Australian Human Rights Commission

BZ and AD v Commonwealth of Australia

[**2012**] AusHRC 55

ISSN 1837-1183

This publication can be found in electronic format on the Australian Human Rights Commission's website at:
www.humanrights.gov.au/human_rights

For further information about the Australian Human Rights Commission, please visit: **www.humanrights.gov.au**
or email: **communications@humanrights.gov.au**

You can also write to: Communications Team Australian Human Rights Commission GPO Box 5218 Sydney NSW 2001

Design and layout Jo Clark **Printing** Masterprint

BZ and AD v Commonwealth of Australia (Department of Immigration and Citizenship)

Report into breaches of privacy, arbitrary detention, the right for the child to be treated with humanity and with respect for the inherent dignity of the human person and the failure of the Commonwealth to treat the best interests of the child as a primary consideration

[2012] AusHRC 55

Australian Human Rights Commission 2012

Australian
Human Rights
Commission

Contents

Australian
Human Rights
Commission

July 2012

The Hon. Nicola Roxon MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by two girls referred to as BZ and AD.

I have found that the act of the Commonwealth of permitting officials from the People's Republic of China to question the mothers of the complainants to be a breach of the complainants' right to privacy.

I have also found that the failure of the Commonwealth to make referrals to the Minister for consideration of less restrictive forms of detention for BZ and AD was not in the children's best interests and resulted in detention that was arbitrary. In the case of BZ, detention in immigration detention centres for more than two years and three months after her birth, when less restrictive forms of detention were available, was itself arbitrary.

Finally, I have found that the conditions of detention endured by BZ, and their impact upon her, breached her right to be treated with humanity and with respect for the inherent dignity of the human person.

By letter dated 5 July 2012 the Department of Immigration and Citizenship provided a response to my findings and recommendations. I have set out the response of the department in its entirety in part 8 of my report.

Please find enclosed a copy of my report.

Yours sincerely

Catherine Branson
President
Australian Human Rights Commission

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001

Telephone: 02 9284 9600
Facsimile: 02 9284 9611
Website: www.humanrights.gov.au

1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into complaints against the Commonwealth of Australia by two girls, both currently 10 years old, referred to as BZ and AD.

2. I have directed that the complainant's identities, along with the identities of their parents and siblings, not be disclosed in accordance with s 14(2) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). For the purposes of this report I have given one family a pseudonym beginning with the letter A and the other family a pseudonym beginning with B. The complainants are referred to as AD and BZ throughout the report. Details of the family relationships are set out in section 3 of this report.

3. There are two separate sets of complaints. The first set of complaints relates to an alleged breach of the right to privacy. BZ and AD complain that the Commonwealth permitted officials from the People's Republic of China (PRC) to question their mothers about a number of matters including their applications for protection visas without taking adequate precautions to protect the rights and interests of the families.

4. The second set of complaints relates to the detention of the complainants. In summary, BZ and AD say that they were not detained as a measure of last resort, that their detention was arbitrary including because less restrictive alternatives to detention in the manner in which they were detained were available and that the conditions of their detention were such that they were not treated with humanity and with respect for the inherent dignity of the human person.

5. In the context of each of these complaints, BZ and AD complained that the Commonwealth failed to treat the best interests of the children as a primary consideration.

6. This inquiry has been undertaken pursuant to s 11(1)(f) of the AHRC Act.

7. As a result of the inquiry, the Commission has found that certain acts of the Commonwealth identified below were inconsistent with or contrary to human rights of BZ and AD contained in the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC).

8. The findings made in this report are that:

   (a) the act of the Department of Immigration and Citizenship (the department) in permitting officials from the PRC to question the mothers of the complainants about a number of matters including their applications for protection visas without taking adequate precautions to protect the rights and interests of the families was inconsistent with or contrary to article 17(1) of the ICCPR and article 16(1) of the CRC;

   (b) the act of the department in detaining BZ in Villawood Immigration Detention Centre (VIDC) and Baxter Immigration Detention Centre (BIDC) for more than two years and three months after her birth when less restrictive forms of detention were available was inconsistent with or contrary to article 9(1) of the ICCPR and article 37(b) of the CRC;

   (c) the act of the department in failing to make appropriate referrals to the Minister for Immigration and Citizenship pursuant to either s 417 or s 195A of the *Migration Act 1958* (Cth) (Migration Act) in relation to BZ and AD was inconsistent with or contrary to article 3 of the CRC and resulted in continued detention of BZ and AD which was arbitrary and therefore inconsistent with or contrary to article 9(1) of the ICCPR and article 37(b) of the CRC;

   (d) the conditions of detention endured by BZ and their impact upon her were inconsistent with or contrary to article 10 of the ICCPR and article 37(c) of the CRC.

9. The recommendations made in this report are that:

   (a) the Commonwealth pay to each of BZ and AD compensation in the amount of $2 500 in relation to the arbitrary interference with their privacy;

   (b) the Commonwealth pay to BZ compensation in the amount of $450 000 in relation to her arbitrary detention;

   (c) the Commonwealth pay to AD compensation in the amount of $80 000 in relation to her arbitrary detention;

   (d) the Commonwealth provide a formal written apology to the families of both BZ and AD;

   (e) the department prepare new draft guidelines for the approval of the Minister dealing with the circumstances in which a referral for consideration of the exercise of discretionary powers is to be made. This may involve different guidelines for different powers. In these guidelines, the phrase 'unique or exceptional circumstances' should be replaced with a more neutral phrase such as 'referral circumstances'.

2 Background

10. The first set of complaints arises from an incident that occurred between May and June 2005 when the department permitted representatives of the PRC Ministry for Public Security to interview a number of detainees suspected to be PRC nationals. This incident was the subject of complaints addressed in *Immigration detainees v Commonwealth and GSL (Australia) Pty Ltd* [2009] AusHRC 40 (Report No 40).

11. BZ and AD (both aged three at that time) were present with their mothers (BX and AB respectively) when BX and AB were interviewed on 25 May 2005 by officials from the PRC.

12. The complainants allege that they were placed at risk of persecution because the department permitted PRC officials to question their mothers, with the complainants present, about a number of matters including their applications for protection visas without taking adequate precautions to protect the rights and interests of the families. In particular, they allege they were placed at risk of persecution because as a result of this questioning their parents disclosed that the children had applied for protection visas and had appealed in relation to refusal of those visas. They also allege they were placed at risk of persecution because as a result of this questioning their parents disclosed that the children were born in breach of the PRC's one child policy.

13. The complainants allege that these acts amounted to a breach of articles 10(1) and 17(1) of the ICCPR and articles 3(1), 16(1) and 37(c) of the CRC.

14. The second set of complaints relates to the continued detention of BZ and AD. The particular way in which these complaints were framed is set out in paragraph 105 below.

3 Findings of fact

15. I consider the following statements to be uncontentious.

3.1 AD and family – chronology of immigration detention and applications for protection visas

16. Mrs AB and Mr AC (parents of the complainant, Miss AD) and their child Master AE (the older brother of AD) arrived in Australia on 23 September 2000.

17. On 31 October 2000 AB lodged an application for a protection visa. AC and AE were included in that application. The application was refused on 10 January 2001. AB sought a review of the refusal decision by the Refugee Review Tribunal (RRT).

18. AD was born in Australia on 29 October 2001.

19. On 29 August 2002 the RRT affirmed the decision not to grant a protection visa to AB, AC and AE.

20. On 10 April 2002 AD made a separate application for a protection visa. That application was refused on 24 April 2003.

21. On 7 May 2003 AD sought a review of the refusal decision in the RRT.

22. On 27 February 2004 the RRT affirmed the decision not to grant AD a protection visa.

23. On 16 April 2004 AB's bridging visa expired. On 20 April, AB was detained with her children in VIDC pursuant to s 189(1) of the Migration Act.

24. On 18 June 2004 the family was transferred from VIDC to BIDC.

25. On 26 June 2004 AB, AD and AE were transferred from BIDC to Port Augusta Residential Housing Project.

26. AB's appeal in relation to the refusal of her protection visa was dismissed by the Federal Court on 22 March 2005.

27. On 25 May 2005 AB was interviewed by officials from PRC. Her daughter AD (then aged three) was present at that interview.

28. On 29 June 2005 the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) commenced. That Act introduced s 4AA into the Migration Act which provided that: 'a minor shall only be detained as a measure of last resort'.

29. On 28 July 2005 the Minister made a residence determination in favour of AD and her family pursuant to s 197AB of the Migration Act.

30. On 29 July 2005 AD was transferred with her family into community detention run by the Australian Red Cross.

31. On 17 August 2005 the Minister withdrew from the appeal against the refusal of AD's April 2002 application for a protection visa.

32. On 31 August 2005 the Full Court of the Federal Court quashed the earlier decision dismissing AD's appeal and remitted her application for a protection visa to the RRT for reconsideration.

33. On 25 November 2005 the RRT affirmed the original refusal decision with regard to AD's application for a protection visa.

34. On 2 August 2006 the Minister determined that the family would be permitted to make a new application for a protection visa pursuant to s 48B of the Migration Act.

35. On 23 August 2006 AB and AC made a further application for a protection visa.

36. On 10 October 2006 AB and AC were granted protection visas. AD and AE were also granted protection visas by virtue of s 36(2)(b) of the Migration Act as members of the same family unit.

37. The family was released from community detention on 10 October 2006.

3.2 BZ and family – chronology of immigration detention and applications for protection visas

38. Ms BX and Mr BY (parents of Miss BZ) arrived in Australia on 14 October 2000 as holders of business (short stay) visas. On 10 November 2000 BX and BY applied for long stay visas. In association with that application, BX and BY were granted bridging visas.

39. BX and BY's long stay visa applications were refused on 8 May 2001. The bridging visas associated with that application were cancelled on 12 June 2001.

40. On 5 July 2001 the department's compliance officers located BX. BX was detained pursuant to s 189(1) of the Migration Act and placed in immigration detention at VIDC.

41. On 24 July 2001 BX was granted a further bridging visa pending her departure from Australia after providing the department with a $25 000 bond, agreeing to reporting conditions and demonstrating her intention to depart Australia on 29 July 2001.

42. BX failed to depart Australia on 29 July 2001 and her bridging visa expired on that date. BX forfeited her bond. She remained as an unlawful non-citizen in the community until located by departmental officers on 19 March 2002. BX was again detained pursuant to s 189(1) of the Migration Act and returned to VIDC.

43. On 8 April 2002, while in immigration detention at VIDC, BX gave birth to BZ at Fairfield Hospital.

44. On 10 May 2002 BX lodged an application for a protection visa on behalf of herself and BZ. In association with this application, the department considered whether a bridging visa could also be granted while the application for a protection visa was processed. On 22 May 2002 BX's application for a bridging visa was refused. On 20 June 2002 her protection visa application was also refused.

45. On 5 September 2002 the RRT affirmed the decision to refuse the 10 May 2002 application for a protection visa. Appeals against this decision were dismissed by the Federal Magistrates Court on 28 January 2003 and by the High Court on 27 October 2005.

46. On 8 September 2003 BX made a request to the Minister to intervene pursuant to s 417 of the Migration Act in relation to herself and BZ. The Minister declined to intervene.

47. On 10 May 2004 BX made a second request to the Minister to intervene pursuant to s 417 of the Migration Act in relation to herself and BZ. The department determined that this request did not meet the guidelines and did not refer it to the Minister.

48. On 14 July 2004 BX and BZ were transferred from VIDC to BIDC.

49. On 17 July 2004 BX and BZ were transferred from BIDC to Port Augusta Residential Housing Project.

50. On 25 May 2005 BX was interviewed by officials from the PRC. Her daughter BZ (then aged three) was present at that interview.

51. On 24 May 2005 BX made a third request to the Minister to intervene pursuant to s 417 of the Migration Act in relation to herself and BZ. The department determined that this request did not meet the guidelines and did not refer it to the Minister.

52. On 28 July 2005 the Minister made a residence determination in favour of BZ and her mother pursuant to s 197AB of the Migration Act.

53. On 29 July 2005 BX and BZ were transferred from Port Augusta Residential Housing Project to community detention run by the Australian Red Cross.

54. On 30 December 2005 BX made a fourth request to the Minister to intervene pursuant to s 417 of the Migration Act in relation to herself and BZ. The Minister declined to intervene but permitted a fresh application for a protection visa to be made.

55. On 5 September 2006 BX was granted a protection visa. BZ was also granted a protection visa by virtue of paragraph 32(2)(b) of the Migration Act as a member of the same family unit.

56. BX and BZ were released from community detention on 5 September 2006.

4 Legislative framework

4.1 Functions of the Commission

57. Section 11(1)(f) of the AHRC Act empowers the Commission to inquire into any act or practice that may be inconsistent with or contrary to any human right.

58. Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.

4.2 Acts or practices of the Commonwealth

59. 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.

60. 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.

61. 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;[1] that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

4.3 What is a human right?

62. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR, or recognised or declared by any relevant international instrument. A relevant international instrument is an instrument in respect of which a declaration under s 47 is in force. One such instrument is the CRC.[2]

5 Privacy complaints arising from interview by PRC officials

5.1 Alleged act or practice

63. The complainants allege that the department allowed PRC officials to interview BZ and AD with their mothers without any supervision. They allege that as a result of these interviews, BZ and AD were placed at risk of persecution because:

(a) the department permitted the children to accompany their mothers to the interviews;

(b) as a result of questioning by PRC officials their parents disclosed that the children had applied for protection visas and had appealed in relation to refusal of those visas;

(c) as a result of questioning by PRC officials their parents disclosed that the children were born in breach of the PRC's one child policy.

64. As a result of these acts, the complainants allege that the Commonwealth has breached articles 10(1) and 17(1) of the ICCPR and articles 3(1), 16(1) and 37(c) of the CRC.

65. Article 10(1) of the ICCPR provides that:

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

66. Article 17(1) of the ICCPR provides that:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

67. Article 3(1) of the CRC provides that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

68. Article 16(1) of the CRC provides that:

> No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

69. Article 37(c) of the CRC provides that:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

70. The interviews of PRC nationals, including the mothers of BZ and AD, were the subject of the Commission's Report No 40. This report found that the manner in which the interviews were conducted breached both the right of the complainants to be treated with humanity and dignity (article 10(1) of the ICCPR) and their right to privacy (article 17(1) of the ICCPR). At the time of that report, the department accepted that certain acts or practices complained of were inconsistent with and contrary to human rights under the AHRC Act. The department acknowledged and accepted the Commission's recommendation to pay compensation to the complainants and to provide them with a formal written apology.

71. As a result of the Commission's findings AB, AC and BX have received ex-gratia payments from the Commonwealth. At around the same time as the Commission's report was published, the Minister determined to permit further applications for protection visas by both families pursuant to s 43 of the Migration Act. Those applications were ultimately successful.

72. Although the children BZ and AD were present during those interviews, they were not complainants to the Commission's inquiry which led to Report No 40.

5.2 International law in relation to the best interests of the child

73. The UNICEF *Implementation Handbook for the Convention on the Rights of the Child* provides the following commentary on article 3:[3]

> The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests … .
>
> The child's interests, however, must be the subject of active consideration; it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.

74. Similarly, Mason CJ and Deane J noted in *Minister for Immigration and Ethnic Affairs v Teoh* that article 3 of the CRC is:[4]

> careful to avoid putting the best interests of the child as the primary consideration; it does no more than give those interests first importance along with such other considerations, as may, in the circumstances of a given case, require equal, but not paramount, weight.

75. The first step in analysing whether article 3 has been complied with is to identify what the best interests of the child require.

76. An identification of what the best interests of the child require, and the recognition by the decision maker of the need to treat such interests as a primary consideration, do not lead inexorably to a decision to adopt a course in conformity with those interests.[5]

77. It is legally open to a decision maker to depart from the best interests of a child. However, in order to do so there are two requirements:

(a) the decision maker must not treat any other factor as inherently more significant than the best interests of the child;

(b) the strength of other relevant considerations must outweigh the consideration of the best interests of the child, understood as a primary consideration.

78. The relevant issue is whether the department took into account the best interests of BZ and AD as a primary consideration when it made decisions about where they should be detained, whether they should be granted a visa (or considered for the grant of a visa) and how they should be treated while in detention.

5.3 Submissions of the department: interference with privacy

79. The department denies that it breached the complainants' right to privacy under article 17(1) of the ICCPR or article 16(1) of the CRC.

80. The department asserts that BZ and AD were in a different position to that of the complainants to the previous inquiry because they were infants aged three at the time of the interviews and they played no active role in the interviews.

81. In relation to the allegation that it failed to take adequate measures to avoid a breach of the complainants' right to privacy, the department says:

    (a) the complainants' mothers, not the complainants, had lodged the applications for protection visas on the basis of claims about themselves and not on the basis of claims relating to the complainants, and those applications had been finalised at the time of the interviews;

    (b) the complainants' mothers, not the complainants, were the only people effectively able to participate in the interviews and have an understanding of the nature of their own protection claims;

    (c) the department has already acknowledged its responsibility in relation to the complainants' mothers.

82. The department says that the grounds of complaint in respect of AD and BZ suggest that:

    (a) infant children should have been informed of the reason for the interview; and

    (b) the protection applications referred to in the interviews were applications made by the children themselves, rather than their mothers.

83. The department annexed to its submission transcripts of the interviews attended by AD and BZ. The department says that these transcripts indicate that their mothers, BX and AB, were asked questions that sought to identify the children's familial relationship, their age and whether they had any siblings. The department concedes that these questions, answered by BX and AB, could be said to be an interference with the children's right to privacy. However, the department notes that only unlawful or arbitrary interferences with the right to privacy are prohibited by article 17(1) of the ICCPR (and article 16(1) of the CRC).

84. The department considers that questions asked by the PRC officials were necessary to establish the identity of the family members which was required to assist the PRC officials to obtain travel documents for the children and their mothers. Furthermore, the department notes that the questions about protection visa applications related to the protection claims of their mothers, not the children.

5.4 Submissions of the department: conditions of treatment

85. The department denies that it breached article 10(1) of the ICCPR or article 37(c) of the CRC. The department says that the transcripts of interview show that the children were passive observers of the interviews:

    (a) the children were not asked any questions, apart from AD being asked her name;

    (b) the department has no evidence that the children could understand the nature of the questions being put to their mothers or the purpose of the interview;

    (c) there is no evidence that has been provided by the complainants, or is apparent to the department from the transcripts, that the children were distressed during the interview or were treated with anything other than humanity and dignity;

(d) the focus of the interviews was on the mothers, not the children;

(e) there is no evidence known to the department that the conditions of the interview room were poor;

(f) the interviews did not proceed for an extended period (BZ's mother was interviewed for approximately 10-15 minutes, and AD's mother was interviewed for approximately 30-40 minutes).

5.5 Submissions of the department: best interests of the children

86. The department denies that it breached article 3(1) of the CRC with respect to the interviews or otherwise. The department says:

(a) the complainants were not separated from their mothers prior to, during or after the interviews. The department considered that maintaining contact between the children and their mothers was a primary consideration for the welfare of the children because of their young age;

(b) the children had no involvement in the interview, other than as observers, and had limited ability to understand the nature or purpose of the interviews;

(c) the children spent only a short period of time in the interview room.

87. The department says that it has relied on the interview transcripts (in the absence of other information) to ascertain whether there was any breach of article 3 of the CRC. The department says that these transcripts do not disclose that there was any breach of article 3 in the manner that the interviews were conducted. In particular, it says that it does not consider that the interviews were unduly long.

5.6 Findings of fact about interviews

88. The department provided the Commission with transcripts which it says are translations of the interviews of BZ's mother and AD's mother and father. The transcripts indicate that not all of the conversations which took place in the interviews were audible. In the absence of any contrary suggestion by the complainants, there is no reason to doubt the veracity of the transcripts of the parts of the interviews able to be transcribed.

89. The transcripts do not indicate that BZ and AD took any part in the interviews, although AD was asked her name. BX and AB were asked questions that sought to identify the children's familial relationship, their age and whether they had any siblings. BX and AB and AC disclosed information to the PRC officials about the applications they had made for protection visas and that the children had also made applications for protection visas.

90. At the time of the interviews, the applications for protection visas made by BX and AB on behalf of themselves and their children had been refused by the department and those refusals had been affirmed by the RRT. AB subsequently filed an application for judicial review of the decision to refuse her family a protection visa, but that application had not been filed at the time of the interview.

5.7 Breach of the right to privacy

91. Article 17(1) of the ICCPR and article 16(1) of the CRC both prohibit arbitrary or unlawful interference with privacy and family.

92. In its General Comment on Article 17(1), the UN Human Rights Committee (UNHRC) confirmed that a lawful interference with a person's family may be arbitrary, unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.[6]

93. It follows that the prohibition against arbitrary interferences with privacy incorporates notions of reasonableness.[7] In relation to the meaning of 'reasonableness', the UNHRC stated in *Toonen v Australia*:[8]

> The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

94. The Commission found in Report No 40 that the purpose of the interviews with the PRC officials was to enable the department to obtain information that would assist in identifying the interviewees for the purpose of preparing travel documentation. For this reason, questions about matters unrelated to that purpose, such as protection visa applications, were found to be unnecessary and to constitute an arbitrary interference with the interviewees' privacy, prohibited by article 17(1) of the ICCPR.

95. The thrust of the department's answer to the complainants' allegations in this matter is that the children did not participate in the interviews and were not the authors of the protection visa applications; and therefore there was no breach of their rights by the department or by the PRC officials. Rather, the breach was committed against their parents, and the department has acknowledged its responsibility in that regard.

96. The department's response does not adequately address the consequences to BZ and AD of the questions asked about their protection visas. The department's submission is that the protection visa applications were made by the parents and related to the parents' own claims to be refugees. The department says that the children's claim for protection was merely derivative. However, as a matter of form, I note that the documents provided by the department indicate that at the time of the interviews AD had made her own application (as the primary applicant) for a protection visa. That application was on appeal from the RRT when the interviews took place.

97. The department's approach also ignores the fact that, as a matter of substance, the children had made claims for protection that had been refused. It appears likely that if adverse consequences were to flow to the children's parents because of the protection visa questions, those adverse consequences would also flow to the children.

98. If this is correct, then I do not think that it matters whether AD and BZ were capable of understanding the questions posed to their mothers. I have formed the view that the department placed BZ and AD's parents in a situation where they were required to answer questions by PRC officials about their children's protection visa applications, thereby placing the children at risk of persecution.

99. The department's obligation to AD and BZ with regard to the interviews by the PRC officials was not only to take adequate steps to ensure that the PRC officials did not breach their parents' right to privacy, but also to ensure the interviews did not arbitrarily interfere with the privacy of AD or BZ, as persons who may have been reasonably foreseen to be the subject of questions. BZ and AD (and in fact, AE) all fall within this category of persons who the department had a duty to protect.

100. I find that the department breached its obligation under article 17(1) of the ICCPR and article 16(1) of the CRC with respect to BZ and AD when the department failed to ensure that their parents were not asked questions about the children's claims for protection visas.

101. The questions about the names and ages of BZ and AD, and about whether they had any siblings, fall into a different category. These questions were reasonably necessary for the purpose of obtaining travel documents for the children and therefore I do not consider that the action of the department in permitting such questions was arbitrary. Therefore, I find that there has been no breach of the children's right to privacy in regard to this category of questions.

5.8 No failure to treat the children with humanity and dignity in relation to the interviews with PRC officials

102. I do not consider that the conditions of the interviews amounted to a failure to treat the children with humanity and respect for their human dignity. Nor do I consider that the decision to allow the children to remain with their parents during the interviews demonstrated that their best interests had not been taken into account as a primary consideration.

103. BZ and AD were infants aged three years at the time they attended the interviews. The submissions of the parties do not indicate that the conduct of the interviews was onerous or otherwise uncomfortable for BZ or AD. It is unlikely that children of that young age would have an understanding of the consequences of the interview with PRC officials or the proposal to remove their families to PRC, such that awareness of those events would cause emotional or other disturbance. Although it is now apparent that some of the questions asked in those interviews were objectionable, the children did not participate in the interviews in any meaningful way. In the circumstances, it was appropriate for them not to be separated from their mothers.

104. Accordingly, I find that there has been no breach of article 10 of the ICCPR or articles 3(1) or 37(c) of the CRC in relation to the children's presence at the interviews with the PRC officials.

6 Detention complaints

6.1 Nature of complaints

105. The complainants' allegations in relation to their detention were made in the following way:

(a) The department failed to act in the best interests of AD and BZ; it did not detain these children as a measure of last resort and for the shortest period of time.

(b) The department's failure to utilise less restrictive alternatives such as alternative home detention and 'removal pending visas' meant that the department did not treat the children with 'human dignity, integrity or kindness'.

(c) The department failed to act in accordance with Ministerial Series Instruction 370 (December 2002) which stated that 'decisions concerning bridging visas and alternative places of detention should accord with the principle of the best interests of the child'.

(d) The department failed to act in accordance with MSI 371 (2002) which 'includes limited references to duty of care obligations and alternative detention options for children'.

(e) The department failed to act in accordance with MSI 384 (2003) which states it is necessary to consider on a case-by-case basis whether a child is eligible for the grant of a bridging visa, or whether the child should be detained.

(f) The department invariably refused bridging visa E applications from the parents of AD and BZ.

(g) BZ and her mother could have been released from detention on a bridging visa associated with the mother's (BX) 2002 protection visa application but 'it appears the department did not take or consider this course of action'.

(h) BZ could have been released from detention pursuant to Ministerial intervention under s 417 of the Migration Act.

(i) AD and BZ were arbitrarily detained in breach of internationally recognised children's rights. AD and BZ lost their liberty for prolonged periods.

106. The complainants allege the department failed to consider the best interests of the child and that the children were arbitrarily detained in breach of article 9 of the ICCPR and articles 3 and 37(b) of the CRC.

107. The complainants allege cruel, inhuman or degrading treatment and failure to treat them with humanity and respect for inherent dignity of the human person in breach of article 10 of the ICCPR and article 37(c) of the CRC.

6.2 International law in relation to arbitrary detention

108. Article 9(1) of the ICCPR provides that:

> Everyone has the right to liberty and security of person. No one shall be subject 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.

109. The prohibition on arbitrary detention in the ICCPR is also reflected in article 37(b) of the CRC, which provides that:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

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

(a) 'detention' includes immigration detention;[9]

(b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system;[10]

(c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;[11] and

(d) detention should not continue beyond the period for which a State party can provide appropriate justification.[12]

111. Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, prolonged detention in an immigration detention centre may be disproportionate if detention in an immigration detention centre is not demonstrably necessary.

112. In *Van Alphen v The Netherlands* the UNHRC 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.[13] Similarly, the UNHRC considered that detention during the processing of asylum claims for periods of three months in Switzerland was 'considerably in excess of what is necessary'.[14]

113. The UNHRC 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.[15]

114. In regard to the particular issues arising where detention of children is contemplated, the United Nations Committee on the Rights of the Child has indicated that the detailed standards set out in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the UN Rules) are relevant to the interpretation of article 37.[16]

115. The UN Rules require that the detention of a child should always be a disposition of last resort and for the minimum necessary period[17] and the Beijing Rules state that any detention should be brief[18] and should occur only where the child has committed 'a serious act involving violence'.[19] The standards arising from these rules stress:

- the importance of considering alternatives to detention in an institution;[20]
- the need to ensure that the conditions of detention and care promote, sustain and protect the health (including mental health) of child detainees;[21]
- the need to ensure adequate medical care (both preventative and remedial) and to ensure immediate access to adequate medical facilities;[22]
- the importance of providing appropriate educational and leisure opportunities and providing an environment where child detainees may associate with other children their age;[23] and
- the treatment of children deprived of their liberty must take into account their age and the needs of child development.

6.3 Options available to the Minister

116. In light of the above principles, the department has an obligation to demonstrate that there was not a less invasive way than detention in an immigration detention centre to achieve the ends of its immigration policy. In the circumstances of the present case, available alternatives included granting a visa or placing in a less restrictive form of detention (along with any necessary conditions).

117. Some of these alternatives are available as a result of discretionary powers reserved to the Minister of Immigration and Citizenship. Failure by the Minister to exercise a discretionary power in circumstances where it is lawfully open can amount to an 'act' for the purposes of s 3 of the AHRC Act.[24]

118. The Migration Act provides two alternatives to detention in detention centres such as VIDC or BIDC for persons detained pursuant to s 198 of the Migration Act:

(a) under s 5 of the Migration Act, the Minister may approve an alternative place of detention in writing; and

(b) since 29 June 2005, the Minister may make a 'residence determination' pursuant to s 197AB of the Migration Act by which a person detained under s 198 may be permitted to reside in a place other than a place falling within the definition of immigration detention provided by s 5 of the Migration Act.

119. It is also possible for a person to be released from immigration detention pursuant to a visa. The Migration Act provides a number of options for the discretionary grant of a visa by the Minister. These include the following:

(a) the Minister may grant a bridging visa pursuant to s 73 of the Migration Act to an eligible non-citizen who meets the criteria established by the Migration Act and regulations – in particular, after the commencement of Regulation 2.20(12) on 11 May 2005, it became possible for the Minister to grant a 'removal pending' visa to persons who had been refused a protection visa;

(b) since 29 June 2005, the Minister may grant a visa pursuant to s 195A of the Migration Act to a person detained pursuant to s 189 of the Migration Act even where that person would not otherwise qualify for a visa because of the criteria established by the Migration Act and regulations; and

(c) pursuant to s 417 of the Migration Act, the Minister may substitute for a decision of the RRT a more favourable decision, which permits the Minister to grant a protection visa (or other visa) where the delegate's refusal to grant that visa has been affirmed by the RRT.

6.4 Less restrictive forms of detention

120. At any time during the period that BZ and AD were detained, the Minister could have exercised the discretion conferred under s 5 of the Migration Act to approve an alternative place of detention. During the relevant period there were a range of alternative places of detention approved by the Minister, including Woomera Residential Housing Project (which closed in April 2003) and Port Augusta Residential Housing Project (which opened in November 2003). Other places could be approved at the discretion of the Minister including foster homes, hotels, motels and community care facilities.

121. From 29 June 2005, in addition to the power conferred on the Minister under s 5 to approve an alternative place of detention, the Minister also had the power to make a 'residence determination' pursuant to s 197AB of the Migration Act. Under a 'residence determination' a person may be detained in a place other than those places specified in the definition of 'immigration detention' in s 5 of the Migration Act.

122. On the same date, s 4AA of the Migration Act was enacted which provided that minors shall only be detained as a measure of last resort. This amendment reflected the Commonwealth's obligations under article 37(c) of the CRC. The reference in s 4AA to a minor being detained did not include a reference to a minor residing at a place in accordance with a residence determination.

123. The complainants have referred to MSI 371 which applied to detaining unlawful non-citizens in alternative places of detention. (The complainants also referred to MSI 370, however, this instruction only applied to unaccompanied wards). At the relevant time, MSI 371 provided that every effort should be made to enable the placement of detained women and children in a residential housing project as soon as possible.[25]

124. AD was held in VIDC and BIDC for just over two months (from 20 April 2004 until 26 June 2004) before being transferred with her mother to Port Augusta Residential Housing Project. BZ was held in VIDC and BIDC for approximately two years and three months (from the date of her birth on 8 April 2002 to 17 July 2004) before being transferred with her mother to Port Augusta Residential Housing Project.

125. The time taken to arrange for AD to be transferred from an immigration detention centre to a residential housing project is regrettable. I note the department's submission that during this period AB did not cooperate with the department's removal process. As noted in paragraph 112 above, the UNHRC has previously found in other cases that detention for a period of two months was arbitrary. Given the findings I have made below about the failure by the department to make appropriate referrals to the Minister pursuant to either s 417 or s 195A of the Migration Act, it is unnecessary for me to make a finding about whether the period of AD's detention in VIDC and BIDC was arbitrary.

126. The case of BZ is clearer. The fact that BZ was held in immigration detention centres for more than two years and three months after her birth is clearly in breach of the instructions to place women and children in a residential housing project as soon as possible. No explanation has been given for this extremely long delay. It has not been suggested that there was no capacity at relevant residential housing projects at the time. However, even if this were the case, it would have been open to the Minister to approve an alternative place of detention.

127. One month after the power to make residence determinations became available on 29 June 2005 BZ and AD were transferred into community detention.

128. I find that detaining BZ in VIDC and BIDC for more than two years and three months after her birth was inconsistent with or contrary to article 9(1) of the ICCPR and article 37(b) of the CRC. During this period BZ was held in the highest security immigration detention environment in circumstances in which less restrictive alternatives were available.

6.5 Grant of a visa

129. The complainants assert that the Commonwealth should have granted BZ and AD visas allowing them to be released from detention. I understand by this that the complainants mean that the Commonwealth should have granted visas to both the children and their mothers.

130. There are two aspects to this claim. First, the complainants say that it was lawfully open to the department to grant certain kinds of bridging visas and that a failure to do so was contrary to the Migration Act and regulations, and to MSI 384 which set out guidelines for the grant of a Bridging E visa (Subclass 051) (BVE). Secondly, the complainants say that the Minister had a discretion under s 195A (from 29 June 2005) or under s 417 of the Migration Act (following an adverse decision by the RRT) to grant a visa regardless of whether or not the requirements of the Migration Act and regulations were met.

(a) Compliance with visa criteria

131. The complainants have said that it was open to the department to grant them a BVE and, from 11 May 2005, a removal pending bridging visa.

132. The complainants' parents made a series of applications for bridging visas since their arrival in Australia. Some of these were granted, but the more recent ones were refused on the basis that they did not meet the relevant conditions including because of breaches of previous visa conditions including prohibitions on working and in one case failing to depart Australia as scheduled. The complainants submitted that they were eligible for a BVE, even if their parents were not.

133. The department submits that an officer would not be expected to consider granting a visa to a minor whose primary carer was not eligible for the same visa if there were no known relatives with lawful residence status who could have taken on a carer's role.

134. The department submits that neither BX nor AB (the mothers of the complainants) was considered for a removal pending bridging visa because the regulations provide that such a visa is to be issued only when 'the Minister is satisfied that the holder's removal from Australia is reasonably practicable'. In this case, the department considered that removal was not practicable because BX and AB were unwilling to be removed.

(b) Ministerial discretion to grant a visa: s 195A

135. From 29 June 2005 the Minister had the power pursuant to s 195A of the Migration Act to grant a visa of any type to a person in detention if the Minister considered it the public interest to do so. As noted above, BZ and AD were placed into community detention on 29 July 2005. The Minister's power under s 195A extends to persons in community detention.

136. Guidelines subsequently issued by the Minister in relation to the exercise of the power under s 195A provided that the public interest is served through ensuring that no person is held in immigration detention for longer than is necessary.

137. The types of cases which officers of the department are to refer to the Minister for consideration under s 195A include cases where:[26]

- The person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department. …
- There are unique or exceptional circumstances which justify the consideration of the use of my public interest powers and there is no other intervention power available to grant a visa to the person.

138. The meaning of 'unique or exceptional circumstances' is considered below in the context of the discretionary power under s 417.

139. Significantly, the guidelines provide for ongoing assessment of persons in detention for suitability for referral for consideration pursuant to s 195A:

> A person's circumstances are to be assessed on an ongoing basis in accordance with case management principles and review practices adopted by the Department. If it is determined as part of this ongoing review of the person's circumstances that the case falls within the ambit of these Guidelines, the case must be brought to my attention in a submission so that I may consider exercising my intervention power.

140. No referral was made to the Minister to consider the exercise of power under s 195A in respect of either BZ or AD at any time during their detention.

(c) Ministerial discretion to grant a visa: s 417

141. Section 417 of the Migration Act gives the Minister discretion to substitute a decision that is more favourable to an applicant than a decision of the RRT if the Minister thinks that it is in the public interest to do so, even if the RRT did not have power to make the more favourable decision.

142. At the relevant time, the guideline relevant to the exercise of the Minister's discretion under s 417 was MSI 386 which provided:[27]

> The public interest may be served through the Australian Government responding with care and compassion where an individual's situation involves unique or exceptional circumstances. This will depend on various factors, which must be assessed by reference to the circumstances of the particular case.

143. The following factors were listed as being relevant, individually or cumulatively, in assessing whether a case involves 'unique or exceptional circumstances':

- Circumstances that may bring Australia's obligations as a signatory to the Convention on the Rights of the Child (CROC) into consideration. …
- Circumstances that may bring Australia's obligations as a signatory to the International Covenant on Civil and Political Rights (ICCPR) into consideration. …

- Circumstances that the legislation does not anticipate.
- Clearly unintended consequences of legislation.
- Circumstances where application of relevant legislation leads to unfair or unreasonable results in a particular case. …
- 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.

144. Significantly, MSI 386 contemplated the exercise of the Ministerial discretion in cases where this was necessary in order to avoid the Commonwealth acting in a way that breaches its international human rights obligations.

145. On 25 March 2004, following the decision by the RRT to refuse a protection visa to AD, the department considered whether the case met the guidelines for referral to the Minister for consideration of the exercise of her powers under s 417 and decided that it did not. It does not appear that any other applications were made on behalf of AD for consideration under s 417. Shortly thereafter AB's bridging visa expired and she and her daughter AD were detained.

146. BX made a number of requests for Ministerial intervention under s 417 in relation to the claims for protection by her and her daughter BZ. She made requests on 8 September 2003, 10 May 2004, 24 May 2005 and 30 December 2005. The department considered that the first request did not meet the Minister's guidelines. The request was referred to the Minister on a schedule indicating that the case had been assessed and did not fall within the scope of the guidelines. The Minister declined to exercise her discretion under s 417 on that occasion. In relation to the requests on 10 May 2004 and 24 May 2005, the department made an assessment that the cases did not meet the guidelines and declined the requests without referring them to the Minister. Following the request dated 30 December 2005, a submission was prepared for the Minister. The Minister declined to exercise her power under s 417 but permitted a further application for a protection visa to be lodged.

147. The minutes prepared by the department in relation to the first three requests made by BX give little consideration to what the best interests of her daughter BZ required and did not engage at all with the obligation in article 3 of the CRC.

148. The minute relating to the 8 September 2003 request recommended against the exercise of the s 417 power on the basis that: 'case does not meet the guidelines and the circumstances are neither exceptional nor unique'. The minute notes BZ's date of birth and the basis of her mother's claims for protection but does not otherwise include any discussion of BZ's welfare or give any consideration to what would be in her best interests or the circumstances of her detention. At this time BZ was 17 months old and still living in VIDC, where she had lived since her birth.

149. The Minister declined to exercise her power under s 417 in relation to the 8 September 2003 request and directed that she did not wish further requests for the exercise of her public interest power in this case to be brought to her attention unless further requests provide additional information that, in the opinion of the assessing officer, when considered in combination with the information known previously, brings the case within the guidelines.

150. The minute relating to the 10 May 2004 request referred to a claim by BX that her second daughter, who was an unregistered 'black child' (a child born in breach of the PRC's one child policy) living with her friend in the countryside in the PRC, died from illness in October 2003 as she was denied access to medical treatment. BX claimed that her relocation with her daughter to another area in the PRC was not a viable option as the authorities would continue to regard her as a resident of her local area and this would result in significant economic hardship which would threaten her third daughter's (BZ's) capacity to subsist. A Manager in the Ministerial Intervention Unit considered that these claims did not meet the guidelines 'and the circumstances are neither exceptional nor unique'. The Manager noted that no birth or death certificate was submitted in support of BX's claim. The request for intervention was not referred to the Minister for consideration.

151. The minute relating to the 24 May 2005 request referred to BX's concerns about the impacts of ongoing detention on BZ. The Director of the department's International Obligations and Interventions Section noted that BX claimed that 'they have remained in detention for three years and have lost their freedom and pass every day with fear' and that she was 'concerned about the influence growing [up] in an abnormal environment is having on [BZ] and is requesting to be released from detention'. However, the Director concluded that these concerns did not 'raise grounds which engage Australia's obligations' under international human rights agreements including the ICCPR and the CRC. As a result, the request for intervention was not referred to the Minister for consideration.

152. The minute relating to the 30 December 2005 request referred to a report from an independent psychiatrist. The Acting Director of the department's International Obligations and Interventions Section noted that the psychiatrist's report stated that:

(a) BX was sexually assaulted over a six month period while in detention, and her case was not adequately dealt with when brought to the attention of the departmentally engaged psychiatrist;

(b) BZ has suffered from developmental issues as a result of her time in detention; and

(c) their time in detention has continued to impact on them even though they were then in community detention.

153. The Acting Director concluded that the information provided in the 30 December 2005 request still did not 'substantially alter the original conclusion that Ms [BX's] claim does not meet the Guidelines as it does not present Unique or Exceptional Circumstances'. However, she concluded that country information at the time of the assessment (16 February 2006) indicated that BX may meet the guidelines. This country information indicated the possibility that BX may be forced to undergo sterilisation upon return to the PRC as she was in breach of the One Child Policy and that BZ may suffer as a result of being a 'black child' because of the potentially hefty fines that may be imposed on her mother. While the Acting Director referred to this country information as new, it appears that at least some of it, including reports from the US State Department and Amnesty International, dates from 2004 and presumably would have been available at the time of the 24 May 2005 request.

154. A submission was prepared to the Minister on 17 March 2006 by the Acting Assistant Secretary Onshore Protection Branch which stated:

> We consider this request meets the relevant guidelines for referral under section 417 because [BX] and her daughter's circumstances may engage Australia's obligations under the Convention on the Rights of the Child as there is a likelihood that [BZ] would be seriously disadvantaged should she go with her mother to China. Information provided also claims that [BZ] has suffered significant harm as a result of her detention. [BX] also meets the relevant guidelines for referral under section 48B as new information about China's treatment of women who have had more than on child and of 'black children' is now available.

155. At the time of this submission, BZ was almost four years old and had spent her entire life in detention, the last eight months of which was in community detention. Under the heading 'Convention on the Rights of the Child (CROC)' the department's submission notes that:

> [BZ] has been identified as a child with special needs due to her physical underdevelopment and her psychological issues which have been attributed by Child Youth and Family Services to her time in detention. She is likely to require ongoing psychiatric and medical assistance.

156. Under the heading 'Other relevant information (Compassionate and compelling circumstances)' the department's submission notes that:

> According to Katrina McNeil, Supervisor, Refugee Program, Children, Youth and Family Services in South Australia, the detention centre environment has severely affected [BZ's] physical and mental development.

157. The submission noted that the request for ministerial intervention was supported by psychiatrists at the Sydney Children's Hospital and the Prince of Wales Hospital.

158. The Minister declined to exercise her discretion under s 417 to substitute a more favourable decision and grant a visa, but decided that it was in the public interest to permit BX to make a further application for a protection visa under s 48B of the Migration Act. BX's subsequent application for a protection visa was successful.

6.6 Breach of article 3(1) of the CRC and prohibitions on arbitrary detention

159. I find that the best interests of BZ and AD would have been served by their release from detention pursuant to a suitable visa. This is confirmed by a consideration of article 37(b) of the CRC which requires that detention of children only be used as a last resort and for the shortest appropriate period of time. That the best interests of BZ required her release from detention is also clear from the findings of the independent psychiatrist set out above.

160. As noted above, this finding does not lead inexorably to a decision to adopt a course in conformity with those interests. However, in order to make a decision inconsistent with the child's best interests:

(a) the decision maker must not treat any other factor as inherently more significant than the best interests of the child; and

(b) the strength of other relevant considerations must outweigh the consideration of the best interests of the child, understood as a primary consideration.

161. The department submitted that the best interests of the infant children were taken into account 'at all times, particularly in relation to their detention'. The department points to the fact that the children and their parents were transferred to a residential housing project and later to community detention. As noted above, in the case of BZ this was done after a delay of more than two years and three months.

162. The department further submitted that it ensured that the best interests of the children were respected '[p]rincipally … by not removing them from family members'. This reasoning takes as its starting point that the complainants' parents were required to remain in immigration detention. It does not appear to consider the possibility that the complainants could have been released from detention along with their parents on visas granted pursuant to s 195A or s 417 of the Migration Act, subject to conditions such as travel restrictions, reporting requirements or the payment of security if considered necessary to mitigate any perceived risk of absconding.

163. The department was asked on four occasions to refer BZ's case to the Minister for consideration under s 417. A key criterion in the guidelines dealing with referral was whether there were any circumstances 'that may bring Australia's obligations as a signatory to the Convention on the Rights of the Child (CROC) into consideration'. In every case, the department considered that the circumstances of BZ in immigration detention did not meet the guidelines. A recommendation was ultimately made to the Minister to use her s 417 powers as a result of what were considered to be changed circumstances in the PRC.

164. I find that the actions of the department in assessing the requests for intervention under s 417 on behalf of BZ were in breach of article 3 of the CRC in that they failed to treat the best interests of BZ as a primary consideration. This was not a situation in which the department weighed up the best interests of BZ against other considerations such as the enforcement of immigration law. In each case where a request was made, officers of the department made findings that there were no circumstances that may have brought Australia's obligations under the CRC into consideration.

165. This is remarkable given that:

(a) BZ was born in VIDC and lived in detention for the first four years of her life;

(b) BZ's mother raised directly and repeatedly with the department her concerns about the development of her daughter while in detention;

(c) an independent psychiatrist found that the detention centre environment had severely affected BZ's physical and mental development.

166. In these circumstances, it is difficult to understand how the department could consider that the requests by BX for ministerial intervention did not engage Australia's obligations under the CRC to treat BZ's best interests as a primary consideration in making decisions about her ongoing detention. Further, no consideration appears to have been given to Australia's obligations under article 37(b) of the CRC which requires that detention of children shall be used only as a measure of last resort and for the shortest appropriate period of time.

167. Similarly, I find that in the cases of both children the failure by the department to make a referral to the Minister pursuant to s 195A of the Migration Act was in breach of article 3 of the CRC. Guidelines subsequently published indicate that the department is to assess on an ongoing basis whether a detainee's circumstances fall within the ambit of the guidelines including cases that fall within the definition of 'unique or exceptional circumstances' such as cases that may bring Australia's obligations under the CRC into consideration.

168. No referral was made to the Minister to consider the exercise of power under s 195A in respect of either BZ or AD at any time during their detention. The department submitted that it 'did not seek intervention under s 195A for AD and BZ as it would have separated the children from their respective parents'. This submission fails to take into account the fact that it would have been possible for the Minister to grant a visa to both the children and their parents pursuant to s 195A.

169. In the case of both children, the department failed to adequately appreciate that their continued detention engaged directly with Australia's obligations under the CRC including treating their best interests as a primary consideration (article 3) and ensuring that they were detained only as a last resort and for the shortest appropriate period of time (article 37(b)). In the case of both children, this meant that referrals were not made to the Minister for the consideration of the use of her discretionary powers when they should have been.

170. There is a real prospect that had an appropriate referral been made to the Minister highlighting Australia's obligations under the CRC, this may have resulted in a grant of a visa and release from detention. The continued detention of the children in circumstances in which their rights under the CRC were not properly considered amounts to detention which is arbitrary within the meaning of article 9(1) of the ICCPR and article 37(b) of the CRC.

6.7 Conditions of detention

171. Article 10(1) of the ICCPR and article 37(c) of the CRC are set out in paragraphs 65 and 69 above.

172. Article 10 is intended to provide 'extra protection for a particularly vulnerable group, people deprived of their liberty'.[28] In order to sustain a claim of a breach of article 10 of the ICCPR, a complainant must demonstrate that he or she has suffered an 'additional exacerbating factor beyond the usual incidents of detention'.[29]

173. The complainants say that the following conduct while they were detained amounted to a breach of article 10 of the ICCPR or article 37(c) of the CRC:

    (a) BZ and AD were moved with their families from VIDC in New South Wales to Port Augusta Residential Housing Project in South Australia and were often threatened with removal from Australia to the PRC;

    (b) BZ and AD accompanied their mothers to an interview with PRC officials;

    (c) BZ and AD 'were exposed to and witnessed acts of violence and serious human dysfunction';

    (d) BZ 'witnessed her mother being repeatedly assaulted' by another detainee while detained in VIDC.

174. In relation to (a) above, I do not consider that by moving the children and their families between detention facilities or by informing their parents that they would be removed to the PRC the department acted in a manner that was inconsistent with its obligations under article 10 of the ICCPR or article 37(c) of the CRC. In the circumstances of these complaints, these actions of the department fall within the usual incidents of detention. The transfer of the children between detention facilities was in general of benefit to them, as they were progressively moved to less restrictive forms of detention. After their initial applications for protection visas were refused, the department was obliged to inform the families that they were to be removed and in this context I do not think that the department's actions could be perceived as a threat.

175. In relation to (b) above, I have dealt in paragraphs 102 to 104 above with the allegations about the interviews with PRC officials and concluded that these acts also did not amount to a breach of article 10 of the ICCPR or article 37(c) of the CRC.

176. In relation to (c) above, the department correctly submits that no specific information was provided in relation to this allegation (other than the details in relation to the allegation in (d)). In these circumstances, I find that the claims in relation to (c), to the extent that they are different from the claims in relation to (d), have not been established.

177. In relation to (d) above, the department submits that 'there are no incident reports that mention these alleged occurrences and the department is not able to provide any comments'. However, there is independent evidence that corroborates these claims.

178. On 24 June 2005, the Manager of BIDC received a memorandum from Katrina McNeil, Supervisor, Refugee Program, Children, Youth and Family Services. In that memorandum, Ms McNeil described BZ's 'vulnerability to ongoing emotional/psychological harm due to young age and the chronic issues involved in this young person's living situation'. She assessed BZ as having 'apparent emerging developmental delays' and 'anxious attachment indicators'. Ms McNeil recommended an independent psychiatric assessment of BZ and her mother.

179. It appears that an independent psychiatric assessment took place towards the end of 2005. In the departmental minute referred to in paragraphs 152 to 153 above (relating to the Ministerial intervention request of 30 December 2005), the department referred to the contents of that assessment. The department noted the report from the psychiatrist stated that BX 'was sexually assaulted over a six month period while in detention, and her case was not adequately dealt with when brought to the attention of the departmentally engaged psychiatrist'.

180. The submission prepared by the department to the Minister dated 17 March 2006 in relation to the use of her s 417 powers notes that the independent psychiatric report was conducted by two doctors from the Sydney Children's Hospital and the Prince of Wales Hospital. It also suggests that BX reported her concerns about the sexual assaults to the departmentally engaged psychiatrist who chose not to pursue the matter. These issues appear under a heading that reads: 'Other relevant information (Compassionate and compelling circumstances)'. It does not appear that the submission seeks to cast any doubt on the veracity of these reports.

181. I do not consider that it is necessary for me to make positive findings about the allegations of sexual assault that the psychiatrists treating BX said that she reported to them. Nor do I consider that it is necessary for me to make findings about whether such assaults were witnesses by BZ. The uncontested evidence is that the detention centre environment had severely affected BZ's physical and mental development. I consider that the conditions endured by BZ and their impact upon her went beyond the 'usual incidents' of detention. I have therefore formed the view that the Commonwealth breached article 10 of the ICCPR and article 37(c) of the CRC in relation to BZ.

7 Findings and recommendations

7.1 Findings

182. As noted above, I find that:

(a) the act of the department in permitting officials from the PRC to question the mothers of the complainants about a number of matters including their applications for protection visas without taking adequate precautions to protect the rights and interests of the families was inconsistent with or contrary to article 17(1) of the ICCPR and article 16(1) of the CRC;

(b) the act of the department in detaining BZ in VIDC and BIDC for more than two years and three months after her birth when less restrictive forms of detention were available was inconsistent with or contrary to article 9(1) of the ICCPR and article 37(b) of the CRC;

(c) the act of the department in failing to make appropriate referrals to the Minister for Immigration and Citizenship pursuant to either s 417 or s 195A of the Migration Act in relation to BZ and AD was inconsistent with or contrary to article 3 of the CRC and resulted in continued detention of BZ and AD which was arbitrary and therefore inconsistent with or contrary to article 9(1) of the ICCPR and article 37(b) of the CRC;

(d) the conditions of detention endured by BZ and their impact upon her were inconsistent with or contrary to article 10 of the ICCPR and article 37(c) of the CRC.

183. 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.[30] The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.[31]

184. The Commission may also recommend:[32]

(a) the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
(b) the taking of other action to remedy or reduce the loss or damage suffered by a person.

7.2 Compensation

185. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.

186. However, in considering the assessment of a recommendation for compensation under s 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.[33]

187. I am of the view that this is the appropriate approach to take in the present inquiry. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.[34]

(a) Compensation for breach of privacy

188. I have been asked to consider compensation for AD and BZ in relation to the findings of arbitrary interference with their privacy.

189. In Report No 40, the Commission made a recommendation that the Commonwealth pay $5 000 in compensation to each of the complainants who had their human rights breached as a result of their participation in the interviews with PRC officials.

190. In that report, one aspect of the basis for compensation was the feelings of distress and fear as a result of being subjected to the interviews. In paragraphs 102 to 104 above I found that there had not been a breach of article 10 of the ICCPR or articles 3(1) or 37(c) of the CRC in relation to the children's presence at the interviews with the PRC officials. Given the young age of BZ and AD at the time of the interviews, they would have had a very limited understanding of the consequences of the interview with PRC officials at that time.

191. However, I consider that the complainants are still entitled to compensation as a result of the breach of article 17(1) of the ICCPR and article 16(1) of the CRC.

192. An additional aspect of the basis for compensation in Report No 40 was the potential danger posed to the safety of the complainants who disclosed information about their protection visa applications during the interviews. I consider that this detriment was present regardless of the understanding of BZ and AD at the time of the interviews.

193. In Report No 40, the then President of the Commission considered that the harm suffered by each of the complainants arising from the interviews would have varied from person to person but that the differences would not be so significant as to warrant an individual assessment of that harm. He recommended that compensation be paid to each complainant in the same amount. I propose to adopt the same course and recommend that the Commonwealth pay to each of BZ and AD compensation in the amount of $2 500 in relation to this aspect of their complaint.

(b) Principles relating to compensation for detention

194. I have been asked to consider compensation for AD and BZ for being arbitrarily detained in contravention of articles 3 and 37(b) of the CRC and article 9(1) of the ICCPR.

195. The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR or article 37(b) of the CRC. This is because an action for false imprisonment cannot succeed where there is lawful justification for the detention, whereas a breach of article 9(1) of the ICCPR or article 37(b) of the CRC will be made out where it can be established that the detention was arbitrary, irrespective of legality.

196. Notwithstanding this important distinction, the damages awarded in false imprisonment provide an appropriate guide for the award of compensation for a breach of article 9(1) of the ICCPR or article 37(b) of the CRC. This is because the damages that are available in false imprisonment matters provide an indication of how the courts have considered it appropriate to compensate for loss of liberty.

197. The principal heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).[35]

198. I note that the following awards of damages have been made for injury to liberty and provide a useful reference point in the present case.

199. In *Taylor v Ruddock*,[36] the District Court at first instance considered the quantum of general damages for the plaintiff's loss of liberty for two periods of 161 days and 155 days, during which the plaintiff was in 'immigration detention' under the Migration Act but held in New South Wales prisons.

200. Although the award of the District Court was ultimately set aside by the High Court, it provides useful indication of the calculation of damages for a person being unlawfully detained for a significant period of time.

201. The Court found that the plaintiff was unlawfully imprisoned for the whole of those periods and awarded him $50 000 for the first period of 161 days and $60 000 for the second period of 155 days. For a total period of 316 days wrongful imprisonment, the Court awarded a total of $110 000.

202. In awarding Mr Taylor $110 000 the District Court took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.[37]

203. On appeal, the Court of Appeal of New South Wales considered that the award was low but in the acceptable range.[38] The Court noted that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish'.[39]

204. In *Goldie v Commonwealth of Australia & Ors (No 2)*,[40] Mr Goldie was awarded damages of $22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days.

205. In *Spautz v Butterworth*,[41] Mr Spautz was awarded $75 000 in damages for his wrongful imprisonment as a result of failing to pay a fine. Mr Spautz spent 56 days in prison and his damages award reflects the length of his incarceration. His time in prison included seven days in solitary confinement.

206. In *El Masri v Commonwealth*,[42] I recommended that the Commonwealth should pay the complainant $90 000 as compensation for the 90 days he was arbitrarily detained in immigration detention. In *Al Jenabi v Commonwealth*,[43] I recommended that the Commonwealth should pay the complainant $450 000 as compensation for the 16 months he was arbitrarily detained in immigration detention.

(c) Compensation for detention

207. I have found that AD and BZ were arbitrarily detained for prolonged periods.

208. AD was detained in total for more than 900 days. For the first two months, from the time she was two and half years old, she was detained in an immigration detention centre. She was then detained in a residential housing project at Port Augusta for approximately 13 months and then in community detention administered by the Red Cross for approximately 15 months.

209. BZ was detained in total for more than 1600 days. From the time she was born she was detained in an immigration detention centre and spent the first two years and three months of her life in VIDC. She was then detained in a residential housing project at Port Augusta for approximately 12 months and then in community detention administered by the Red Cross for approximately 13 months. When she was approximately three and a half years old, an independent psychiatrist found that the detention centre environment had severely affected her physical and mental development. She was eventually released from detention when she was almost four and a half years old.

210. Community detention is a less restrictive environment than an immigration detention centre or immigration residential housing and I acknowledge that the department appropriately made use of the option for community detention for each of the complainants shortly after it became available.

211. However, in the case of each complainant, I have found that the department failed to make appropriate referrals to the Minister for Immigration and Citizenship to consider the grant of a visa pursuant to either s 417 or s 195A of the Migration Act. The circumstances of each of the children clearly engaged Australia's obligations under the CRC, in particular the principle that detention of children should be used only as a measure of last resort and for the shortest appropriate period of time. The failure by the department to make appropriate referrals and to indicate to the Minister how Australia's international obligations were engaged meant that the Minister was not in a position to assess whether or not to use her discretionary powers to grant a visa (if necessary with conditions) to each of the complainants and their mothers.

212. The continuing detention of the complainants in such circumstances was arbitrary and therefore inconsistent with or contrary to article 9(1) of the ICCPR and article 37(b) of the CRC.

213. Assessing compensation in circumstances such as these is difficult and requires a degree of judgement. I have taken into account the guidance provided by the decisions referred to above. In the case of BZ, I have also considered the particular circumstances of her case including her age, the places at which she was detained, the periods for which she was detained in each place and the impact of detention on her which went beyond the 'usual incidents' of detention. I consider that payment of compensation in the amount of $450 000 would be appropriate in the case of BZ in relation to her detention.

214. In the case of AD, I have considered the particular circumstances of her case including her age, the places at which she was detained and the periods for which she was detained in each place. I consider that payment of compensation in the amount of $80 000 would be appropriate in the case of AD in relation to her detention.

7.3 Apology

215. I have been asked to consider recommending that the Commonwealth provide a formal written apology to AD and BZ and their parents for breaching the children's human rights.

216. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to the families of both BZ and AD. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.[44]

7.4 Policy

217. I note that following Report No 40, the department accepted certain recommendations of the Commission relating to the interviews with PRC officials. In particular, the department agreed only to conduct such interviews in future when all other means of ascertaining identity have been exhausted. In such circumstances, interviews are to be conducted by the department with the assistance of overseas officials, rather than by overseas officials themselves.

218. The department also noted that the interviews conducted by the PRC delegation were in 2005, before the Palmer and Comrie Reports and the subsequent reform agenda. It said that since that time significant changes had been made to departmental processes and policy, particularly around the investigation of identity. As such, the department said that it would not conduct such interviews again in the same way in which those interviews took place.

219. I note that a significant failure in this case has been the identification by departmental officials of the circumstances which require a referral of a matter to the Minister for consideration of the use of discretionary powers. The guidelines provide that referrals are to be made in 'unique or exceptional' circumstances. However, the relevant factors to which departmental officers are to have regard are neither unique nor, unfortunately, exceptional. It appears that there is a real danger that officers assessing whether or not a case meets the guidelines will seek to give 'unique or exceptional circumstances' a meaning based on their own experience of applications, rather than a meaning consistent with the factors set out in the guidelines. As such, the phrase 'unique or exceptional circumstances' is apt to mislead.

220. I recommend that the department prepare new draft guidelines for the approval of the Minister dealing with the circumstances in which a referral for consideration of the exercise of discretionary powers is to be made. This may involve different guidelines for different powers. I recommend that in these guidelines, the phrase 'unique or exceptional circumstances' is replaced with a more neutral phrase such as 'referral circumstances'. This would be more likely to cause departmental officers to engage specifically with the list of relevant factors and reduce the risk that a gloss is put on the necessary referral circumstances based upon what an individual may consider to be unique or exceptional.

8 Department's response to recommendations

221. On 20 June 2012, I provided the Commonwealth with a Notice under s 29(2)(a) of the AHRC Act outlining my findings and recommendations in relation to the complaint made by BZ and AD against the Commonwealth.

222. By letter dated 5 July 2012 the department provided the following response to my findings and recommendations:

> **The Department's response on behalf of the Commonwealth of Australia to the findings and recommendation of the Australian Human Rights Commission with regard to [BZ] and [AD].**
>
> 1. *That the Commonwealth pay to each of [BZ] and [AD] compensation in the amount of $2 500 in relation to the arbitrary interference with their privacy.*
>
> The Department notes the findings of the Australian Human Rights Commission (the Commission) in relation to payments of compensation for arbitrary interference with the privacy of [BZ] and [AD]. The Department is considering options under the discretionary compensation mechanisms in relation to this recommendation.

2. *That the Commonwealth pay to [BZ] compensation in the amount of $450 000 in relation to her arbitrary detention.*

3. *That the Commonwealth pay to [AD] compensation in the amount of $80 000 in relation to her arbitrary detention.*

The Department notes the findings of the Commission in relation to payments of compensation to [BZ] and [AD] for arbitrary detention. However for the reasons previously provided to the Commission, the Department respectfully remains of the view that [BZ] and [AD] were not arbitrarily detained. Accordingly, the Department advises the Commission that there will be no action taken in relation to these recommendations.

4. *That the Commonwealth provide a formal written apology to the families of both [BZ] and [AD].*

The Department disagrees with this recommendation.

The Department maintains that the detention of the children was not arbitrary. The Department did not breach their right to be treated with humanity and dignity or act contrary to the best interests of the child.

5. *[The department] prepare new draft guidelines for the approval of the Minister dealing with the circumstances in which a referral for consideration of the exercise of discretionary powers is to be made. This may involve different guidelines for different powers. In these guidelines, the phrase 'unique or exceptional circumstances' should be replaced with a more neutral phrase such as 'referral circumstances'.*

The Minister approved amended guidelines in relation to his section 345, 351, 391, 417, 454, 501J and 195A Ministerial intervention powers on 24 March 2012, in the context of complementary protection implementation. The Commission's comments will be taken into account in any future consideration that may be given to amending the Minister's intervention guidelines.

223. I report accordingly to the Attorney-General.

Catherine Branson
President
Australian Human Rights Commission
July 2012

1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
2 *Human Rights and Equal Opportunity Commission Act 1986 - Declaration of the United Nations Convention on the Rights of the Child* dated 22 October 1992.
3 United Nations Children's Fund ('UNICEF'), 'Implementation Handbook for the Convention on the Rights of the Child' (2008), pp 38-39. Note Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.
4 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (Teoh) at 289 (Mason CJ and Deane J).
5 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 at [32] (the Court).
6 United Nations Human Rights Committee, General Comment 16 (Thirty-second session, 1988), Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc HRI/GEN/1/Rev.6 (2003) 142 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation) at [4].
7 Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed 2004) pp 482-3.
8 *Toonen v Australia*, UN Doc CCPR/C/50/D/488/1992 at [8.3]. Whilst this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.
9 UN Human Rights Committee, General Comment 8 (1982). See also *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001.
10 UN Human Rights Committee, General Comment 31 (2004) [6]. See also Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (2nd ed, 2004), p 308 at [11.10].
11 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway*, UN Doc CCPR/C/67/D/631/1995.
12 *A v Australia*, UN Doc CCPR/C/76/D/900/1993, *C v Australia* UN Doc CCPR/c/76/D/900/1999.
13 13 *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988.
14 14 UN Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
15 15 *C v Australia* UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* UN Doc CCPR/C/90/D/1255; *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001; *D and E v Australia*, UN Doc CCPR/C/87/D/1050/2002.
16 UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2008), 548.
17 UN Rules, Rule 1.
18 Rule 17.1(b) of the Beijing Rules provides: 'Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum'.
19 Rule 17.1(c) of the Beijing Rules provides that 'Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response'.
20 Beijing Rules, Rules 13.2, 28.1, 28.2, 29.1.
21 UN Rules, Rule 28 and Beijing Rules, Rule 26.2.
22 UN Rules, Rules 49 and 51.
23 UN Rules, Rules 18, 32 and Part (IV)E and F and Beijing Rules, Rules 24.1, 26.1, 26.2, 26.6.
24 For example, see *Yousefi v Commonwealth* [2011] AusHRC 46 at [92] and [110], *Al Jenabi v Commonwealth* [2011] AusHRC 45 at [44] and [60], *Badraie v Commonwealth* [2002] AusHRC 25 at [11.4] and [14.6], pp 37-39 and 58-59, *Kiet v Commonwealth* [2001] AusHRC 13 at [4.1], pp 6-7.
25 *MSI 371: Alternative Places of Detention* (issued 2 December 2002) at [1.1.7] and [5.1.5]-[5.2.3].
26 Guidelines on Minister's Detention Intervention Power (Section 195A of the *Migration Act 1958*), 18 October 2007 at [4.1.1].
27 *MSI 386: Guidelines on Ministerial Powers under ss 345, 351, 391, 417, 454 and 501J of the Migration Act* (issued 14 August 2003, replacing MSI 225) at [4.1.1]. The description of 'unique or exceptional circumstances' in MSI 225 (issued 4 May 1999) was in a substantially similar form.
28 Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights, Cases, Materials and Commentary* (2nd ed 2004) at [9.132].
29 UN Human Rights Committee, General Comment 21 (1992) and UN Human Rights Committee, General Comment 9 (1982); See UN Human Rights Committee General Comment 21 (1992). The UNHRC also considered this relevant in *Jensen v Australia*, where it found a complaint of both article 7 and article 10 inadmissible because it failed to demonstrate that the treatment departed from that of an ordinary prisoner.
30 *Australian Human Rights Commission Act 1986* (Cth) 29(2)(a).
31 *Australian Human Rights Commission Act 1986* (Cth) 29(2)(b).
32 *Australian Human Rights Commission Act 1986* (Cth) 29(2)(c).
33 *Peacock v The Commonwealth* (2000) 104 FCR 464 at 483 (Wilcox J).
34 *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217 at 239 (Lockhart J).
35 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999) at [87].
36 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
37 Ibid at [140].
38 *Ruddock v Taylor* [2003] NSWCA 262 at [49]-[50].
39 Ibid at [49].
40 *Goldie v Commonwealth of Australia & Ors (No 2)* [2004] FCA 156.
41 *Spautz v Butterworth* (1996) 41 NSWLR 1 (Clarke JA).
42 *El Masri v Commonwealth* [2009] AusHRC 41 at [376].
43 *Al Jenabi v Commonwealth* [2011] AusHRC 45 at [101].
44 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: www.humanrights.gov.au

For detailed and up to date information about the Australian Human Rights Commission visit our website at: www.humanrights.gov.au

To order more publications from the Australian Human Rights Commission download a Publication Order Form at: www.humanrights.gov.au/about/publications/index.html
or call: (02) 9284 9600 fax: (02) 9284 9611
or e-mail: publications@humanrights.gov.au

Australian Human Rights Commission
www.humanrights.gov.au