



Australian  
Human Rights  
Commission

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# Mr KO v Commonwealth of Australia

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## (Department of Home Affairs)

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**[2024] AusHRC 162**

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April 2024

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Australian Human Rights Commission  
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# **Mr KO v Commonwealth of Australia (Department of Home Affairs)**

[2024] AusHRC 162

*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 complaint of Mr KO, alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr KO arrived in Australia by boat at Christmas Island, and was transferred into a regional processing centre in Papua New Guinea in July 2013. From his arrival in 2013, Mr KO would remain in closed immigration detention facilities until April 2022. This was notwithstanding Mr KO's ongoing serious physical and mental health concerns, which were caused by, or worsened by his extensive time in detention. In 2023, Mr KO was resettled in Canada.

Mr KO consequently complained that his 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 Department's delay in referring Mr KO's case to the Minister for consideration of his discretionary intervention powers under s 195A and/or s 197AB of the *Migration Act 1958* (Cth) is inconsistent with, or contrary to, the right to freedom from arbitrary detention under article 9(1) of the *International Covenant on Civil and Political Rights*.

On 21 December 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 27 February 2024. That response can be found in Part 8 of this report.

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 a complaint by Mr KO against the Commonwealth of Australia (Department of Home Affairs) (Department) alleging a breach of his human rights. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr KO was detained in an immigration detention centre for a combined period of 4 years and 5 months. He complains that his detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup>
3. The right to liberty and freedom from arbitrary detention is not directly protected in the Australian Constitution or in legislation. As a result, there are limited avenues for an individual to challenge the lawfulness of their detention, outside of seeking a writ of *habeas corpus*, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.<sup>2</sup>
4. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights. Detention may be lawful under domestic law but still arbitrary, contrary to international human rights law.
5. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary and proportionate, on the basis of the individual's particular circumstances. There is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the immigration policy, for example the imposition of reporting obligations, sureties or other conditions, in order to avoid the conclusion that detention was 'arbitrary'.
6. Mr KO has, since this inquiry commenced, resettled in Canada through a third country resettlement process. Though Mr KO has departed Australia, the Commission is required to conclude the inquiry.
7. This report is issued pursuant to s 29(2) of the AHRC Act setting out my findings in relation to this complaint and my recommendations to the Commonwealth.

8. Given that Mr KO was a person seeking asylum and raised protection claims against his home country, I have made a direction under s 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

## 2 Summary of findings and recommendations

9. As a result of this inquiry, I find that the following acts of the Commonwealth are inconsistent with, or contrary to, article 9(1) of the ICCPR:
  - the Department's failure to refer the case to the Minister for consideration of the exercise of his powers under ss 195A or 197AB of the *Migration Act 1958* (Cth) (Migration Act) between 6 December 2013 and 17 April 2015 while Mr KO was in Australia receiving medical treatment for his poor mental health
  - the Department's delays in referring Mr KO's case to the Minister for consideration under ss 195A and 197AB of the Migration Act between April 2019 and April 2022.
10. I make the following recommendations:

### **Recommendation 1**

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated
- the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement
- increasing community-based placements for low and medium risk detainees, through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

### **Recommendation 2**

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 transitory persons in closed immigration detention are eligible for referral under ss 195A and 197AB of the Migration Act
- 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
- 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.

### **Recommendation 3**

The Commonwealth provide a written apology to Mr KO for the delay in releasing him from closed detention in view of the clear evidence of his compelling circumstances.

## **3 Background**

11. Mr KO is from Iran and arrived at Christmas Island as an unauthorised maritime arrival (UMA) on 25 July 2013. He was detained pursuant to s 189(3) of the Migration Act at Christmas Island Detention Centre from 25 July 2013 to 26 August 2013.
12. On 26 August 2013, Mr KO was taken to Papua New Guinea (PNG), a regional processing country (RPC), under s 198AD of the Migration Act for regional processing of his protection claims. He therefore meets the definition of a 'transitory person' under s 5(1) of the Migration Act.
13. On 6 December 2013, Mr KO was transferred from PNG to Darwin, Australia, under s 198B of the Migration Act for medical treatment. He was denied immigration clearance under s 172(3) of the Migration Act and detained under s 189(1).
14. Between 5 March 2014 and 26 August 2014, Mr KO was an inpatient receiving treatment at Toowong Private Hospital, a provider of specialised psychiatric care, and Pine Rivers Private Hospital, a mental health hospital. He was transferred to Brisbane Immigration Transit Accommodation (BITA) upon discharge from the hospital in August 2014.

15. On 30 August 2014, Mr KO married an Australian Citizen while being detained at BITA. The Department, in its response to the Commission dated 28 September 2021, advised that this relationship subsequently broke down and they separated. According to the Department's case reviews in 2019, the relationship broke down because Mr KO was transferred back to PNG.
16. On 17 April 2015, Mr KO was transferred from Australia back to PNG under s 189AD of the Migration Act.
17. On 17 October 2016, Mr KO received a negative refugee status determination outcome from the PNG Government. Mr KO apparently did not engage in the refugee status determination process in PNG. According to the Department's case review from May 2019, however, a subsequent Deportation Risk Assessment by the PNG Government determined that to remove Mr KO to his country of origin could be in breach of PNG's international obligations.
18. On 7 April 2019, Mr KO was transferred from PNG to Brisbane, Australia, under s 198B of the Migration Act for medical treatment. On arrival, he was denied immigration clearance under s 172(3) of the Migration Act and detained under s 189(1) at BITA.
19. On 15 April 2019, the Department commenced a Ministerial Intervention process for Mr KO's case to be assessed against the s 197AB Ministerial Intervention Guidelines (s 197AB Guidelines) for residence determination.
20. On 22 May 2020, the Department commenced a Ministerial Intervention process for Mr KO's case to be assessed against the s 195A Ministerial Intervention Guidelines (s 195A Guidelines) for the grant of a Bridging Visa E (BVE). Consequently, the s 197AB referral was withdrawn. According to the first Ombudsman Report, this was on the basis that the Minister had directed that persons returned from an RPC should be considered under s 195A of the Migration Act for the grant of a visa, rather than s 197AB of the Migration Act for a community placement. The first Ombudsman Report was prepared under s 486O of the Migration Act, which requires that the Commonwealth Ombudsman prepare and provide to the Minister an assessment of the appropriateness of arrangements for people who have been in immigration detention for more than two years, and then every six months for as long as they remain in detention. At the time of the first Ombudsman report, Mr KO had been in immigration detention for a cumulative period of more than two and half years and the Ombudsman was recommending that the Department expedite its

assessment of Mr KO's case against the s 195A Guidelines. If Mr KO's case did not meet the s 195A Guidelines for referral to the Minister, the Ombudsman was recommending that the Department assess his case against the s 197AB Guidelines.

21. The Department has since clarified in its response to my preliminary view, that after the Department commenced a Ministerial Intervention process for Mr KO's case in May 2020, his case was referred to the Minister under both ss 195A and 197AB of the Migration Act in December 2020. However, the submission was returned to the Department in January and February 2021 unsigned for updating.
22. On 15 May 2021, a Medical Officer of the Commonwealth provided an opinion that Mr KO was no longer required to remain in Australia for the specific temporary medical purpose for which he was brought to Australia. Consequently, the Department formed the view that a duty may now arise to take Mr KO back to an RPC as soon as practicable pursuant to s 198AD.
23. According to the Department, there were ongoing negotiations with PNG to accept returns on a case-by-case basis, but as Mr KO had not expressed willingness to return to an RPC, it was not practicable to return him.
24. On 2 August 2021, the Department finalised the Ministerial Intervention process that they commenced in May 2020. Despite the initial referral to the Minister mentioned above, after the submission was returned unsigned for updating, Mr KO's case was assessed as not meeting either the s 195A or s 197AB Guidelines for referral to the Minister. According to the Department's response to my preliminary view, this was because after the Honourable Karen Andrews MP was sworn in as the Minister for Home Affairs on 31 March 2021, the Department did not receive authority from her to refer transitory persons for Ministerial Intervention consideration.
25. On 22 October 2021, the Department commenced another Ministerial Intervention process for Mr KO's case to be assessed against both the s 195A and s 197AB Guidelines.
26. On 18 February 2022, Mr KO was assessed as not meeting the s 197AB and s 195A Guidelines for referral to the Minister.
27. On 5 April 2022, after Minister Andrews gave authority for the Department to refer transitory persons for her consideration, the Department referred Mr KO's case to the Minister in a bulk submission for consideration under ss 195A and 197AB of the Migration Act. On 7 April 2022, the Minister intervened under s 195A in Mr KO's case and granted him a BVE, releasing him from closed immigration detention. On 17 August 2022, the Minister

lifted the s 46A and s 46B statutory bars indefinitely, to allow Mr KO to lodge valid BVE applications before each BVE granted expires.

28. Once released from detention, Mr KO engaged in a third country resettlement process with Canada and was interviewed with the Canadian Consulate in Sydney on 28 February 2023.
29. On 1 August 2023, Mr KO departed Australia and was resettled in Canada.

## **4 Procedural history of this inquiry**

30. On 8 August 2023, I issued a preliminary view in this matter and gave the Department the opportunity to respond to my preliminary findings.
31. On 7 November 2023, the Department responded to my preliminary view.

## **5 Legislative framework**

### **5.1 Functions of the Commission**

32. 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.
33. 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.
34. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

### **5.2 What is an 'act' or 'practice'**

35. 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.
36. 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.
37. 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.<sup>3</sup>

### **5.3 What is a human right?**

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

39. Article 9(1) of the ICCPR relevantly 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.

## **6 Arbitrary detention**

40. Mr KO complains that his detention in immigration detention facilities in Australia since his arrival by boat was 'arbitrary', contrary to article 9(1) of the ICCPR. The Commission notes that he was detained over two periods in Australia, being 6 December 2013 to 17 April 2015, and 7 April 2019 to 7 April 2022.

### **6.1 Law on article 9 of the ICCPR**

41. 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<sup>4</sup>
- lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances<sup>5</sup>
- '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<sup>6</sup>
- detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>7</sup>

42. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two months to be 'arbitrary' because the State Party did not show that remand

in custody was necessary to prevent flight, interference with evidence or recurrence of crime.<sup>8</sup>

43. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than closed 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'.<sup>9</sup>
44. Relevant jurisprudence of the UN HR 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.<sup>10</sup>

45. The United Nations Working Group on Arbitrary Detention has expressed the view that the use of administrative detention for national security purposes is not compatible with international human rights law where detention continues for long periods or for an unlimited period without effective judicial oversight.<sup>11</sup> A similar view has been expressed by the UN HR Committee, which has said:

if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law ... information of the reasons must be given ... and court control of the detention must be available ... as well as compensation in the case of a breach.<sup>12</sup>

46. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.<sup>13</sup>
47. A short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, closed detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.<sup>14</sup>
48. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty – in this case, continuing closed 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'.<sup>15</sup>
49. Accordingly, where alternative places or modes of detention that impose a lesser restriction on a person's liberty are reasonably available, and in the absence of particular reasons specific to the individual, prolonged detention in an immigration detention centre may be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.
50. It is therefore necessary to consider whether the detention of Mr KO in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his 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 considered 'arbitrary' under article 9 of the ICCPR.

## **6.2 Act or practice of the Commonwealth?**

51. As Mr KO arrived in Australia by boat without a valid visa, he was an 'unlawful non-citizen' and therefore the Migration Act required that he be detained pursuant to s 189(1) of the Migration Act. As a transitory person, he was prevented from making a valid bridging or substantive visa application himself due to a legislative bar in place pursuant to s 46B of the Migration Act.
52. While the Migration Act requires the detention of unlawful non-citizens, there are a number of powers that the Minister could have exercised to

detain Mr KO in a manner less restrictive than a closed immigration detention facility.

53. Under s 197AB of the Migration Act, the Minister may, if the Minister thinks that it is in the public interest to do so, make a residence determination to allow a person to reside at a specified place instead of being detained in held immigration detention. The residence determination may be made subject to other conditions, such as reporting requirements. The Department did not refer Mr KO's case to the Minister for consideration under s 197AB at any time during his detention. Accordingly, the Minister did not have the opportunity to consider Mr KO for a residence determination.
54. Under s 195A of the Migration Act, the Minister may, if the Minister thinks it is in the public interest to do so, grant a visa to a person detained under s 189 of the Migration Act, subject to any conditions necessary to take into account their specific circumstances. This is a discretionary non-compellable power of the Minister. The Department did not refer Mr KO's case to the Minister for consideration under s 195A until 5 April 2022. Once the Department referred Mr KO's case to the Minister, the Minister intervened within 2 days and granted Mr KO a BVE.
55. I find the following acts of the Commonwealth are relevant to this inquiry:
  - The Department's failure to refer Mr KO's case to the Minister for consideration of the exercise of his powers under ss 195A or 197AB of the Migration Act between 6 December 2013 and 17 April 2015 while Mr KO was in Australia receiving medical treatment for his poor mental health
  - the Department's delays in referring Mr KO's case to the Minister for consideration under ss 195A and 197AB of the Migration Act between April 2019 and April 2022.

### **6.3 Findings**

56. As noted above, lawful immigration 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. Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, and where detention in an immigration detention centre is not demonstrably necessary, prolonged



detention in an immigration detention centre may be disproportionate to the goals said to justify the detention.

57. The Minister has discretionary powers under ss 195A and 197AB of the Migration Act that may have allowed Mr KO to be granted a visa or be held in a less restrictive form of detention.

### ***Section 197AB Guidelines***

58. On 30 May 2013, the Hon Brendan O'Connor MP, then Minister for Immigration and Citizenship, published guidelines to explain the circumstances in which he might wish to consider exercising his residence determination power under s 197AB of the Migration Act.
59. New guidelines were issued on 18 February 2014 by the Hon Scott Morrison MP, then Minister for Immigration and Border Protection.<sup>16</sup> These guidelines provided that the Minister would consider exercising this power for single adults who had 'ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention'. They also provided that the Minister did not expect cases involving people who had arrived after 19 July 2013 to be referred to him unless there were exceptional reasons.
60. On 29 March 2015, the Hon Peter Dutton MP, Minister for Home Affairs, issued replacement guidelines.<sup>17</sup> On 21 October 2017, Minister Dutton re-issued these guidelines which are currently in use by the Department.<sup>18</sup> These guidelines also provided that the Minister would consider exercising this power for single adults who had 'ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention'. However, they provided that the Minister would not expect cases to be referred to him where a person had been transferred from an offshore processing centre to Australia for medical treatment or any other reason, unless there were exceptional reasons.
61. The guidelines also stated that the Minister would consider cases where there were 'unique or exceptional circumstances'.
62. The phrase 'unique or exceptional circumstances' is not defined in any of the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.<sup>19</sup> In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
  - circumstances that may bring Australia's obligations as a party to the ICCPR into consideration

- the length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community
- compassionate circumstances regarding the age and/or health and/or psychological state of the person, such that a failure to recognise them would result in irreparable harm and continuing hardship to the person
- where the Department has determined that the person, through circumstances outside their control, is unable to be returned to their country/countries of citizenship or usual residence.

### **Section 195A Guidelines**

63. Similarly, guidelines have been published in relation to the exercise of the power under s 195A of the Migration Act to grant a visa to a person in immigration detention. The Hon Chris Bowen MP, then Minister for Immigration and Citizenship, published guidelines on s 195A in March 2012. These guidelines provided for referral by the Department of cases where the person has 'individual needs that cannot be properly cared for in a secured immigration detention facility'. They did not explicitly exclude for referral individuals who had been transferred to Australia from an offshore processing facility or who arrived in Australia after a certain date, and also provided for the referral of cases where 'unique and exceptional circumstances' arise.
64. In April 2016, Minister Dutton re-issued s 195A guidelines, which are the current guidelines in use by the Department. These guidelines provide that the Minister will consider the exercise of this power where a person has individual needs that cannot properly be cared for in a secured immigration detention facility, as confirmed by a treating professional. However, they also provide that the Minister does not expect referral of 'transitory persons', defined under s 5(1) of the Migration Act to include a person who was taken to an RPC under s 198AD, who had been brought to Australia for temporary processes, including medical treatment and legal proceedings. Although there is no exception for unique and exceptional circumstances – unlike the other ministerial intervention guidelines referred to above – under these guidelines, the Minister will consider cases where there are compelling or compassionate circumstances.

**(a) Failure by the Department to refer Mr KO's case to the Minister for consideration during the first period of detention from 2013 to 2015**

65. Under the Migration Act, Mr KO is a transitory person and was transferred to Manus Island Regional Processing Centre in PNG on 26 August 2013, soon after his arrival in Australia. For the reasons set out in the Commission's report, *Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128, it is my view that the detention of Mr KO in PNG was not an act done by or on behalf of the Commonwealth. Accordingly, I make no findings on Mr KO's allegations of arbitrary detention during the period of his detainment in PNG.
66. On 6 December 2013, he was transferred back to Australia for medical treatment. According to the IHMS Health Summary Report for the Commonwealth Ombudsman, dated 10 October 2019, this transfer was for the 'evaluation and management of neurologic and psychiatric issues', including urinary incontinence and lower limb weakness. For over five months between 5 March 2014 and 26 August 2014, Mr KO was an inpatient at specialised psychiatric hospitals, until he was discharged and transferred to BITA.
67. During this period, Mr KO was diagnosed with conversion disorder that was causing lower leg paralysis, a neurological condition in which a person shows psychological stress in physical ways. This diagnosis was subsequently questioned and re-diagnosed by an IHMS psychiatrist at BITA as malingering of bilateral lower limb paralysis due to inconsistent evidence about his lower limb weakness and suggestions he may have been faking the paralysis to prolong his stay in Australia.
68. On 28 January 2015, according to the IHMS Health Summary Report for the Commonwealth Ombudsman, dated 10 October 2019, a counsellor from the Queensland Program of Assistance to Survivors of Torture and Trauma (QPASTT) recommended that Mr KO be considered for 'alternative residence to detention' with access to allied health treatment and ongoing torture and trauma counselling so as to 'promote his physical and mental health recovery and to minimise the risk of further deterioration in the detention setting'.
69. On 17 April 2015, Mr KO was transferred back to PNG.
70. When Mr KO first arrived in Australia from PNG in December 2013, neither the s 197AB nor the s 195A Guidelines in force at the time of his arrival excluded transitory persons from referral to the Minister by the Department. Both guidelines also considered the health of a person to be a relevant factor when considering referral of a case to the Minister. The

195A Guidelines in force at the time of Mr KO's arrival remained unchanged for this first period of his detention in Australia before his transfer back to PNG in May 2015.

71. The re-issued s 197AB Guidelines, that introduced the exclusion of persons who arrived 'after 19 July 2013' from referral to the Minister, came into effect on 18 February 2014, two months after Mr KO was transferred to Australia. These guidelines, however, provided a carve out for 'exceptional reasons' and stated that the Minister would expect a case to be referred to him for consideration of those powers where there were 'unique or exceptional circumstances'. These guidelines also provided that the Minister would consider single adults who had 'ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention'.
72. The Department was aware of Mr KO's significant physical and mental health issues from the start of this period of detention, given that he was transferred to Australia for medical treatment. He was diagnosed with depression, anxiety and PTSD and prescribed antidepressants and sedatives. A few months after his transfer to Australia, he was admitted to psychiatric hospitals where he was under the care of mental health specialists for over 5 months.
73. I expressed in my preliminary view that, in August 2014 upon his discharge from hospital, and in light of his ongoing mental health issues, there was scope for Mr KO to have met the guidelines for referral to the Minister under ss 195A and 197AB of the Migration Act for consideration of the grant of a bridging visa or placement in the community pursuant to a residence determination. However, there is no evidence to suggest that the Department at any point considered Mr KO's case nor assessed his situation against the s 195A or s 197AB Guidelines.
74. It is also apparent that by January 2015, the Department was aware of the QPASTT counsellor's opinion that Mr KO should be considered for 'alternative residence to detention'. Mr KO would clearly have met the criteria in the s 195A guidelines of a person with ongoing illness and individual needs that could not properly be cared for in a secured immigration detention facility. Mr KO's case could also have established 'exceptional reasons' and would likely have met the criteria of 'unique or exceptional circumstances' warranting referral of Mr KO's case to the Minister under the s 197AB Guidelines.
75. In response to my preliminary view, the Department provided the following explanation for why Mr KO's case was not referred to the

Minister at any point during the first period of his detention in Australia between 2013 and 2015:

On 6 December 2013, Mr [KO] was transferred to Australia for the temporary purpose of undergoing medical and mental health treatment and, being subject to regional resettlement arrangements at the time, was liable for return to a regional processing country on completion of the intended medical and mental health treatment and being deemed fit to travel.

Mr [KO's] placement at the Brisbane Immigration Transit Accommodation (BITA) from 26 August 2014 was considered appropriate to support regional resettlement arrangements and where Mr [KO's] ongoing medical and mental health needs could be adequately managed.

As Mr [KO's] ongoing physical and mental health needs were determined to be adequately managed in the detention centre environment. Mr [KO] was not considered to fall under the exceptional circumstances provision for referral of Ministerial Intervention consideration.

For these reasons, Mr [KO] was not referred for Ministerial Intervention for alternative placement consideration under sections 195A or 197AB of the Act prior to him being returned to Papua New Guinea (Manus Island) Regional Processing Centre (RPC) on 17 April 2015.

76. I consider that the Department's explanation does not justify Mr KO's prolonged detention during this period given the seriousness of his mental health issues as demonstrated by the material before me.
77. The Department maintains in its response dated 7 November 2023 that it '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'. However, having reviewed the medical opinions expressed in the material before me, I question how the Department could have considered that Mr KO's ongoing physical and mental health needs were being adequately managed in the detention centre environment, especially given the QPASTT counsellor's opinion recommending alternative residence to detention.
78. The Department also stated in its response to my preliminary view that:

It is not a legal requirement that a detention case be considered for Ministerial Intervention, or be referred to the Minister for consideration of their powers. There are no requirements that a case should be referred to the Minister within a certain timeframe or at regular intervals.
79. As I stated above, 'arbitrariness' under international law is not to be equated with 'against the law', and lawful detention can be arbitrary when

it becomes unjust, unreasonable or disproportionate to its legitimate aim. Furthermore, pursuant to the High Court's 2023 decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37, detention in circumstances where removal from Australia is not practicable in the reasonably foreseeable future may, in some circumstances, be unlawful,<sup>20</sup> although I express no views as to whether Mr KO's detention was at any stage unlawful.

80. Applying then the test of whether the Commonwealth has demonstrated that Mr KO's placement in held detention was reasonable, necessary and proportionate, I find that it has not. I find that the Department's failure to refer Mr KO's case to the Minister to consider exercising his discretion under ss 195A and/or 197AB of the Migration Act from 26 August 2014 to his return to PNG on 17 April 2015 was arbitrary, contrary to article 9(1) of the ICCPR.

(b) ***Delays by the Department in referring Mr KO's case to the Minister for consideration under ss 195A and 197AB of the Migration Act due to the reliance on receiving authority from the Minister to refer the transitory persons cohort between 2019 and 2022***

81. Mr KO was in closed immigration detention for 3 years after he was transferred from PNG to Australia on 7 April 2019 for medical treatment. He was released from immigration detention on a BVE on 7 April 2022.

82. At the time of his transfer to Australia, Mr KO already had an extensive psychiatric history. As mentioned above, he was transferred to Australia in December 2013 for medical treatment of neurologic and psychiatric issues. In 2014, he was an inpatient in psychiatric hospitals for over 5 months. In January 2015, a counsellor recommended that Mr KO be considered for alternative residence to detention.

83. In February 2019, just before his transfer from PNG to Australia for medical treatment, Mr KO was a patient at the Pacific International Hospital (PIH) in PNG. According to the PIH psychiatric report dated 4 April 2019, Mr KO was being treated for Reactive Depression with Psychosis (with suicidal risk), comorbid Diabetes and urinary incontinence. The consultant psychiatrist also reported that Mr KO was 'feeling depressed, helpless and hopeless, and feeling guilty and embarrassed' by his bedwetting, as well as experiencing auditory hallucinations. He was 'at higher risk of committing suicide in the near future' and would 'benefit from being reunited with his wife and daughter in Australia'. IHMS notes that Mr KO does not have a wife or daughter in Australia, but it is likely

that this is a reference to the wife he married in Australia in 2014 from whom he then separated. IHMS Clinical Records also indicate that Mr KO has a daughter in Iran whom he has not seen since he left Iran.

84. On arrival in Brisbane, Mr KO was assessed at the Royal Brisbane & Women's Hospital. He did not require hospital admission and was therefore detained at BITA.
85. Over the next three years, various IHMS records provided by the Department to the Commission make the following observations in relation to Mr KO's mental health during the period of his detention from April 2019 to April 2022:
  - On arrival at BITA, Mr KO's risk of suicidality was assessed as moderate in his Induction Mental Health Screen.
  - On 12 April 2019, Mr KO was reported as feeling better following his arrival in Australia, his mood was documented as stable with no acute concerns identified. The psychiatrist recommended ongoing psychotropic medications and referral for specialised torture and trauma counselling.
  - In May 2019, an IHMS psychiatrist recommended that Mr KO be placed into a share accommodation situation in the community for monitoring and social support.
  - In October 2019, IHMS reported to the Commonwealth Ombudsman that Mr KO is 'distressed by remaining in a detention centre environment'.
  - In November 2019, Mr KO commenced on antidepressant medication and was provided supportive counselling after he was noted to have symptoms of depression.
  - In May 2020, Mr KO presented as low in mood with poor sleep.
  - In July 2020, Mr KO reported ongoing mental fatigue with varying sleep patterns depending on his level of anxiety. The IHMS GP recorded 'detention fatigue'.
  - In November 2020, Mr KO was taken to the Emergency Department after he lost consciousness and required CPR. It was noted in the Royal Brisbane and Women's Hospital discharge summary that this occurred in a 'setting of emotional crisis due to prolong [sic] period of detention leading to voluntary refusal of medications'.

- In December 2020, the IHMS GP reported Mr KO was feeling very despondent and helpless, and noted 'I really feel for this man, I would whole heartedly support escalating his case, esp given his very concerning collapse some weeks ago, this was a dire event and we still do not really have an explanation for this'.
- In March 2021, Mr KO was reported having a 'high level of frustration about being in detention, worse currently as many people have recently left, most of whom came into detention in Australia after him'.
- On 15 May 2021, a Medical Officer of the Commonwealth provided the opinion that Mr KO had completed management of the specific temporary medical purpose for which he was brought to Australia, being severe major depressive disorder with psychosis complicated by active suicidality and urinary incontinence.
- On 8 July 2021, an IHMS GP noted that Mr KO was experiencing despair, was 'exhausted with BITA, feels at breaking point' and that continued stay at BITA would cause his mental health to deteriorate quickly and in turn worsen his physical health.
- On 30 August 2021, an IHMS Health Summary Report for the Commonwealth Ombudsman noted that a torture and trauma counsellor reported that in order for Mr KO to begin his recovery, he required 'basic freedoms, safety, agency and autonomy' and that he was 'vulnerable to his mental health deteriorating even further if he remains in held detention'. He was also noted to have missed meals after threatening food and fluid refusal between 7 June and 11 June 2021.

86. Mr KO also suffered numerous physical health issues during this period. In response to this complaint, the Department provided the Commission with an IHMS Health Summary dated 15 April 2020 from which I have summarised Mr KO's key health issues as follows:

- Urinary incontinence – Mr KO has a documented history of urinary issues including urinary frequency, bedwetting and urinary urgency. He was diagnosed with an enlarged prostate and chronic cystitis and prescribed medication that has assisted with his symptoms.
- Diabetes – Mr KO was diagnosed with mellitus-type II diabetes in July 2014 (developed while in a wheelchair) and has a documented



history of poorly controlled diabetes that has resulted in inpatient admission in PNG and multiple medical adverse symptoms.

- Hyperthyroidism – Mr KO has overactive thyroid function from a benign appearing nodule and has been prescribed medication.
- High blood pressure / chronic peripheral pitting oedema – Mr KO is prescribed regular anti-hypertensive and diuretic medications and provided with compression stockings to assist with lower leg swelling.
- High blood cholesterol levels / obesity / fatty liver – Mr KO is prescribed lipid lowering medication.
- Chronic back pain – Mr KO has chronic back pain for which he has previously been prescribed analgesia and attended physiotherapy. A CT scan showed minor central spine disc bulges and degenerative changes. According to a specialist at the Health Spine clinic, 'The psychological and environmental factors involved are significant contributors'.
- Cataracts - Mr KO has a history of cataracts for which he has previously undergone surgery.
- GORD – Mr KO is prescribed regular anti-reflux medication.
- Nasal Septal Deviation / Nasal Polyp / Sleep Apnoea – Mr KO was diagnosed with mild to moderate chronic bilateral sinusitis, left nasal septal deviation and bilateral nasal turbinate congestion following a CT scan and has ongoing chronic ventilation issues. He also has a notable polyp in the left nostril.

87. The Department's initial position in relation to Mr KO's detention, as outlined in its response to the Commission's inquiry dated 28 September 2021, is that Mr KO is an unlawful non-citizen and is therefore required, under s 196 of the Migration Act, to be detained until he is removed from Australia under s 198 of the Migration Act, taken to an RPC under s 198AD of the Migration Act, or granted a visa. He is not eligible to lodge a valid visa application as he is barred from doing so by s 46B of the Migration Act. This response does not explain the Department's delays in referring Mr KO's case to the Minister for consideration under ss 195A and 197AB despite almost three years of being detained.

88. The Department stated in its response to my preliminary view that:

Prior to March 2020, the Department was operating in accordance with sections 195A and 197AB Ministerial Intervention guidelines in place at the

time, that state the Minister would generally not expect to have transitory persons who have been brought to Australia for a temporary purpose, including but not limited to medical treatment, legal proceedings or transit through Australia to a third country, referred for consideration under their personal intervention power.

89. Based on the guidelines in force during this second period of detention, while the Minister would not expect a transitory person to be referred to him for consideration of his powers under ss 197AB or 195A of the Migration Act, the Minister's guidelines also provide for referral to the Minister in cases where:
- a person has an ongoing illness, including mental health illness, requiring ongoing intervention or has individual needs that cannot be properly cared for in a secured immigration detention facility, or
  - there are 'unique or exceptional' or 'compelling or compassionate' circumstances.
90. The Department was aware of Mr KO's significant physical and mental health issues from the time of his detention given the reasons for his transfer to Australia and his previous period in Australia receiving intensive inpatient psychiatric care. The Department had a counsellor's recommendation from January 2015 for alternative residence rather than closed detention. Furthermore, within a month of Mr KO's return to Australia in 2019, an IHMS psychiatrist recommended in May 2019 that Mr KO be placed into a share accommodation situation in the community for monitoring and social support. Over the next three years, as outlined above, there were numerous reports of concern from medical professionals to the Department regarding his mental health and the detrimental effect of prolonged held detention on his mental and physical health.
91. It is clear from the medical records provided by the Department that Mr KO would have met the criteria of a person with an ongoing illness and individual needs that cannot properly be cared for in an immigration detention facility. These matters would also have clearly meant that Mr KO's case met the criteria of 'unique or exceptional' and 'compelling or compassionate' circumstances warranting referral of Mr KO's case to the Minister.
92. It is the Commission's understanding that from 15 May 2021, after the Medical Officer provided their opinion that Mr KO was no longer required to remain in Australia for the specific temporary medical purpose, the

Department considered that it had a duty to return Mr KO to an RPC as soon as practicable under s 198AD of the Migration Act. However, due to a range of factors, including COVID-19 and the need for consent from the transitory person, returning Mr KO to PNG was not practicable at that time. As noted above, detention in circumstances where removal from Australia is not practicable in the reasonably foreseeable future may be unlawful. I am not able to form an opinion as to whether Mr KO's detention was unlawful at this time. I do note, however, that the Department was aware that his removal from Australia to PNG was not practicable while he remained in immigration detention.

93. Furthermore, I noted in my preliminary view that the Department had initiated a Ministerial Intervention process under s 197AB within a week of Mr KO's arrival in Australia in April 2019 that had, according to the first Ombudsman Report, met the s 197AB Guidelines for community placement. However, this Ministerial submission was withdrawn in June 2020, when the Minister directed that persons returning from an RPC should be considered under s 195A rather than s 197AB. Subsequent considerations by the Department of Mr KO's case against the s 197AB and s 195A Guidelines were then assessed as failing to meet the Guidelines. The Department decided not to refer Mr KO to the Minister for consideration under either ss 197AB or 195A of the Migration Act on 2 August 2021 and again on 18 February 2022.
94. The Department, in its response to my preliminary view, has clarified that they commenced a Ministerial Intervention process for Mr KO's case in May 2020, after the then Minister for Home Affairs gave instructions for the Department to refer transitory persons for Ministerial consideration under both ss 195A and 197AB of the Migration Act. The Department stated:

In March 2020, the then Minister for Home Affairs gave instructions for the Department to refer transitory persons in immigration detention for their consideration under sections 195A and 197AB of the Act.

In May 2020, the Department commenced a Ministerial Intervention process for Mr [KO's] case, and in December 2020, the Department referred his case to the Minister under sections 195A and 197AB of the Act. In January and February 2021, the submission was returned to the Department unsigned for updating.

On 31 March 2021, the Hon Karen Andrews MP was sworn in as the Minister for Home Affairs. The Department sought authority from Minister Andrews at the time to refer this cohort for Ministerial Intervention consideration.

Having not received authority from the former Minister to refer transitory persons, on 2 August 2021, Mr [KO's] Ministerial Intervention process was finalised.

On 3 March 2022, former Minister Andrews gave authority for the Department to refer transitory persons in immigration detention for her consideration under sections 195A or 197AB of the Act.

On 30 March 2022, the Department referred Mr [KO's] case to the former Minister under sections 195A and 197AB of the Act. On 7 April 2022, the former Minister intervened under section 195A of the Act to grant Mr [KO] a Bridging E (subclass 050) visa, and declined to intervene under section 197AB of the Act.

95. The Department's response indicates that there was no consideration of the individual circumstances of Mr KO's case as to whether he met the criteria of 'unique or exceptional' and 'compelling or compassionate' circumstances. The Department's decision as to whether to refer his case to the Minister for consideration under ss 195A and 197AB of the Migration Act appears to be based entirely on whether the Minister had provided a blanket authorisation for referral of the cohort of detainees which included Mr KO, being transitory persons. This approach by the Department meant that the Minister was never given the opportunity to consider Mr KO's case, despite the fact that a proper assessment of his mental health issues would likely have shown that he met the criteria for 'unique or exceptional' and 'compelling or compassionate' circumstances and therefore met the guidelines for referral.
96. The Commission is not aware of any behavioural incidents in detention or any character or security concerns with respect to placing Mr KO in the community. According to the Community Protection Assessment Tool (CPAT) completed on 11 December 2019, the CPAT recommendation was for a Tier 1 – Bridging Visa. This was subsequently amended to Tier 1 – Residence Determination on the basis that at that time government policy was that RPC transitory persons were not being considered for BVEs. Comments relating to 'Strengths' in the CPAT included '[p]ositive engagement with others in Held Detention'. I also note that the IHMS clinical records describe Mr KO at various times as polite, pleasant and/or cooperative, with one GP noting that Mr KO 'is doing all he can to work with serco, keep himself as fit as he can be, he is always very adherent to treatment options and seeks help when needed from IHMS'.
97. I find that the Department's delays in referring Mr KO's case to the Minister for consideration under ss 195A and 197AB of the Migration Act

due to the Department's reliance on receiving authority from the Minister to refer the transitory persons cohort contributed to the continued detention of Mr KO without consideration of whether that detention was justified in the particular circumstances of his case.

98. I find that Mr KO's continued detention for three years from 7 April 2019 until his release from detention on a BVE on 7 April 2023 has not been justified by the Department as reasonable, necessary or proportionate in the context of his particular circumstances and, as a result, his detention may be considered to be 'arbitrary' for the purposes of article 9(1) of the ICCPR. This period of detention, during which all assessments against the s 195A or s 197AB Guidelines appear to be based on what the Minister has authorised for the transitory persons cohort without consideration of Mr KO's individual circumstances, is particularly concerning in light of Mr KO's significant mental and physical health issues.
99. Mr KO has, since his release from immigration detention, informed the Commission that he continues to experience ongoing medical issues from his time in detention. He forwarded a medical report dated 30 August 2023 from his GP in Queensland, Dr Anna Hebden, about his chronic back pain and referral to an orthopaedic surgeon. Dr Hebden notes that Mr KO was subject to significant trauma while detained on Manus Island, as well as severe trauma in Iran, that has resulted in complex PTSD. He continues to suffer from urinary continence issues, thought to be related to his PTSD and ongoing nightmares. Mr KO was also seen by Dr Ivan Astori, a hip and knee surgeon, about his ongoing back and leg pain, who noted in his report to Dr Hebden dated 18 July 2022 that 'it is important to recognise that [Mr KO] has been through a large amount of trauma and there may well be a large psychological element to his presentation'.

## **7 Recommendations**

100. 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.<sup>21</sup> The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.<sup>22</sup> The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.<sup>23</sup>

## 7.1 Alternatives to held detention

101. As previously highlighted by the Commission, the detention review process currently conducted by the Department considers whether there are circumstances that indicate that a detainee cannot be appropriately managed within a detention centre environment. They do not consider whether detention is reasonable, necessary or proportionate on the basis of particular reasons specific to the individual, and in light of the available alternatives to closed detention. The Commission has expressed concern that this process does not adequately safeguard against arbitrary detention.<sup>24</sup>
102. In August 2022, the Department conducted a stakeholder briefing about its Alternatives to Held Detention program. It subsequently published a briefing note and slide deck in relation to that briefing.<sup>25</sup> These documents described a range of important initiatives that were being explored by the Department, including:
- **Risk assessment tools:** reviewing current tools and developing a revised risk assessment framework and tools that enable a dynamic and nuanced assessment of risk across the status resolution continuum.
  - **An ‘independent panel’:** establishing a qualified independent panel of experts to conduct a more nuanced assessment of a detainee’s risk, including risks related to their physical and mental health, and provide advice about community-based placement for detainees with complex circumstances and residual risk.
  - **Increasing community-based placements:** in particular, by focusing on detainees who pose a low to medium risk to the community, and managing residual risk through the imposition of bail-like conditions and the provision of post-release support services.
  - **A ‘step-down’ model:** considering transfer from held detention to a residence determination as part of a transition to living in the community.
103. Those initiatives were prompted by two reviews:
- the Independent Detention Case Review conducted by Robert Cornall AO for the Department in March 2020<sup>26</sup>

- the Commission’s report to the Attorney-General, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958* (Cth) [2021] AusHRC 141, in February 2021.
104. The Commission welcomes these initiatives which reflect and build on recommendations it has made in a number of previous reports including the one identified above. 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.
105. The Commission encourages further work to be undertaken by the Department in each of the areas identified in the Alternatives to Held Detention program.

### **Recommendation 1**

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated
- the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement
- increasing community-based placements for low and medium risk detainees, through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

## **7.2 Guidelines for referrals to the Minister**

106. The current ministerial guidelines on referrals to the Minister under s 197AB exclude for referral transitory persons, unless there are exceptional reasons or on the Minister’s request, and those under s 195A exclude them unless there are compelling or compassionate circumstances. This is particularly concerning given, according to the Department, there were 1,083 transitory persons in Australia at 31 March 2023.<sup>27</sup> Of these, 23 were in detention. The remainder were in the community either in community detention (237) or on BVEs (823).

107. The ministerial guidelines should be amended to remove these exclusions. A transitory person should not be detained merely for the fact of them falling within that definition, unless there are other factors relevant to their individual circumstances that justifies their detention as necessary, proportionate and reasonable. Otherwise, their detention may be considered arbitrary and contrary to article 9(1) of the ICCPR.
108. Following the High Court's recent judgment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, it appears that there will need to be amendments made to the guidelines issued by the Minister to the Department about the exercise of ministerial intervention powers, including under s 195A and s 197AB. 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,<sup>28</sup> and the Commission considers that this is likely to apply equally to referrals under s 197AB.
109. Any revised guidelines issued by the Minister should contain clear, objective criteria for referral.<sup>29</sup> It also appears from the documents published by the Department as part of the Alternatives to Held Detention program, identified above, that some intractable cases will only be able to be resolved by the Minister. As a result, there is a real need to ensure that these cases are brought to the Minister's attention so that decisions can be made by the Minister about the potential exercise of their personal intervention powers.
110. 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.
111. The Commission reiterates previous recommendations it has made for amendment of the guidelines for referral.<sup>30</sup>



## **Recommendation 2**

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 transitory persons in closed immigration detention are eligible for referral under ss 195A and 197AB of the Migration Act
- 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
- 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.

### **7.3 Written apology**

112. I consider that the treatment of Mr KO warrants an apology from the Commonwealth for the delay in releasing him from closed detention in view of the clear evidence of his compelling circumstances and the significant impact of immigration detention on his health and mental health. I recommend such an apology be made.

## **Recommendation 3**

The Commonwealth provide a written apology to Mr KO for the delay in releasing him from closed detention in view of the clear evidence of his compelling circumstances.

## **8 The Department's response to my findings and recommendations**

113. On 21 December 2023, I provided the Department with a notice of my findings and recommendations.
114. On 27 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 does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).

Mr KO was lawfully detained as an unlawful non-citizen under section 189 of the *Migration Act 1958* (the Act). At no point in time did Mr KO's detention become arbitrary.

### **Recommendation 1 – Partially Agree**

*The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:*

- *the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated*
- *the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement*
- *increasing community-based placements for low and medium risk detainees, through necessary conditions and support services*
- *utilising residence determinations as part of a step-down model of reintegration into the community.*

The Department continues to progress the Alternatives to Held Detention (ATHD) program, however the ATHD model is being considered in light of the High Court judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (S28/2023) [2023] HCA 37 (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 on the direction and priorities of ATHD. The Department continues to actively review processes and assess individual cases as appropriate.

Wherever possible, the proposed 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
- explore jurisdictional consistency relating to parole arrangements (including provision of support) for unlawful non-citizens.

The Department continues to consider the impact of the High Court decision in *NZYQ* on the future direction of the ATHD program. Development of longer-term options for ATHD may require changes to legislative and policy settings. Options for ATHD remain under development and will be subject to policy authority from Government.

#### ***Recommendation 2 - 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 transitory persons in closed immigration detention are eligible for referral under ss 195A and 197AB of the Migration Act*
- *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*
- *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.

**Recommendation 3 - Disagree**


*The Commonwealth provide a written apology to Mr KO for the delay in releasing him from closed detention in view of the clear evidence of his compelling circumstances.*

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

**Table 1 - Summary of Department’s response to recommendations**

Recommendation number	Department’s response
1	Partially Agree
2	Agree
3	Disagree

115. I report accordingly to the Attorney-General.



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

## Endnotes

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- <sup>1</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- <sup>2</sup> *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.
- <sup>3</sup> See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212–3 and 214–5.
- <sup>4</sup> UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014). See also UN Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); UN Human Rights Committee, *Views: Communication No. 900/1999*, 67<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*); UN Human Rights Committee, *Views: Communication No 1014/2001*, 78<sup>th</sup> sess, CCPR/C/78/D/1014/2001 (18 September 2003) (*Baban v Australia*).
- <sup>5</sup> UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014) 5–6 [18]; UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 1 [6].
- <sup>6</sup> *Manga v Attorney-General* [2000] 2 NZLR 65, 71 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee in *Views: Communication No. 305/1988*, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*); UN Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); UN Human Rights Committee, *Communication No. 631/1995*, 67<sup>th</sup> sess, UN Doc CCPR/C/67/D/631/1995 (11 November 1999) (*Spakmo v Norway*).
- <sup>7</sup> UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 1 [6]; UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014); UN Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*) (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); UN Human Rights Committee, *Views: Communication No. 900/1999*, 67<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*).
- <sup>8</sup> UN Human Rights Committee, *Views: Communication No. 305/1988*, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*).
- <sup>9</sup> UN Human Rights Committee, *Views: Communication No. 900/1999*, 67<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*); UN Human Rights Committee, *Views: Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90<sup>th</sup> sess, UN Doc CCPR/C/90/D/1255/2004 (20 July 2007) (*Shams & Ors v Australia*); UN Human Rights Committee, *Views: Communication No 1014/2001*, 78<sup>th</sup> sess, CCPR/C/78/D/1014/2001 (18 September 2003) (*Baban v Australia*); UN Human Rights Committee, *Views: Communication No. 1050/2002*, 87<sup>th</sup> sess, CCPR/C/87/D/1050/2002 (9 August 2006) (*D and E and their two children v Australia*).
- <sup>10</sup> UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014) 5–6 [18], footnotes omitted.
- <sup>11</sup> Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].
- <sup>12</sup> UN Human Rights Committee, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons)*, 60<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.1 (1982) [4]. See also UN Commission on Human

Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc E/CN.4/826/Rev.1 (1962) [783]–[787].

<sup>13</sup>UN Human Rights Committee, *Communication No 1051/2002*, 80<sup>th</sup> sess, UN Doc CCPR/C/80/D/1051/2002 (2004) (*Mansour Ahani v Canada*) [10.2].

<sup>14</sup>UN Human Rights Committee, *Communication No 794/1998*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/794/1998 (2002) (*Jalloh v the Netherlands*); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).

<sup>15</sup>UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 1 [6]; *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999.

<sup>16</sup>The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 18 February 2014. The guidelines are incorporated into the Department's Procedures Advice Manual.

<sup>17</sup>The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the Department's Procedures Advice Manual.

<sup>18</sup>The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 21 October 2017. The guidelines are incorporated into the Department's Procedures Advice Manual.

<sup>19</sup>The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s345, s 351, s 417 and s 501)*, 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the Department's Procedures Advice Manual.

<sup>20</sup>*NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.

<sup>21</sup>AHRC Act, s 29(2)(a).

<sup>22</sup>AHRC Act, s 29(2)(b).

<sup>23</sup>AHRC Act, s 29(2)(c).

<sup>24</sup>Australian Human Rights Commission, *Ms RC v Commonwealth (Department of Home Affairs)* [2022] AusHRC 144, at [104].

<sup>25</sup>Department of Home Affairs, *Alternatives to Held Detention Program, stakeholder meeting – briefing notes and presentation*, 8 August 2022, at <https://www.homeaffairs.gov.au/foi/files/2022/fa-220901228-document-released.PDF>.

<sup>26</sup>Department of Home Affairs, *Independent Detention Case Review* (Report, 27 March 2020) at <https://www.homeaffairs.gov.au/foi/files/2023/fa-230300029-document-released.PDF>.

<sup>27</sup>Senate Standing Committee on Legal and Constitutional Affairs Budget Estimates, Parliament of Australia, *Question on notice no. 766* (Home Affairs Portfolio, BE23-766, May 2023).

<sup>28</sup>*MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 [13], [46].

<sup>29</sup>*Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [17] (Kiefel CJ, Gageler and Gleeson JJ) and [99] (Gordon J), cf [219] (Steward J).

<sup>30</sup>*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].