what criteria should be included in Ministerial Intervention guidelines.

Table 1 - Summary of Department's response to recommendations

Recommendation number	Department's response
1	Agree and already implemented
2	Agree
3	Partially Agree
4	Agree

205. I report accordingly to the Attorney-General.



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

Endnotes

- ¹ Migration Regulations 1994 (Cth), Sch 2, item 200.211(1)(a).
- ² The Hon Phillip Ruddock MP, Minister for Immigration and Multicultural and Indigenous Affairs, 'Remember Refugees at Risk on World Refugee Day' Media Release, 20 June 2002.
- ³ The Hon Phillip Ruddock MP, Minister for Immigration and Multicultural and Indigenous Affairs, 'Humanitarian Program Intake for 2003-04' Media Release, 31 March 2003.
- ⁴ Department of Immigration and Multicultural and Indigenous Affairs, *2003-04 Annual Report*, (Report, 2004) 68.
- ⁵ Department of Immigration, Multicultural and Indigenous Affairs, *Generic Guidelines D – The offshore humanitarian program* (Guidelines, 2003) section 4.
- ⁶ Department of Immigration and Multicultural and Indigenous Affairs, *Report on the Review of Settlement Services for Migrants and Humanitarian Entrants* (Report, 2003) 61.
- ⁷ Department of Immigration and Multicultural and Indigenous Affairs, *Report on the Review of Settlement Services for Migrants and Humanitarian Entrants* (Report, 2003) 65.
- ⁸ Andrew Jakubowicz, 'Australia's migration policies: African dimensions: background paper for African Australians: A review of human rights and social inclusion issues' (Research Paper, University of Technology, May 2010) 7.
- ⁹ Andrew Jakubowicz, 'Australia's migration policies: African dimensions: background paper for African Australians: A review of human rights and social inclusion issues' (Research Paper, University of Technology, May 2010) 14.
- ¹⁰ Australian Government, 'Measures to Improve Settlement Outcomes for Humanitarian Entrants' (Discussion Paper, Commonwealth of Australia, October 2006) 7.
- ¹¹ Australian Government, 'Measures to Improve Settlement Outcomes for Humanitarian Entrants' (Discussion Paper, Commonwealth of Australia, October 2006) 7.
- ¹² Eileen Pittaway, Chrisanta Muli and Sarah Shteir, "'I Have a Voice—Hear Me!'" Findings of an Australian Study Examining the Resettlement and Integration Experience of Refugees and Migrants from the Horn of Africa in Australia' (2009) 26(2) *Refugee* 133, 143.
- ¹³ Department of Immigration and Citizenship, *Annual Report 2007-08* (Report, 2008) 80, 86. homeaffairs.gov.au/reports-and-pubs/Annualreports/diac-annual-report-2007-08.pdf.
- ¹⁴ Farah Farouque, Andrea Petrie and Daniella Miletic, 'Minister cuts African refugee intake' *The Age* (Web Page, 2 October 2007) theage.com.au/national/minister-cuts-african-refugee-intake-20071002-ge5yb1.html; Alison Caldwell, 'Andrews under fire for cutting African refugee intake' *ABC News* (Web Page, 2 October 2007) abc.net.au/news/2007-10-03/andrews-under-fire-for-cutting-african-refugee/688430.
- ¹⁵ Australian Human Rights Commission, 'In our own words, African Australians: A review of human rights and social inclusion issues' *Australian Human Rights Commission* (Web Page, 2010) humanrights.gov.au/our-work/race-discrimination/projects/our-own-words-african-australians-review-human-rights-and#engaging.
- ¹⁶ Australian Human Rights Commission, *In our own words, African Australians: A review of human rights and social inclusion issues* (Publication, 2010), 29–30.
- ¹⁷ *AZAFQ v Minister for Immigration and Border Protection* [2015] FCAFC 105, [6].
- ¹⁸ The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- ¹⁹ See *Secretary, Department of Defence v HREOC, Burgess and Ors* (1997) 78 FCR 208.

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- ²⁰ UN Human Rights Committee, *General Comment 8 (Article 9: Liberty and security of person)*, 16th sess, UN Doc HRI/GEN/1/Rev.1 (30 June 1982). 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).
- ²¹ UN Human Rights Committee, *General Comment 31 The nature of the general legal obligation imposed on State Parties to the Covenant* 80th sess, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004) [6]. See also Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2004) 308 [11.10].
- ²² *Manga v Attorney-General* [2000] 2 NZLR 65 [40]-[42] (Hammond J). See also the views of the UN Human Rights Committee, *Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('*Van Alphen v The Netherlands*'); UN Human Rights Committee, *Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*'); UN Human Rights Committee, *Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) ('*Spakmo v Norway*').
- ²³ *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); UN Human Rights Committee, *Communication No 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('*C v Australia*').
- ²⁴ *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- ²⁵ United Nations Human Rights Committee, *Concluding Observations: Switzerland*, UN Doc CCPR/A/52/40 (1997) [100].
- ²⁶ *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communication No 1255,1256,1259,1260,1266,1268,1270,1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (2007) ('*Shams & Ors v Australia*'); *Baban v Australia*, CCPR/C/78/D/1014/2001; UN Human Rights Committee, *Communication No 1050/2002*, 87th sess, CCPR/C/87/D/1050/2002 (2006) ('*D and E and their two children vAustralia*').
- ²⁷ UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014) [18].
- ²⁸ UN Human Rights Committee, *General Comment 31 The nature of the general legal obligation imposed on State Parties to the Covenant* 80th sess, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004) [6].
- ²⁹ See the description of these factors in *AZAFQ v Minister for Immigration and Border Protection* [2015] FCAFC 105, [11], [44]-[45], [59].
- ³⁰ Migration Act, s 500(1)(b).
- ³¹ *AZAFQ v Minister for Immigration and Border Protection* [2015] FCA 681.
- ³² *AZAFQ v Minister for Immigration and Border Protection* [2015] FCAFC 105.
- ³³ *AZAFQ v Minister for Immigration and Border Protection* [2015] FCA 681, [39], [44]-[46].
- ³⁴ *AZAFQ v Minister for Immigration and Border Protection* [2015] FCAFC 105 [45].
- ³⁵ US Department of State, *Country Report on Human Rights Practices 2016 – Sudan* (Report, 2017) 49.
- ³⁶ *YLHG and Minister for Immigration and Border Protection (Migration)* [2018] AATA 1454.
- ³⁷ *YLHG and Minister for Immigration and Border Protection (Migration)* [2018] AATA 1454,[76]-[77].
- ³⁸ *YLHG and Minister for Immigration and Border Protection (Migration)* [2018] AATA 1454, [50][53].

- ³⁹ *YLHG and Minister for Immigration and Border Protection (Migration)* [2018] AATA 1454, [83].
- ⁴⁰ *RWDX and Minister for Immigration and Border Protection (Migration)* [2019] AATA 123.
- ⁴¹ *RWDX and Minister for Immigration and Border Protection (Migration)* [2019] AATA 123, [33]–[34].
- ⁴² *RWDX v Minister for Immigration and Border Protection* [2020] FCA 391.
- ⁴³ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141 (Report, 2021), 21-24.
- ⁴⁴ *Migration Amendment (Clarifying International Obligations for Removal)* Bill 2021 (Cth).
- ⁴⁵ *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, [26].
- ⁴⁶ *AZAFQ v Minister for Immigration and Border Protection* [2015] FCAFC 105, [1].
- ⁴⁷ *Sentencing Act 2017 (SA)*, s 10(1)(a).
- ⁴⁸ *Criminal Law (High Risk Offenders) Act 2015 (SA)*, s 5.
- ⁴⁹ *Criminal Law (High Risk Offenders) Act 2015 (SA)*, s 7(3)(b).
- ⁵⁰ *Criminal Law (High Risk Offenders) Act 2015 (SA)*, s 7(5).
- ⁵¹ *Criminal Law (High Risk Offenders) Act 2015 (SA)*, s 7(6).
- ⁵² *Criminal Law (High Risk Offenders) Act 2015 (SA)*, ss 15–17.
- ⁵³ *Criminal Law (High Risk Offenders) Act 2015 (SA)*, s 18(2).
- ⁵⁴ *Criminal Law (High Risk Offenders) Act 2015 (SA)*, s 18(2)(b).
- ⁵⁵ *Commonwealth v AJL20* (2021) 273 CLR 43 at [44] (Kiefel CJ, Gageler, Keane and Steward JJ).
- ⁵⁶ AHRC Act, s 29(2)(a).
- ⁵⁷ AHRC Act, s 29(2)(b).
- ⁵⁸ AHRC Act, s 29(2)(c).
- ⁵⁹ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Guidelines on Minister's detention intervention power - section 195A of the Migration Act 1958* (Guidelines, 2016) 5.
- ⁶⁰ Department of Home Affairs, *Alternatives to Held Detention Program* (submission to the Minister for Immigration, Citizenship and Multicultural Affairs, MS22-001397, 14 July 2022) at homeaffairs.gov.au/foi/files/2023/fa-230300856-document-released.PDF.
- ⁶¹ Department of Home Affairs, *Alternatives to held detention: Phase 1 Program Report*, (Report 2022) 5, at homeaffairs.gov.au/foi/files/2023/fa-230200887-document-released.PDF.
- ⁶² Department of Home Affairs, *Alternatives to held detention: Phase 1 Program Report*, (Report 2022) 21.
- ⁶³ Department of Home Affairs, *Alternatives to held detention: Phase 1 Program Report*, (Report 2022) 25.
- ⁶⁴ Department of Home Affairs, *Alternatives to held detention: Phase 1 Program Report*, (Report 2022) 28.
- ⁶⁵ Department of Home Affairs, *Alternatives to held detention: Phase 1 Program Report*, (Report 2022) 6.
- ⁶⁶ Department of Home Affairs, *Alternatives to Held Detention Program* (submission to the Minister for Immigration, Citizenship and Multicultural Affairs, MS22-001397, 14 July 2022), 7.
- ⁶⁷ Department of Home Affairs, *Alternatives to Held Detention Program*, Stakeholder briefing slide pack, 8 August 2022, p 5, at homeaffairs.gov.au/foi/files/2022/fa-220901228-document-released.PDF.

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- ⁶⁸ Department of Home Affairs, *Detention Status Resolution Review* (submission to the Minister for Immigration, Citizenship and Multicultural Affairs, MS22-002407, 31 October 2022) 21 at homeaffairs.gov.au/foi/files/2023/fa-230300856-document-released.PDF.
- ⁶⁹ Department of Home Affairs, *Detention Status Resolution Review* (submission to the Minister for Immigration, Citizenship and Multicultural Affairs, MS22-002407, 31 October 2022) at homeaffairs.gov.au/foi/files/2023/fa-230300856-document-released.PDF.
- ⁷⁰ *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989, [13]-[46].
- ⁷¹ *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 [17] (Kiefel CJ, Gageler and Gleeson JJ) and [99] (Gordon J), cf [219] (Steward J).
- ⁷² *AZ v Commonwealth (Department of Home Affairs)* [2018] AusHRC 122 [58]; *QA v Commonwealth (Department of Home Affairs)* [2021] AusHRC 140, [189]; *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, [576]-[578].