Australian Human Rights Commission

Sri Lankan refugees v Commonwealth of Australia

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Report of an inquiry into complaints by Sri Lankan refugees in immigration detention with adverse security assessments

Report into arbitrary detention and the best interests of the child

[2012] AusHRC 56

Australian
Human Rights
Commission

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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 10 adult Sri Lankan refugees in immigration detention with adverse security assessments and 3 minor Sri Lankan refugees who are residing in an immigration detention facility with their parents. The parents of these three children are among the adult complainants.

I have found that the following two acts of the Commonwealth resulted in arbitrary detention contrary to article 9(1) of the *International Covenant on Civil and Political Rights*:

(a) the failure by the Department of Immigration and Citizenship (the department) to ask the Australian Security Intelligence Organisation (ASIO) to assess the individual suitability of six of the complainants for community based detention while they were awaiting their security clearance; and

(b) the failure to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention.

I have also found that the department failed to consider fully alternatives to closed detention for the Rahavan family of two parents and three children, in a way that included an assessment of the specific security risk of alternatives and how that risk could be mitigated. This failure was contrary to articles 3 and 37(b) of the *Convention on the Rights of the Child*.

By letters dated 23 July 2012 the Hon Chris Bowen MP, Minister for Immigration and Citizenship, and the Department of Immigration and Citizenship provided responses to my findings and recommendations. I have set out the responses of the Minister and the department in their entirety in part 15 of my report.

Please find enclosed a copy of my report.

Yours sincerely

Catherine Branson
President
Australian Human Rights Commission

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint alleging a breach of their human rights made against the Commonwealth of Australia by 10 adult Sri Lankan refugees in immigration detention with adverse security assessments and 3 minor Sri Lankan refugees who are residing in an immigration detention facility with their parents. The parents of these three children are among the adult complainants.

2. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). I have directed that the identities of four of the complainants not be disclosed in accordance with s 14(2) of the AHRC Act. For the purposes of this report each complainant whose identity has been suppressed has been given a pseudonym beginning with C.

3. All of the adult complainants have made complaints in writing in which they allege that their ongoing immigration detention is arbitrary and therefore inconsistent with the human rights recognised in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

4. Additionally, the children Atputha, Abinayan and Vahisan Rahavan allege that their detention is inconsistent with the rights articulated under article 37 of the *Convention on the Rights of the Child* (CRC). Their claim also calls into consideration article 3 of the CRC.

5. Mr Ketharan Thambirasa and Mr CA allege that the Commonwealth has treated them inhumanely in breach of article 10(1) of the ICCPR while in detention.

6. Mr CB alleges that the Commonwealth has arbitrarily interfered with his family in breach of articles 17 and 23 of the ICCPR.

7. As a result of the inquiry, the Commission has found that the following two acts of the Commonwealth were inconsistent with the rights of the complainants recognised under article 9(1) of the ICCPR:

    (a) the failure by the Department of Immigration and Citizenship (the department) to ask the Australian Security Intelligence Organisation (ASIO) to assess their individual suitability for community based detention while awaiting their security clearance (other than those complainants who were part of the *Oceanic Viking* group who received an adverse security assessment prior to arrival in Australia and Mr CB who was placed in community detention on Christmas Island for part of his detention);

    (b) the failure to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention.

8. I also find that the failure to consider fully alternatives to closed detention for the Rahavan family, in a way that included an assessment of the specific security risk of alternatives and how that risk could be mitigated, amounts to a breach of articles 3 and 37(b) of the CRC.

2 Background

9. The individuals identified below have made complaints in writing to the Commission. The complainants fall within two groups.

10. The first group arrived by boat at Christmas Island during June and July 2009. The following table sets out the date on which each of them was detained, the date that they were found to be a refugee, and the date that the department received an adverse security assessment in respect of them from ASIO.

Name	Detained	Refugee finding	Adverse security assessment
Mr Suvendran Kathirkamaththambi	28 June 2009	2 October 2009	30 August 2010
Mr CA	28 June 2009	4 September 2009	6 January 2011
Mr CC	28 June 2009	28 September 2009	29 November 2010
Mr CD	28 June 2009	8 May 2010	6 April 2011
Mr CB	12 July 2009	23 October 2009	1 February 2011
Mr Ketharan Thambirasa	12 July 2009	6 April 2010	10 November 2010
Mr Rahavan Yogachandran	12 July 2009	28 September 2009	18 December 2009

11. All of the complainants in this group were detained on behalf of the Commonwealth under s 189(3) of the *Migration Act 1958* (Cth) (Migration Act) immediately upon their arrival at Christmas Island.

12. The second group was rescued at sea by the Australian Customs Vessel *Oceanic Viking* and taken initially to Indonesia. They were subsequently brought to Christmas Island from Indonesia by the Commonwealth pursuant to special purpose visas. After immigration clearance, each member of this group was also detained by the Commonwealth pursuant to s 189(3).

13. The following table sets out the date on which each of the complainants in the *Oceanic Viking* group was detained, the date that they were found to be a refugee, and the date that the department received an adverse security assessment in respect of them from ASIO.

Name	Detained on Christmas Island	Refugee finding	Adverse security assessment
Mrs Sumathy Rahavan	30 December 2009	7 December 2009 (by UNHCR)	11 December 2009
Miss Atputha Rahavan (aged 8 years)	30 December 2009	7 December 2009 (by UNHCR)	N/A
Master Abinayan Rahavan (aged 4 years)	30 December 2009	7 December 2009 (by UNHCR)	N/A
Mr Yasikaran Sinnathurai	30 December 2009	Prior to 30 December 2009 (by UNHCR)	23 December 2009
Mr Sasikathan Shanmugarayah	30 December 2009	Prior to 30 December 2009 (by UNHCR)	11 December 2009

14. Mrs Sumathy Rahavan and Mr Yogachandran Rahavan are the parents of Atputha and Abinayan Rahavan. This family of four was transferred by the Commonwealth from Christmas Island to Sydney on 13 August 2010. Mrs Sumathy Rahavan gave birth to Vahisan Rahavan while in detention in Sydney on 25 September 2010. On 22 December 2011 Vahisan was granted a protection visa. Following the grant of his visa, Vahisan has, with his parent's consent, remained with his family in detention at Sydney Immigration Residential Housing (SIRH). Atputha and Abinayan were granted protection visas on 1 May 2012 and also continue to remain with the rest of the family in detention at SIRH.

15. All of the complainants have been found to be refugees within the meaning of the *1951 Convention Relating to the Status of Refugees* and the *1967 Protocol relating to the Status of Refugees*, either by the Commonwealth or by the United Nations High Commissioner for Refugees (UNHCR). However, each of the adult complainants has received an adverse security assessment from ASIO.

16. The Commission has received information in relation to the complaints from the department. The Commission has also received information from ASIO about the manner in which it conducts security assessments for the department.

3 Legislative framework

3.1 Functions of the Commission

17. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly s 11(1)(f) gives the Commission the following functions:

> to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
>
> (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
>
> (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.

18. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.

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

3.2 What is a 'human right'?

20. The rights and freedoms recognised by the ICCPR and the CRC are 'human rights' within the meaning of the AHRC Act.[1] The following articles of the ICCPR and the CRC are relevant to the acts and practices which are the subject of the present inquiry.

21. Article 9(1) and (4) of the ICCPR provides:

> (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. …
>
> (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

22. Article 10(1) of the ICCPR provides:

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

23. Article 14(1) of the ICCPR provides:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. …

24. Article 17(1) of the ICCPR provides:

> 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.

25. Article 23(1) of the ICCPR provides:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

26. Article 3(1) of the CRC provides:

> 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.

27. Article 37(b) of the CRC provides:

> 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.

3.3 What is an 'act' or 'practice'?

28. 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.

29. 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.

30. 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;[2] that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

4 The complaints

31. The acts of the Commonwealth to which I have given consideration in relation to each of the complainants are as follows:

> **Act 1:** The failure by the department to ask ASIO to assess their individual suitability for community based detention while awaiting their security clearance.
>
> **Act 2:** The failure to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention.

32. Each of these acts is considered in the context of article 9 of the ICCPR and, in the case of the three children Atputha, Abinayan and Vahisan Rahavan, the acts are considered in the context of article 37(b) of the CRC (which also calls into consideration article 3 of the CRC).

33. For the reasons set out below, I find that each of Acts 1 and 2 was inconsistent with or contrary to the rights of the complainants under article 9 of the ICCPR and, in the case of the children in detention, articles 3 and 37(b) of the CRC.

34. Two of the complainants raised specific complaints of breaches of article 10 of the ICCPR. I find that there is insufficient evidence to establish these claimed breaches.

35. A claim by Mr CB of a breach of articles 17 and 23 of the ICCPR is not dealt with in this report and is the subject of separate consideration by the Commission.

36. I have also given consideration to a number of other issues raised in submissions by the representatives of the complainants including:

    (a) the failure by the Minister to exercise his discretion to grant visas to the complainants;

    (b) the steps taken by the department to pursue third country resettlement for the complainants;

    (c) the lack of effective review of the merits or lawfulness of the complainants' adverse security assessments.

37. In relation to (a) above, given the adverse security assessment made by ASIO in relation to each of the complainants, I am not able to find that the failure by the Minister to grant them a visa is unreasonable. However, granting a visa, possibly subject to conditions, remains an option for the Minister in resolving their status.

38. In relation to (b) above, I note that the department has provided very few details about any concrete steps taken by it to arrange third country resettlement. I am concerned about the time it has taken to find a durable alternative to detention for each of the complainants. I encourage the Commonwealth to continue actively to pursue alternatives to detention for each of the complainants, including the prospect of third country resettlement. If third country resettlement is not possible, the Commonwealth should actively consider all other appropriate alternatives to detention.

39. In relation to (c) above, I note that the potential difficulties for the complainants in obtaining effective review of the merits and lawfulness of their adverse security assessments arise partly as a result of an act of an intelligence agency, in this case ASIO, and in part as a result of the application of legislation.

40. To the extent that the complainants have been hindered in seeking review of adverse security assessments as a result of a decision or decisions made by ASIO not to provide them with reasons for their respective assessments, s 11(3) of the AHRC Act prevents the Commission from inquiring into this aspect of their complaints. It may be that this is an act that could be considered by the Inspector-General of Intelligence and Security.[3] Where a complaint is made to the Commission alleging that an act or practice of an intelligence agency is contrary to any human right, s 11(3) of the AHRC Act provides that the Commission shall refer the complaint to the Inspector-General. The Commission has provided the Inspector-General with a copy of a notice served on the department pursuant to s 29(2)(a) of the AHRC Act setting out the Commission's findings in relation to this inquiry and relevant documents from the files of the complainants to enable the Inspector-General to inquire into the issue outlined above.

41. To the extent that each complainant may have been hindered in seeking review of an adverse security assessment as a result of statutory provisions preventing them from obtaining review in the Administrative Appeals Tribunal, this does not enliven the Commission's functions as there is no relevant 'act' or 'practice' within the meaning of s 11(1)(f) of the AHRC Act. I note that because the complainants are not Australian citizens or holders of either a permanent visa or a special category visa, they appear not to have a statutory right to merits review of their adverse security assessments. I further note that the Joint Select Committee on Australia's Immigration Detention Network recommended that the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) be amended to allow the Security Appeals Division of the Administrative Appeals Tribunal to review ASIO security assessments of refugees and asylum seekers.[4]

5 Arbitrary detention

42. 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;[5]

    (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;[6]

    (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;[7] and

    (d) detention should not continue beyond the period for which a State party can provide appropriate justification.[8]

43. In *Van Alphen v The Netherlands*,[9] the UN Human Rights Committee (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. 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'.[10]

44. 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.[11]

45. The United Nations Working Group on Arbitrary Detention has expressed the view that the use of administrative detention for national security purposes is not compatible with international human rights law where detention continues for long periods or for an unlimited period without effective judicial oversight.[12] A similar view has been expressed by the UNHRC, which has said:[13]

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

46. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.[14]

47. A short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.[15]

6 Act 1: Failure by the department to ask ASIO to assess the individual suitability of the complainants for community based detention while awaiting their security clearance

6.1 Security clearance process

48. Most classes of visas, including protection visas, contain a requirement that the applicant meet public interest criteria 4002 (the security requirement).

49. The security requirement is intended to 'protect the resident Australian community from the actions and influence of persons who might threaten the security of the nation'.[16] Security assessments against public interest criteria 4002 are carried out by ASIO at the request of the department. The ASIO security assessment is based on the definition of 'security' in s 4 of the ASIO Act which is in the following terms:

> ***security*** means:
>
> (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
>
> (i) espionage;
> (ii) sabotage;
> (iii) politically motivated violence;
> (iv) promotion of communal violence;
> (v) attacks on Australia's defence system; or
> (vi) acts of foreign interference;
>
> whether directed from, or committed within, Australia or not; and
>
> (aa) the protection of Australia's territorial and border integrity from serious threats; and
>
> (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

50. The department may also ask ASIO to carry out other types of assessments for different purposes.

51. ASIO notes that the type of assessment that it carries out varies according to the purpose for which it has been asked to make an assessment. In particular, the assessment will relate to the particular administrative act that is proposed (for example, the act of granting a visa or the act of placing someone in community detention).[17] This is consistent with the definitions of 'security assessment' and 'adverse security assessment' in s 35 of the ASIO Act. Section 35 provides that an adverse security assessment contains a recommendation by ASIO that prescribed administrative action (such as the exercise of a power under the Migration Act) be taken or not be taken in respect of the person the subject of the assessment, being a recommendation the implementation of which would be prejudicial to the interests of the person. As discussed in more detail below, the Minister has the power under s 197AB of the Migration Act to make a residence determination in favour of a person which allows that person to be placed in community based detention. ASIO currently offers two types of assessments to the department in relation to 'irregular maritime arrivals':[18]

> The first one is to determine suitability of community based detention and the second one is to determine the suitability for an individual to reside permanently in Australia.

52. Different considerations apply to each type of assessment.[19] ASIO notes that:[20]

> A community detention assessment is a form of advice to DIAC on the security implications of placing an individual in community detention. Community detention assessments are not assessments of the security implications of the individual being granted a visa to remain in Australia.
>
> Not all individuals are referred to ASIO for community detention assessment. For example, minors under 16 are not referred for this purpose.

53. ASIO says that it usually responds to requests for community detention assessment within 24 hours.[21] ASIO stated that the quicker community detention assessment could be carried out in advance of a security assessment in relation to the grant of a visa if a request for such a community detention assessment were made by the department.[22]

54. In respect of each of the complainants other than Mr CD (who received an 'interim' community detention assessment from ASIO), the department only asked ASIO to perform a security assessment against public interest criteria 4002 in relation to the potential grant of a visa. The department did not ask ASIO to conduct an assessment to determine the suitability of community based detention for any of the other complainants.[23]

55. The department confirmed that, prior to the Government's announcement on 18 October 2010 that it proposed to expand the use of community based detention for identified vulnerable irregular maritime arrivals, there were no protocols in place for the referral of clients to ASIO for the provision of security advice regarding community detention placement.[24] From 18 October 2010, women, children and family groups were considered for community detention.

56. From January 2011, single adult males were identified as eligible for referral to ASIO. By 1 January 2011, all but three of the adult complainants had received their adverse security assessments from ASIO.

57. Mr CA received an adverse security assessment on 6 January 2011. The department submitted that given the date of this assessment he was not separately referred for security advice regarding consideration of community detention.

58. Mr CB received an adverse security assessment on 1 February 2011. Prior to this date, the department had assessed Mr CB's case as meeting the guidelines for referral to the Minister for consideration of the making of a residence determination pursuant to s 197AB of the Migration Act. However, once the department received the adverse security assessment in relation to the potential grant of a visa, it discontinued its consideration of referring Mr CB's case to the Minister for consideration of a community detention placement. The department did not seek specific advice from ASIO about whether it would be consistent with the requirements of security for a residence determination to be made in favour of Mr CB. Rather, it discontinued its consideration of a referral to the Minister based on Government policy discussed in relation to Act 2 below.

59. Mr CD received an adverse security assessment on 1 April 2011. Prior to this date, on 11 March 2011, the department referred his case to ASIO for security advice regarding consideration for community detention. On 16 March 2011, ASIO recommended that the Minister should not exercise his power under s 197AB as it would not be in the public interest. On 7 April 2011, the department referred Mr CD's case to the Minister for consideration of the exercise of his power under s 197AB. The submission referred to Mr CD's 'known health issues' and to the fact that ASIO had advised that it would not be in the public interest for a residence determination to be made. On 12 April 2011, the Minister declined to consider Mr CD for a community detention placement. Mr CD is the only complainant to have received an assessment from ASIO about the exercise of the Minister's power to grant a residence determination.

60. Because of the Government policy discussed in relation to Act 2 below, if a complainant received an adverse security assessment in relation to the potential grant of a visa, the department did not refer him or her to ASIO for a community detention assessment.

61. Six complainants were detained for between 14 and 21 months prior to a security assessment being carried out by ASIO. In some cases, a complainant has been detained in an immigration detention facility for more than a year between being found to be a refugee and receiving an adverse security assessment (for example, Mr CA and Mr CC).

62. In circumstances where a community detention assessment could have been conducted within 24 hours, the failure to request such an assessment prior to conducting a full security assessment may have had the effect of requiring the complainant to remain in an immigration detention facility much longer than was necessary, pending the outcome of their security assessment.

63. I note that community detention was considered to be an appropriate option for one of the complainants prior to his receiving an adverse security assessment. The department has advised that, after two months in detention on Christmas Island, a residence determination was made in favour of Mr CB and his wife and child and they were placed in community detention on Christmas Island for eight months. This residence determination was later revoked and the family was transferred to Sydney Immigration Residential Housing. The period in which this family was in community detention on Christmas Island was prior to Mr CB receiving his adverse security assessment.

64. The department submitted that, prior to 18 October 2010, it referred cases to the Minister for consideration of a residence determination under s 197AB where they met the appropriate guidelines and were in line with the Minister's direction at the time.[25] In a later submission, responding to a request by the Commission for clarification, the department noted that the only complainant to be referred to the Minister for consideration under s 197AB was Mr CD and that the department's submission to the Minister noted ASIO's recommendation that the exercise of this power would not be in the public interest.[26] (This later submission to the Commission does not appear to take into account the earlier residence determination made in favour of Mr CB and his wife and child while they were still on Christmas Island.)

65. The applicable guidelines at the time provided that '[i]n referring cases to me for residence determination, the Department is to note that I will give priority to: … cases which will take a considerable period to substantively resolve; and other cases with unique or exceptional characteristics'.[27] The substantially similar phrase 'unique or exceptional circumstances' is used in guidelines promulgated by the Minister in relation to the use of other discretionary powers.[28] The guidelines provide that the following factors may be relevant, individually or cumulatively, in assessing whether a case involves 'unique or exceptional circumstances':

- particular circumstances or personal characteristics of a person which provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity should they return to their country of origin;
- circumstances that may bring Australia's obligations as a party to the ICCPR into consideration;
- circumstances that may bring Australia's obligations as a party to the CRC into consideration;
- circumstances that the legislation does not anticipate;
- clearly unintended consequences of legislation;
- circumstances where the 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);
- compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person;
- where the department has determined that the person, through circumstances outside their control, is unable to be returned to their country/countries of citizenship or usual residence.

The cases of each of the present complainants appear to fall within several of these categories.

66. The department submitted that none of the other complainants was referred to the Minister for consideration under s 197AB because, in the department's view, they did not satisfy paragraph 5.1 of the Minister's s 197AB guidelines.

67. Paragraph 5.1 of the guidelines provides that:[29]

> **5.1 Mitigation of Risk to the Community**
>
> 5.1.1 The identification of health, identity, character and security risks to the community and the development of strategies to mitigate those risks are very important processes in the development of a residence determination plan.
>
> 5.1.2 My preference is that persons satisfy the normal requirements for health, identity, character and security checking before being referred for my consideration. However where significant risks associated with ongoing detention in an immigration detention facility are identified, I am prepared to consider persons where an assessment of the risks and placement has been completed.
>
> 5.1.3 Where the Department refers cases to me as in paragraph 5.1.2, the Department is to consider how any potential risk can be mitigated through the use of conditions I may place on the residence determination. Such conditions must be appropriate to the needs of the individual and normally be agreed by them before I approve the residence determination.
>
> 5.1.4 If the Department forms the view that risks to the community cannot be mitigated, and that a residence determination is therefore inappropriate, this should be included in the schedule described at 4.2.1 [of cases being considered for referral for a residence determination, to be provided fortnightly to the Minister].

68. I note that paragraph 5.1.3 makes provision for the department to refer a case to the Minister for consideration of the exercise of his powers under s 197AB despite the identification of security risks. In those circumstances, the department is to consider how any potential risk can be mitigated through the use of conditions. However, it appears that this provision was not used in the case of any of the complainants. (No submissions were made by the department that risk mitigation through the use of conditions was considered for Mr CD.)

69. I find that the failure by the department to ask ASIO to conduct an assessment for the following complainants to determine the suitability of community based detention while a security assessment in relation to the grant of a visa was carried out was contrary to article 9(1) of the ICCPR because a community detention assessment could have been conducted quickly and may have led to the complainants being held in a less restrictive form of detention.

70. This act is relevant to the situations of each of the following complainants. The time in brackets indicates the period of time that they were held in detention prior to the security assessment by ASIO being carried out:

- Mr Suvendran Kathirkamaththambi (14 months);
- Mr CA (18 months);
- Mr CC (17 months);
- Mr CD (21 months);
- Mr Ketharan Thambirasa (16 months);
- Mr Rahavan Yogachandran (5 months).

7 Act 2: The failure to assess on an individual basis whether the circumstances of each complainant indicated that they could be placed in less restrictive forms of detention

7.1 Security clearance as proxy for community detention assessment

71. It appears that the department has treated the adverse security assessment received in respect of each of the complainants as constituting advice from ASIO that they should not be placed in community detention.

72. The Commission asked the department a number of questions about each complainant including:

(a) whether the department had asked ASIO to provide advice about any risk that individual poses to the Australian community which would preclude the individual being placed in community detention;

(b) whether the department had received specific advice from ASIO that any risk the individual poses to the Australian community requires that the individual be detained in an immigration detention facility;

(c) whether the department had conducted an assessment of the individual's circumstances in order to determine whether it was necessary, reasonable and proportionate to hold the complainant in an immigration detention facility.

73. In relation to each of these questions, the department provided the following response:[30]

> The Migration Act 1958 requires the detention of irregular maritime arrivals except where the Minister for Immigration and Citizenship exercises one of his non-compellable public interest powers to allow an individual to be detained in the community or to grant a visa. **Where ASIO issues an adverse security assessment it advises the department that an individual presents a direct or indirect risk to security and recommends that a visa not be granted. ASIO also recommends that a residence determination allowing detention in the community not be made in relation to any individual who is the subject of an adverse security assessment.** On the basis of this advice, the Minister has indicated to the department that he does not consider it to be in the public interest to allow persons with adverse security assessments to live in the Australian community and that he is not minded to consider the exercise of his intervention powers in relation to individuals within this caseload.
>
> IMAs [irregular maritime arrivals] with adverse security assessments will therefore remain in immigration detention until they are able to be removed from Australia or until third country resettlement options are found. Removal action will only take place where it would be consistent with Australia's international non-refoulement obligations.
>
> (emphasis added)

74. It appears that no separate request has been made by the department to ASIO to determine the suitability of community based detention for any of the complainants other than Mr CD. (In the case of Mr CD, the assessment was described as an 'interim' assessment which suggests that it may be subject to change once further information is known.) The department asserts that, despite this, whenever ASIO issues an adverse security assessment it also recommends that a residence determination allowing detention in the community not be made in relation to that individual. This appears to be contrary to the process described by ASIO which:

(a) requires a specific request from the department in relation to a particular proposed administrative act, for example to determine suitability of community based detention or to determine the suitability for an individual to reside permanently in Australia;

(b) involves different considerations in relation to each type of assessment;

(c) involves different recommendations specific to the type of assessment requested.

75. It also appears contrary to the more recent submissions received by the department which suggest that most of the adverse security assessments for the present complainants were given to the department before the department had in place protocols for the referral of clients to ASIO for the provision of security advice regarding community detention placement (see paragraphs 54 to 60 above).

76. Further, at least in relation to those complainants who are part of the *Oceanic Viking* group, it appears that the security assessments were in the following form:[31]

1. ASIO assesses the following individual from the Oceanic Viking caseload to be directly or indirectly a risk to security, within the meaning of Section 4 of the Australian Security Intelligence Act 1979:

   [Here the applicants are named]

2. ASIO therefore recommends that any application for a visa by this individual be refused.
3. Public Interest Criterion 4002, Part 1, Schedule 4, Migration Regulation refers.

77. These assessments do not on their face say anything about the appropriateness of community detention.

78. In the light of this conflicting information, the Commission wrote to the department indicating that it seemed that any recommendation made by ASIO would have been limited to whether the complainants (other than Mr CD) should be granted a visa and that ASIO would not have made any recommendation that a residence determination allowing detention in the community not be made.

79. In response, the department confirmed that in order for ASIO to provide a security assessment about a community detention placement, the department has to ask ASIO for such an assessment. No such request was made in relation to any of the complainants other than Mr CD. The department noted, however, that the Government has determined, as a matter of policy, that 'individuals assessed by ASIO to present a threat to national security should remain in held detention, rather than live in the community, until such time as resettlement in a third country or removal is practicable'.[32]

80. The Commission is concerned that the individual circumstances of each of the complainants were not taken into account in assessing whether community based detention (or some other less restrictive form of detention than detention in an immigration detention facility) was appropriate and consistent with any risk the complainants posed to security. Instead, the Minister has made his own assessment about the security risk of community detention based on a security assessment carried out for another purpose. Further, no consideration has been given to how any risk of community detention could be mitigated.

81. It appears from the fact of the definition of 'security' in the ASIO Act that there may well be people who fail a security assessment who would not pose a risk to the Australian community that would justify refusing to consider their placement in community detention. For example, the definition of 'security' in the ASIO Act includes 'the carrying out of Australia's responsibilities to any foreign country' in a number of respects.

82. When examining the effect of analogous legislative provisions in New Zealand, the New Zealand Court of Appeal drew attention to this issue observing that there may be a 'wide spectrum of interests' that fall under the 'national security umbrella'. The Court considered that it was 'obvious that all risks to national security do not call for equal treatment. It is also apparent that different security interests can be identified and distinguished'.[33]

83. It may well be that there are alternative options to prolonged detention in secure facilities which can be appropriately provided to the complainants despite their having received adverse security assessments. These alternative options may include less restrictive places of detention than immigration detention centres as well as community detention, if necessary with conditions to mitigate any identified risks. Conditions could include a requirement to reside at a specified location, curfews, travel restrictions, regular reporting and possibly even electronic monitoring.

84. Of the 13 complainants, one family of five and two other complainants are currently accommodated at SIRH. During the course of the Commission's inquiry, two single men have been moved from Villawood Immigration Detention Centre (VIDC) to the adjoining SIRH. Two other single men are still accommodated at VIDC. One man is accommodated at Maribyrnong Immigration Detention Centre. Three single men are currently accommodated at Melbourne Immigration Transit Accommodation. All of these places of detention are more restrictive than community based detention pursuant to a residence determination.

7.2 Residence determinations

85. As noted above, lawful immigration detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system. Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, and where detention in an immigration detention centre is not demonstrably necessary, prolonged detention in an immigration detention centre may be disproportionate to the goals said to justify the detention.

86. The complainants claim that it is open to the Minister to permit them to live in the community subject to a 'residence determination'. Section 197AB permits the Minister, where he thinks that it is the public interest to do so, to make a residence determination to allow, subject to conditions, one or more specified persons to reside in a specified place instead of being detained. A 'specified place' may be a place in the community.

87. The department has developed a client placement model pursuant to which persons with a range of individual circumstances may meet the guidelines for referral to the Minister for consideration of a community detention placement.[34] These circumstances include families with minor children and persons whose prospect of removal is unlikely within a reasonable time frame and who are not eligible for a 'removal pending' bridging visa. The present complainants fall within these identified circumstances.

88. The department submits that at all times it acted in accordance with the directions of the responsible Minister at the time in ensuring that he was made aware of the option to exercise his powers under s 197AB in relation to the complainants.[35]

89. As noted above, the department also noted that the Minister has determined that he does not consider it to be in the public interest to allow persons with adverse security assessments to live in the Australian community. However, it appears that this determination is based on the incorrect view that an adverse security assessment also constitutes advice from ASIO about the appropriateness of a residence determination being made.

90. In these circumstances, it appears that there has been a decision by the department, possibly made at the request of the Minister, not to refer to the Minister for consideration under s 197AB any cases where a refugee has been given an adverse security assessment.

91. The decision by the department not to refer each complainant's case to the Minister for consideration under s 197AB (whether or not this reflected a policy direction by the Minister) was not required by law. It is an 'act' for the purposes of s 3 of the AHRC Act.

92. It appears that this act was done without considering the individual circumstances of each of the complainants to determine whether community detention (or some other less restrictive form of detention than detention in an immigration detention facility) was appropriate. In particular, it appears that no comprehensive and individualised assessment has been undertaken in respect of each complainant to assess whether they pose any risk to the Australian community and whether any such risk could be addressed (for example by the imposition of particular conditions) without their being required to remain in an immigration detention facility.

93. For completeness, I note that it would also be open to the Minister to grant a visa to any of the complainants under s 195A of the Migration Act, again subject to any conditions necessary to take into account their specific circumstances.

94. I find that the act identified above is contrary to article 9(1) of the ICCPR in that it results in ongoing detention in immigration detention facilities of people to whom Australia has protection obligations, and who may be eligible for placement in community detention (or a visa at the discretion of the Minister), without an adequate consideration of their individual circumstances and the extent to which they pose any particular risk to the Australian community.

95. The breach identified above arises from a failure adequately to consider less restrictive forms of detention or alternatives to detention taking into account the circumstances of each complainant. The Commission does not express any view as to what the outcome of any such consideration in each particular case would be.

8 Discretionary power to grant a visa

96. Article 9(1) of the ICCPR requires the Commonwealth not to detain the complainants beyond the period for which it can provide appropriate justification.[36] It is therefore incumbent on the Commonwealth to take all appropriate steps to find an alternative to their continued detention. Available alternatives in each case include the grant of a visa or placement in a less restrictive form of detention (along with any necessary conditions) or arranging resettlement to a third country.

97. Some of the complainants submitted that the Commission should find that the failure of the Minister to grant the complainants a visa is itself an act that constitutes a breach of article 9(1) of the ICCPR on the basis that the failure to grant them a visa has resulted in their continued detention. In particular, they refer to the power to grant a visa under s 195A of the Migration Act and the power to grant a special purpose visa under s 33 of the Migration Act. The analysis is the same in relation to each.

98. The Minister has what the department describes as a 'non-delegable and non-compellable' power under s 195A to grant a visa to a person who is in detention under s 189 if he thinks that it is in the public interest to do so. The power is non-delegable in the sense that it may only be exercised by the Minister personally. The power is non-compellable in the sense that the Migration Act provides that the Minister does not have any duty to consider whether to exercise the power.

99. In exercising the power under s 195A, the Minister is not bound by the regulatory criteria for a particular visa and so may issue a visa notwithstanding the fact that the complainant has received an adverse security assessment.

100. The Minister's power under s 195A is discretionary. Failure by the Minister to exercise a discretionary power, including the power under s 195A, in circumstances where it is lawfully open can amount to an 'act' for the purposes of s 3 of the AHRC Act.[37]

101. As noted above, it would be open to the Minister to grant a visa under s 195A to any of the complainants. The visa could be granted subject to such conditions as the Minister considers necessary to address any potential risk to security. It may be that conditions imposed on a visa could address all legitimate security concerns. The requirement on the Commonwealth to ensure that the complainants are able to enjoy their right to liberty to the maximum extent makes it incumbent on the Minister to consider whether there are alternatives to detention that are available which are consistent with the protection of Australia's security. This is one of the things that should be done in the course of the individualised assessment called for in relation to Act 2 described above.

102. However, in the present circumstances, I am unable to find that the failure to grant visas to the complainants was unreasonable or disproportionate to the need to protect Australia's security. The reason for this is that ASIO issued an adverse security assessment in respect of each of them and has recommended that each of them not be granted a visa on security grounds. I am not aware of the grounds upon which any of these assessments was made. I am therefore unable to determine whether the assessments were affected by error or whether the recommendations were appropriate in the circumstances of each individual case.

9 Third country resettlement

103. All of the complainants in this matter have been detained for more than two years (other than Vahisan Rahavan who was born in detention in September 2010).

104. On 3 February 2010, certain documents concerning the asylum seekers on board the *Oceanic Viking* were tabled in the Senate. These included a letter from the Minister-Counsellor Immigration at the Australian Embassy in Jakarta to these asylum seekers dated November 2009 which provided a guarantee in the following form:[38]

> The Australian Government guarantees that mandated refugees will be resettled. The procedures will differ slightly depending on your circumstances:
>
> 1. If UNHCR has found you to be a refugee – Australian officials will assist you to be resettled within 4-6 weeks from the time you disembark the vessel.
> 2. If you have already registered with UNHCR – Australian officials will assist you with your UNHCR processing. If you are found to be a refugee, you will be resettled within 12 weeks from the time you disembark the vessel.
> 3. If you have not yet registered with UNHCR – Australian officials will assist you with your UNHCR processing. If you are found to be a refugee, you will be resettled within 12 weeks from the time you disembark the vessel.

105. This guarantee was provided to each of the complainants in the *Oceanic Viking* group.

106. The Commission has asked the department to provide details of the steps taken by it to pursue third country resettlement options, including communications between the department and other Government departments and communications between the Australian Government and governments of other countries.

107. The department has indicated that it has 'had contact with government officials from a number of resettlement countries to explore options for resettlement' for each of the complainants. No further details of these explorations of options have been provided, other than that they included 'facilitation of exchanges of information relating to adverse assessments to relevant authorities' in these other countries.[39]

108. It appears that over the past two and a half years Australia has sought resettlement of the complainants in other countries, and shared with those countries some or all of the content of the adverse security assessments prepared by ASIO. To date, it appears that no other countries have agreed to allow the complainants to resettle with them.

109. The department has acknowledged that it has 'no control over the response times from these countries' and that it 'has not set any operational time limits in relation to exploring third country resettlement options'.[40]

110. I am concerned about the time it has taken to find a durable alternative to detention for each of the complainants. I encourage the Commonwealth to continue actively to pursue alternatives to detention for each of the complainants, including the prospect of third country resettlement. If third country resettlement is not possible, the Commonwealth should actively consider all other appropriate alternatives to detention.

10 Lack of effective review of the merits or lawfulness of the adverse security assessments

111. Each of the complainants has the right to take proceedings before a court to challenge the lawfulness of their detention pursuant to article 9(4) of the ICCPR. Further, the complainants have a right to a fair hearing in relation to the kinds of proceedings described in article 14(1) of the ICCPR.

112. The department notes that a person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia.[41]

113. However, in *A v Australia*, the UNHRC observed that judicial review of detention decisions by Australian courts was limited to whether detention was lawful in accordance with domestic law, not whether it was in accordance with article 9(1) of the ICCPR including consideration of whether detention was arbitrary. The inability to order release if detention was inconsistent with article 9(1) of the ICCPR meant that there was a breach of article 9(4) of the ICCPR:[42]

> The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention … . In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. … As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

114. In the present circumstances, a key contributing factor to the continued detention of the complainants is their adverse security assessment. I am concerned that there are significant practical difficulties for the complainants in obtaining effective review of the merits or lawfulness of these security assessments. In particular, I note that:

(a) by reason of s 36 of the ASIO Act, the complainants are not entitled to be provided with a copy of their adverse security assessment or the grounds for the assessment;

(b) s 36 of the ASIO Act prevents the complainants from seeking review of an adverse security assessment in the Administrative Appeals Tribunal;[43]

(c) although the High Court has confirmed that decisions of ASIO are susceptible to judicial review,[44] there are significant practical difficulties in seeking judicial review, including because of the inability to obtain a copy of an adverse security assessment or the reasons for it.[45]

10.1 Failure to provide complainants with the grounds for their adverse security assessment

115. Although ASIO does not have an obligation under the ASIO Act to provide a person who received an adverse security assessment with the grounds for that assessment, it does have a discretion to do so. The complainants have been provided with notice that they have received an adverse security assessment; however, they have not been provided with the grounds for that assessment.

116. Some of the complainants submitted that the failure to provide them with the grounds for their adverse security assessment is an act which is inconsistent with article 9(2) of the ICCPR. Article 9(2) provides that:

> Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

117. The UNHRC has made clear that while the second part of article 9(2) only applies to detention on criminal charges, the first part applies to any kind of detention.[46]

118. The complainants make reference to the decision of the UNHRC in *Drescher v Uruguay* for the proposition that a State must provide a person arrested with substantive reasons for the arrest and that a mere reference to security measures is insufficient. In that case, the UNHRC said:[47]

> article 9(2) of the Covenant requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded. It is the view of the Committee that it was not sufficient simply to inform Adolfo Drescher Caldas that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him.

119. As a result of s 11(3) of the AHRC Act, the Commission's inquiry function does not include inquiring into an act or practice of an intelligence agency, including ASIO. As a result, I do not make any findings in relation to the above submissions as to the failure by ASIO to give reasons for its adverse security assessments. It may be that this is an act that could be considered by the Inspector-General of Intelligence and Security.[48] Where a complaint is made to the Commission alleging that an act or practice of an intelligence agency is contrary to any human right, s 11(3) of the AHRC Act provides that the Commission shall refer the complaint to the Inspector-General. The Commission has provided the Inspector-General with a copy of a notice served on the department pursuant to s 29(2)(a) of the AHRC Act setting out the Commission's findings in relation to this inquiry and relevant documents from the files of the complainants to enable the Inspector-General to inquire into the issue outlined above.

10.2 Inability to seek merits review

120. Some of the complainants note that s 36 of the ASIO Act draws a distinction between persons based on their visa and citizenship status. Citizens, holders of permanent visas and persons who hold a special category visa or are taken to have been granted a special purpose visa have a right to merits review in the AAT. Non-citizens who do not hold one of these visas do not have a right to merits review.

121. It is submitted that the distinction drawn by s 36 operates to exclude procedural fairness for people in the complainants' situation and that it lacks objective justification. In particular, it is submitted that national security does not require that all such people be precluded from merits review of security decisions.

122. Section 36 of the ASIO Act has the operation described above as a matter of law. Preclusion of merits review for people in the situation of the complainants does not involve a discretionary act on the part of the Commonwealth. Accordingly, for the reasons set out in paragraph 30, it is not an act that the Commission has the function of inquiring into under s 11(1)(f) of the AHRC Act.

123. I note that the Joint Select Committee on Australia's Immigration Detention Network recommended that the ASIO Act be amended to allow the Security Appeals Division of the Administrative Appeals Tribunal to review ASIO security assessments of refugees and asylum seekers.[49]

10.3 Effective review of the substance of adverse security assessments

124. Some of the complainants refer to processes that have been put in place in the United Kingdom and Canada which provide for review of security decisions through the provision of a security cleared special advocate. This process was implemented following decisions of the European Court of Human Rights[50] and the Supreme Court of Canada[51] that found that previous processes infringed fundamental rights of asylum seekers in proceedings seeking to challenge adverse security assessments.

125. Such procedures are also in place in New Zealand.[52]

126. In the United Kingdom, the role of the special advocate is to represent the interests of a person before the Special Immigration Appeals Commission (SIAC) in circumstances where the person and his or her legal representative are excluded for security reasons.[53]

127. The United Kingdom procedure was considered in 2009 by the European Court of Human Rights in *A v United Kingdom*.[54] The Court noted that during closed sessions before the SIAC, the special advocate could make submissions on behalf of the applicant, both as regards to procedural matters, such as the need for further disclosure, and as to the substance of the case. As a general principle, the Court held that:[55]

> it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5(4) [of the European Convention on Human Rights, the equivalent of article 9(4) of the ICCPR] required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.

128. In assessing the effectiveness of the special advocate in achieving this aim, the Court said:[56]

> The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.

129. Whether the procedures observed in any particular case complied with the relevant Convention rights would need to be assessed on a case by case basis.

130. The procedures used in the United Kingdom, Canada and New Zealand allow greater scope than the procedures in Australia for a person challenging an adverse security assessment to know the basis for that assessment and to have submissions on the content of that assessment made on his or her behalf. They appear to be more consistent with the rights under article 9(4) of the ICCPR than the current procedures in place in Australia. These are issues that the Commission has dealt with in other contexts.[57] However, the structure of legislation and rules that govern how merits and judicial review occurs in Australia do not give rise to a discretionary act that the Commission can inquire into under s 11(1)(f) of the AHRC Act.

11 The children's complaints: articles 3 and 37 of the CRC

131. The child complainants, Atputha, Abinyan and Vahisan Rahavan, complain that their ongoing detention is arbitrary under article 9 of the ICCPR. An equivalent right specifically in relation to children appears at article 37(b) of the CRC which they also refer to in their complaint. Article 37(b) provides that detention of children should not be arbitrary, should be a measure of last resort, and should be for the shortest appropriate period of time.

132. The claim in relation to article 37(b) also engages article 3 of the CRC which requires that in any decision about the detention of a child their best interests must be a primary consideration.

133. The UNICEF Implementation Handbook for the Convention on the Rights of the Child provides the following guidance on article 3:[58]

> 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.

134. 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.

135. Alternatives to detention include:

(a) the grant of a bridging or substantive visa such as a protection visa;

(b) making a residence determination in favour of them and one or both of their parents;

(c) offering them resettlement in a third country.

136. Vahisan Rahavan was recognised as a refugee and on 22 December 2011 was granted a protection visa. Following the grant of his protection visa, his mother was invited by the department to sign an undertaking requesting that he remain in SIRH under her care. I find that this invitation was made with the intention of relying on the undertaking to, in effect, continue to detain Vahisan in SIRH. The department has not made any submissions about whether it considered any alternatives to the continued detention of Vahisan at SIRH.

137. Atputha and Abinyan Rahavan were also recognised as refugees and it appears that neither of them was the subject of an adverse security assessment. In my letter of 7 March 2012 setting out my preliminary views in this inquiry, I noted that it was open to the children to make an application for a protection visa and that it was also open to the Minister to grant them a protection visa pursuant to s 195A regardless of whether an application for such a visa is made. I noted that on the basis of material available to the Commission, it appeared appropriate for each of the older children to be granted a protection visa. I understand applications for protection visas had been made by Atputha and Abinyan's parents on their behalf on 20 January 2012 and that on 1 May 2012 they were both granted protection visas. Like Vahisan, they continue to reside at SIRH with their parents.

138. Section 4AA of the Migration Act confirms that children should only be detained as a measure of last resort. The reference to detention does not include a reference to a child residing at a place in accordance with a residence determination. Therefore, if it is open to make a residence determination in relation to a child in detention, such a determination should be made.

139. Issues relating to resettlement are dealt with above.

140. I consider that it is in the best interests of Atputha, Abinyan and Vahisan Rahavan to be released with their parents into the community pursuant to a visa or a residence determination, potentially with conditions attached. It may be that these interests are outweighed by other considerations. However, it does not appear that the Commonwealth has given any separate or specific consideration to whether the children could be released with their parents into the community. In particular, it does not appear that there has been any assessment of the specific security risk of alternatives to closed detention for the family and how any risk could be mitigated. Rather, it appears that the Commonwealth made a decision about the detention of the adult complainants based on advice from ASIO that they not be granted a permanent visa which resulted in the consequential detention of the children.

141. I find that there has been a failure fully to consider available alternatives to closed detention for the whole family in a way that would be consistent with the best interests of each of the children. As a result, I find that the detention of the children has also been arbitrary in breach of article 37(b) of the CRC.

142. I note that the complaint on behalf of the children potentially raises a number of aspects of article 37. However, the complainants' submissions address article 37(b) only. For this reason the material currently before the Commission does not support a broader claim.

12 Specific complaints about article 10 of the ICCPR

12.1 Mr Ketharan Thambirasa's complaint

143. Mr Ketharan Thambirasa complains that during his time in detention the Commonwealth has treated him inhumanely in breach of the protection conferred by article 10(1) of the ICCPR. He says that in August 2010 he had a meeting with an officer of the department (Mr Morris) who told him that his security clearance had arrived. He says that Mr Morris promised him that he would be granted a protection visa in three weeks. Mr Thambirasa claims that he was told to keep this information a secret and that he could contact Mr Morris at any time.

144. Three weeks later, Mr Thambirasa claims he asked to meet Mr Morris again. At that meeting, Mr Morris denied having made a promise that Mr Thambirasa would be granted a protection visa. Mr Thambirasa began a hunger strike, drinking only water in protest. Mr Thambirasa claims that on the 12th day of his hunger strike he was visited by Mr Morris and a mental health doctor. Mr Thambirasa claims that the doctor spoke on behalf of Mr Morris, who was also visiting other detainees, and that the doctor told him that his security clearance had arrived and that the application had been sent to Canberra for the Minister's signature. According to Mr Thambirasa, the doctor told him the process would take two weeks.

145. The department denies giving any assurances to Mr Thambirasa about his security assessment. The department says that it was informed of Mr Thambirasa's adverse security assessment on 10 November 2010 and notified Mr Thambirasa and his migration agent of the negative assessment on 30 November 2010.

146. The basis of this complaint is an assertion by Mr Thambirasa that he was misled about his prospects of receiving a security clearance. The factual basis for this complaint is denied by the department. I am not able to discount the possibility of a misunderstanding on the part of Mr Thambirasa on one or both of these occasions. On the basis of the material before the Commission, I find that an allegation of inhumane treatment in breach of article 10(1) of the ICCPR cannot be sustained.

12.2 Mr CA's complaint

147. Mr CA also complains that during his time in detention the Commonwealth has treated him inhumanely in breach of the protection conferred by article 10(1) of the ICCPR. In particular, he alleges that he attended a dental appointment at Perth IDC in December 2010 and understood that he was having a standard check-up but that the dentist removed four teeth during the appointment.

148. The department agrees that Mr CA attended dental appointments on 9 and 20 December 2010 which it says were in response to Mr CA's complaints of dental pain. The department contends that on 9 December 2010 the dentist determined that it was necessary to extract two wisdom teeth for relief of pain and because of 'traumatic occlusion'. The department concedes that an interpreter was not used but submits that the dentist advised that Mr CA listened to the dentist and indicated his approval for the recommended treatment and that he had the clear impression that Mr CA understood his explanation and had consented to the treatment. Further, at his follow-up appointment with the dentist on 20 December 2010, Mr CA did not express any concerns with the treatment that had been provided to him.

149. It is regrettable that an interpreter was not taken to the appointment or that the Telephone Interpreter Service was not utilised once it became clear that Mr CA needed two wisdom teeth extracted. However, on the material available to the Commission, it appears that the dentist formed a professional opinion that the teeth extractions were necessary to ensure that Mr CA's pain and suffering would be alleviated and that the dentist formed the view that the Mr CA understood and consented to the treatment. Accordingly, I find that Mr CA's allegation of inhumane treatment in breach of article 10(1) of the ICCPR cannot be sustained.

12.3 Mr Sinnathurai and Mr Shanmugarayah's complaints

150. The complaints lodged on behalf of Mr Yasikaran Sinnathurai and Mr Sasikathan Shanmugarayah attached a copy of article 10 of the ICCPR. However, the complaints did not outline how Mr Shanmugarayah or Mr Sinnathurai claimed that their human rights have been breached under article 10. The Commission asked for further details about whether specific issues were raised under article 10 but did not receive a response. I make no findings about these issues.

13 Specific complaints about articles 17 and 23 of the ICCPR

13.1 Mr CB's complaint

151. Mr CB, his wife Mrs CB and their young son were initially detained at the Christmas Island Construction Camp facility from 12 July 2009. After two months they were placed into community detention on Christmas Island from 30 September 2009 to 18 June 2010. I note that it is not clear what, if any, security clearance was obtained to permit their transfer into community detention.

152. On 23 October 2009, Mr CB was found to be a refugee through the Refugee Status Assessment (RSA) process. Mrs CB and their son were also found to be refugees through the RSA process.

153. On 19 June 2010, the family members were notified that the Minister had intervened under s 197AD and revoked the residence determination that had been made in respect of them. They were then transferred to the SIRH facility next to VIDC.

154. On 1 February 2011, Mr CB received an adverse security assessment from ASIO. He was notified of this on 7 February 2011, and was moved from SIRH to the more restrictive Fowler accommodation area within VIDC. On 8 February 2011, Mrs CB and her son were granted protection visas and released from immigration detention. On 24 April 2011, Mr CB was moved to the Hughes accommodation area within VIDC.

155. As a result of the requirement that Mr CB remain in detention, he has been separated from his family, and he and his wife and son are extremely distressed by this separation. Articles 17 and 23 of the ICCPR, relating to interference with the family, are relevant to their complaint.

156. I am conducting a separate inquiry into this complaint. I do not express any views on it in this report.

13.2 Mr Sasikathan Shanmugarayah's complaint

157. Mr Sasikathan Shanmugarayah claimed that his detention on Christmas Island caused him to be separated from his wife and daughter who are presently in Indonesia in breach of articles 17 and 23 of the ICCPR. The department claimed that there has not been arbitrary interference with Mr Shanmugarayah's family and that he could ask to be removed from Christmas Island to Indonesia at any time. I conducted a separate inquiry into this complaint and found that the Commonwealth did not arbitrarily interfere with Mr Shanmugarayah's family by detaining him on Christmas Island or in MITA.

14 Conclusion and recommendations

158. I find that the following acts amount to a breach of article 9(1) of the ICCPR:

(a) The failure by the department to ask ASIO to assess the suitability of each of the complainants referred to in paragraph 70 above for community based detention while awaiting their security clearance.

(b) The failure by the department to assess on an individual basis whether the circumstances of each individual complainant indicated that they could be placed in a less restrictive form of detention.

159. The failure of the department to take these steps raises the real possibility that each of the complainants was either detained unnecessarily or detained in a more restrictive way than their circumstances required. The detention of the complainants in these circumstances was arbitrary.

160. I also find that the failure to consider fully alternatives to closed detention for the Rahavan family in a way that included an assessment of the specific security risk of alternatives and how any risk could be mitigated amounts to a breach of articles 3 and 37(b) of the CRC.

161. 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.[59] The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.[60]

14.1 Recommendation to the Minister for Immigration and Citizenship

162. As noted in paragraph 73 above, the department has said that it has received an instruction from the Minister that 'he does not consider it to be in the public interest to allow persons with adverse security assessments to live in the Australian community and that he is not minded to consider the exercise of his intervention powers in relation to individuals within this caseload'.

163. It appears that this instruction is based on the view that 'ASIO … recommends that a residence determination allowing detention in the community not be made in relation to any individual who is the subject of an adverse security assessment'. However, this view is contrary to the information provided by ASIO about its own assessment processes and to the terms of the ASIO Act. ASIO says that a security assessment in relation to the grant of a visa is different to a security assessment in relation to a community detention placement. ASIO will only make recommendations about the particular act that an agency is considering undertaking.

164. The result of the Minister's instruction is that a person refused a visa on security grounds is precluded from consideration for community detention or other forms of community placement. However, it may be ASIO would not assess that person as a risk to security if placed in community detention or would consider that any risk could be mitigated through imposing other conditions.

Recommendation 1

The Minister for Immigration and Citizenship indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because the Department has received advice from ASIO that the person not be granted a visa on security grounds.

14.2 Recommendations to the department

165. All but three of the complainants received an adverse security assessment prior to January 2011 when there was a change in Government policy pursuant to which they were considered eligible for referral to ASIO for consideration of their suitability for community detention.

166. Ultimately, only one of the complainants, Mr CD, was referred to ASIO for an assessment of his suitability for community detention. A submission was prepared for the Minister for consideration of the exercise of his powers under s 197AB which referred to ASIO's assessment that it would not be in the public interest for a residence determination to be made in favour of Mr CD. ASIO advised that it would not be in the public interest for the Minister to intervene to place Mr CD in community detention. This advice was described as 'interim' which suggests that it may be subject to change once further information is known. It is not clear whether any submissions were made by the department about how any potential risk could be mitigated through the use of conditions the Minister could place on the residence determination.

167. It is important that an individualised assessment be undertaken in relation to each of the complainants about the level of risk that they would pose to the community if they were in a less restrictive form of detention or if they were in the community subject to conditions. If there is any risk, it is also important that an assessment is undertaken of whether there are conditions that could be imposed on a residence determination that would ameliorate or mitigate such risk. It is only once the department has such information that it will be in a position to assess properly placement options for each of the complainants.

Recommendation 2

The department refer each of the complainants to ASIO and request that ASIO provide a security assessment pursuant to s 37(1) of the ASIO Act relevant to the following prescribed administrative actions:

(a) granting the complainant a temporary visa and imposing additional conditions necessary to deal with any identified risk to security, for example, a requirement to reside at a specified location, curfews, travel restrictions, reporting requirements or sureties;

(b) making a residence determination under s 197AB of the Migration Act in favour of the complainant;

(c) making a residence determination in favour of the complainant, if necessary subject to special conditions to ameliorate any identified risk to security, for example, curfews, travel restrictions, reporting requirements or sureties.

Recommendation 3

To the extent that the security assessment carried out in Recommendation 2 would result in an adverse security assessment, the department ask ASIO to advise it of any measures that could be taken to allow the complainants to be placed in a less restrictive form of detention consistently with the requirements of national security.

168. The Commission understands that there are a number of people whose circumstances are not specifically considered in this report but who are in a similar situation to the complainants in that they continue to be held in immigration detention as a result of an adverse security assessment.[61] It is important that the recommended action in relation to the present complainants is extended to all others in comparable circumstances so that all detention is appropriately matched to the level of risk that the individuals in question pose to Australia's national security.

Recommendation 4

The department seek advice from ASIO of the kind identified in Recommendations 2 and 3 in respect of each person held in immigration detention who has received an adverse security assessment from ASIO.

169. As noted in paragraph 65 above, the circumstances of each of the complainants (and those in similar situations) meet the description of 'unique and exceptional' as that phrase is used in guidelines about cases to be referred to the Minister for consideration of the use of public interest powers (relevantly under s 195A and s 197AB). Once the department has received advice from ASIO sought in relation to Recommendations 2, 3 and 4 above, these cases should be referred to the Minister for consideration of the use of appropriate public interest powers.

Recommendation 5

As the department receives advice sought from ASIO in relation to Recommendations 2, 3 and 4, the department refer the cases of each relevant person to the Minister for consideration of the exercise of appropriate public interest powers. The submissions accompanying the referrals should include details of how any potential risk identified by ASIO can be mitigated. In the case of the Rahavan family, the submission should address what the best interests of the children require.

170. Durable solutions must be found for individuals, such as the complainants, who have been refused a substantive visa and who cannot be returned to their country of origin. The complainants cannot be returned to Sri Lanka because Australia has determined that they have a well-founded fear of persecution should they return there. Stateless people who have been given an adverse security assessment are in a similar situation.[62]

171. As noted in paragraphs 107 to 109 above, it appears that over the past two and a half years Australia has sought resettlement of the complainants in other countries, and shared with those countries some or all of the content of the adverse security assessments prepared by ASIO. However, to date, it appears that no other countries have agreed to allow the complainants to resettle there.

Recommendation 6

The Commonwealth continue actively to pursue alternatives to detention, including the prospect of third country resettlement, for each of the complainants and for other people in immigration detention who are facing the prospect of indefinite detention. The Commonwealth inform each of these individuals on a regular basis of the steps taken to secure alternatives to detention and the Commonwealth's assessment of the prospects of success of these steps.

15 Responses by the Minister and the department to my recommendations

172. On 3 July 2012 I provided a notice to the department under s 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to the complaints dealt with in this report.

173. By letter dated 23 July 2012 the Hon Chris Bowen MP, Minister for Immigration and Citizenship provided the following response to Recommendation 1:

> Response by the Minister for Immigration and Citizenship to Recommendation 1 of the Notice of Findings (Notice) by the President of the Australian Human Rights Commission under section 29(2)(a) of the *Australian Human Rights Commission Act 1986* (Cth) into human rights complaints by Sri Lankan refugees in immigration detention with adverse security assessments.
>
> **Recommendation 1**
>
> The Minister for Immigration and Citizenship indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because [the department] has received advice from ASIO that the person not be granted a visa on security grounds.
>
> Minister's Response
>
> Not accepted.
>
> My department already gives careful consideration to the most suitable placement in immigration detention of people in respect of whom the Australian Security Intelligence Organisation (ASIO) has issued an adverse security assessment.
>
> Accommodation placement decisions are made on a case-by-case basis, taking into account the person's individual level of security risk and their care needs. Placement options within the immigration detention network include, where appropriate, the least restrictive facilities, such as Immigration Residential Housing and Immigration Transit Accommodation.
>
> Accommodation placement decisions are subject to regular reviews to ensure that the placement remains appropriate, including departmental senior officer and Commonwealth Ombudsman reviews.
>
> Irrespective of the type of immigration detention facility in which a person is accommodated, every effort is made by the department and its service providers to ensure the person has access to appropriate services and support arrangements for their needs and circumstances.
>
> As a matter of policy, the Australian Government has determined that, individuals who have been assessed by ASIO to be directly or indirectly a risk to security should remain in held detention, rather than live in the community, until such time as resettlement in a third country or removal is practicable.
>
> Under current arrangements, an ASIO security assessment is requested in two circumstances:
>
> (a) to inform consideration of whether an individual is suitable for a residence determination under s197AB; and
>
> (b) in accordance with Public Interest Criterion 4002 (PIC4002), which, as the Notice recognises, is intended to protect the resident Australian community from the actions and influence of persons who might threaten the security of the nation, and therefore is a prerequisite for the grant of a protection visa.

While the uses to which the two separate security assessments are put are different, in each case ASIO is actually answering the same question – ie. whether the individual assessed presents a risk to security, as defined in the *Australian Security Intelligence Organisation Act 1979*.

In conducting a security assessment to aid consideration of an individual's suitability for community detention, ASIO does not, in fact, make a recommendation that the individual is or is not suitable to be released into the community. Rather, ASIO simply makes a recommendation that the individual does or does not present a risk to security. This is the identical question it subsequently considers when conducting a security assessment following a request under PIC4002, even though the assessment is being sought for a different purpose.

Recommendation 1 in the Notice is linked (through paragraphs 162-164) to other recommendations that, following the ASIO adverse security assessment associated with the consideration of whether an individual should receive a protection visa, the Department of Immigration and Citizenship ought to ask ASIO to conduct a further security assessment for the purpose of determining whether the individual should be eligible to live in the community.

This relies on the premise (set out in paragraphs 51-52 and paragraphs 163-164 of the Notice) that different security criteria apply to:

(a) ASIO's initial consideration of whether an individual should be permitted to live in the community; and

(b) ASIO's more detailed consideration of whether an individual should be granted a visa.

As indicated above, this is not the case.

It is true that, in the interests of detaining vulnerable individuals for the shortest practicable period of time, the initial security assessment for the purpose of informing my consideration of an individual's suitability for community detention is often faster and less intensive than the subsequent security assessment requested under PIC4002. For example, the initial security assessment does not involve an interview. Consequently, the second, more detailed, security assessment (requested under PIC4002) could theoretically yield a different outcome from the first. However, the threshold criteria for an adverse security assessment are the same in each case, as the question being asked is the same in each case.

This was recently noted by the Auditor-General in the Australian National Audit Office's report of 25 June 2012, entitled *Security Assessments of Individuals*.

The report stated:

> *In November 2011, ASIO appropriately revised its security assessment thresholds for community detention in light of the changing risk profile of the community detention cohort. The same threshold now applies across all IMA security assessments. ASIO will therefore issue an adverse security assessment in relation to community detention if the IMA was assessed as representing a direct or indirect risk to security*.[1]

1 Australian National Audit Office report no 49 2011-12, *Security Assessments of Individuals*, 25 June 2012, paragraph 3.32. Emphasis added.

Since the criteria for assessment are the same, once an individual's circumstances have been considered as part of the more comprehensive security assessment requested under PIC4002, and that person has been assessed by ASIO to present a risk to national security, a subsequent security assessment sought for the purpose of determining whether [an] individual should be eligible for community-based detention would yield the same adverse outcome (unless that individual's circumstances have materially changed in the interim).

The Notice observes that, in certain circumstances, I have discretionary non-compellable and non-delegable powers under the *Migration Act 1958* to make residence determinations or to grant visas.

Given the serious nature of the assessments by ASIO, and in light of Government policy, I am not minded to exercise these powers in respect of individuals with adverse security assessments.

174. By letter dated 23 July 2012 the department provided the following response to Recommendations 2 to 6:

Response by the Acting Secretary of the Department of Immigration and Citizenship to Recommendations 2, 3, 4, 5 and 6 of the Notice of Findings by the President of the Australian Human Rights Commission under section 29(2)(a) of the *Australian Human Rights Commission Act 1986* (Cth) into human rights complaints by Sri Lankan refugees in immigration detention with adverse security assessments.

Recommendation 2

[The department] refer each of the complainants to ASIO and request that ASIO provide a security assessment pursuant to s 37(1) of the ASIO Act relevant to the following prescribed administrative actions:

(a) granting the complainant a temporary visa and imposing additional conditions necessary to deal with any identified risk to security, for example, a requirement to reside at a specified location, curfews, travel restrictions, reporting requirements or sureties;

(b) making a residence determination under s 197AB of the Migration Act in favour of the complainant;

(c) making a residence determination in favour of the complainant, if necessary subject to special conditions to ameliorate any identified risk to security, for example, curfews, travel restrictions, reporting requirements or sureties.

DIAC Response

Not accepted.

The Australian Government has determined that, as a matter of policy, people who have been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security should remain in held detention, rather than live in the community, until such time as resettlement in a third country or removal is practicable. Accordingly, the Minister for Immigration and Citizenship has advised that he is not minded to exercise his intervention powers to release from immigration detention, or make a residence determination for, a person with an adverse security assessment.

In light of this, referring each of the complainants to ASIO for a security assessment for the purpose of the grant of a temporary visa or to determine suitability for community-based detention would serve no practical purpose.

Further, as the Minister notes in his response to Recommendation 1, the same threshold is applied to a security assessment whether it is requested for the purpose of community detention or Public Interest Criterion 4002 (PIC4002; the security requirement), with the result that recipients of an adverse security assessment for permanent visa purposes are not considered eligible for community detention.

Consequently, and in light of Government policy, once an individual's circumstances have been considered as part of the visa security assessment requested for PIC4002 purposes, and that person has been adversely assessed by ASIO – that is, they are assessed to present a direct (or indirect) risk to security within the meaning of section 4 of the ASIO Act 1979 – a subsequent security assessment for the purpose of determining that individual's suitability to reside in the community under residence determination arrangements would yield the same outcome.

Recommendation 3

To the extent that the security assessment carried out in Recommendation 2 would result in an adverse security assessment, [the department] ask ASIO to advise it of any measures that could be taken to allow the complainants to be placed in a less restrictive form of detention consistently with the requirements of national security.

DIAC Response

Not accepted.

Refer to response at Recommendation 2.

Recommendation 4

The Department seek advice from ASIO of the kind identified in Recommendations 2 and 3 in respect of each person held in immigration detention who has received an adverse security assessment from ASIO.

DIAC Response

Not accepted.

Refer to response at Recommendation 2.

Recommendation 5

As [the department] receives advice sought from ASIO in relation to Recommendations 2, 3 and 4, [the department] refer the cases of each relevant person to the Minister for consideration of the exercise of appropriate public interest powers. The submissions accompanying the referrals should include details of how any potential risk identified by ASIO can be mitigated. In the case of the Rahavan family, the submission should address what the best interests of the children require.

DIAC Response

Not accepted.

Refer to response at Recommendation 2.

In the case of the Rahavan children who are holders of protection visas, DIAC notes that, at their parents' request, they remain with them in their care as a family unit, rather than in the community with another relative or carer.

Recommendation 6

The Commonwealth continue actively to pursue alternatives to detention, including the prospect of third country resettlement, for each of the complainants and for other people in immigration detention who are facing the prospect of indefinite detention. The Commonwealth inform each of these individuals on a regular basis of the steps taken to secure alternatives to detention and the Commonwealth's assessment of the prospects of success of these steps.

DIAC Response

Noted.

DIAC is continuing its efforts to identify third country resettlement options for people in immigration detention with an adverse security assessment, noting that any options identified will be consistent with Australia's international obligations.

DIAC further notes that safe return to their country of origin may also become possible, particularly if there has been a change in their home country's situation.

DIAC will continue to inform these individuals about their immigration status resolution, including third country resettlement options.

175. I report accordingly to the Attorney-General.

Catherine Branson
President
Australian Human Rights Commission

July 2012

1 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act. On 22 October 1992, the Attorney-General made a declaration under s 47 that the CRC is an international instrument relating to human rights and freedoms for the purposes of the AHRC Act: *Human Rights and Equal Opportunity Commission Act 1986 - Declaration of the United Nations Convention on the Rights of the Child*.
2 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
3 *Inspector-General of Intelligence and Security Act 1986* (Cth), s 8.
4 Joint Select Committee on Australia's Immigration Detention Network, Final Report, March 2012, Recommendation 28 at [6.152].
5 UN Human Rights Committee, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
6 UN Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
7 *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* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.
8 *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 (the fact that the author may abscond if released into the community with not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.
9 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
10 UN Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
11 *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* [2007] UNHRC 73, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia* [2003] UNHRC 22, CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, CCPR/C/87/D/1050/2002.
12 *Report of the Working Group on Arbitrary Detention*, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].
13 UN Human Rights Committee, General Comment 8 (1982) at [4]. See also the *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, United Nations Doc E/CN.4/826/Rev.1 at [783]-[787].
14 *Mansour Ahani v Canada* [2004] UNHRC 6, UN Doc CCPR/C/80/D/1051/2002 at [10.2].
15 *Jalloh v The Netherlands* [2002] UNHRC 17, UN Doc CCPR/C/74/D/794/1998; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
16 Department of Immigration and Citizenship, Procedures Advice Manual, PAM3: Sch 4/4002 — The security requirement.
17 Legal and Constitutional Affairs Committee, Parliament of Australia, Senate Estimates Transcript, Wednesday 25 May 2011, p 113.
18 Australian Security Intelligence Organisation, *Director-General's Statement: Visa Security Assessments*, 25 May 2011, available at: http://www.asio.gov.au/Publications/Public-Statements/2011/Visa-Security-Assessments-Statement.html; see also Hansard, Senate, Legal and Constitutional Affairs Committee, Estimates, Wednesday 25 May 2011, p 107.
19 Australian Security Intelligence Organisation, *ASIO Report to Parliament 2010-11*, p 25.
20 Australian Security Intelligence Organisation, *Australian Human Rights Commission Request for Assistance: ASIO Response to Questions*, 19 October 2011.
21 Australian Security Intelligence Organisation, *Submission to Joint Select Committee on Australia's Immigration Detention Network*, 22 November 2011 at [23].
22 Legal and Constitutional Affairs Committee, Parliament of Australia, Senate Estimates Transcript, Wednesday 25 May 2011, pp 108-109.
23 Letter from the department to the Commission dated 6 June 2012, Attachment A, p 2.
24 Letter from the department to the Commission dated 17 April 2012, Attachment A, p 1.
25 Ibid.
26 Above n 23, p 2.
27 *Minister's Residence Determination Power Under s 197AB and s 197AD of the Migration Act 1958: Guidelines*, 1 September 2009 at [4.1.4].
28 Department of Immigration and Citizenship, Procedures Advice Manual, PAM3: Act – Ministerial Powers Instructions [P A098.12] section 12 Unique or exceptional circumstances.
29 *Minister's Residence Determination Power Under s 197AB and s 197AD of the Migration Act 1958: Guidelines*, 1 September 2009 at [5.1].
30 Letter from the department to the Commission dated 14 November 2011, Attachment A, p 5 and Attachment B, p 5.
31 *Re PPHF and Others and Director-General of Security* (2010) 119 ALD 407 at [10].
32 Letter from the department to the Commission dated 6 June 2012, Attachment A, p 3.
33 *Choudry v Attorney Genera*l [1999] 2 NZLR 582.
34 Department of Immigration and Citizenship, Detention Services Manual, Chapter 2 — Client placement — Client placement model.
35 Letter from the Department to the Commission dated 17 April 2012, Attachment A, p 2.
36 *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.

37 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.
38 Parliament of Australia, Senate Hansard, Wednesday 3 February 2010, p 332.
39 Letter from the department to the Commission dated 14 November 2011, Attachment A, p 4 and Attachment B, p 4.
40 Ibid.
41 Letter from the department to the Commission dated 17 April 2012, Attachment A, p 3.
42 *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 at [9.5].
43 Confirmed in *PPHF v Director General of Security* [2011] FCAFC 70.
44 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25.
45 See, for example, *Parkin v O'Sullivan* (2006) 162 FCR 444; *O'Sullivan v Parkin* [2006] FCA 1654; *O'Sullivan v Parkin* [2007] FCAFC 98; *Parkin v O'Sullivan* [2007] FCA 1647; *O'Sullivan v Parkin* (2008) 169 FCR 283; *Parkin v O'Sullivan* (2009) 260 ALR 503; *Sagar v O'Sullivan* (2011) 193 FCR 311.
46 UN Human Rights Committee, *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, No. 8, available at: http://www.unhcr.org/refworld/docid/4538840110.html at [1].
47 *Drescher v Uruguay* [1983] UNHRC 19, UN Doc CCPR/C/19/D/43/1979 at [13.2].
48 *Inspector-General of Intelligence and Security Act 1986* (Cth), s 8.
49 Joint Select Committee on Australia's Immigration Detention Network, Parliament of Australia, Final Report, March 2012, Recommendation 28 at [6.152].
50 *Chahal v United Kingdom*, ECtHR App No 22414/93 (15 November 1996).
51 *Charkaoui v Canada* [2007] 1 SCR 350.
52 *Immigration Act 2009* (NZ) ss 240-244, 252-271.
53 *Special Immigration Appeals Commission Act 1997* (UK) (SIAC Act), s 6(1).
54 *A v United Kingdom*, ECtHR App No 3455/05 (19 February 2009).
55 Ibid at [218].
56 Ibid at [220].
57 For example, see Australian Human Rights Commission, Independent Review of the Intelligence Community, April 2011 available at: http://www.humanrights.gov.au/legal/submissions/2011/20110431_intelligence.html.
58 United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child* (2008), pp 38-39.
59 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
60 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
61 For example, see Australian Human Rights Commission, *Immigration detention at Curtin: Observations from visit to Curtin Immigration Detention Centre and key concerns across the detention network*, September 2011 at [5.1], available at: http://www.humanrights.gov.au/human_rights/immigration/idc2011_curtin.html.
62 For example, see Australian Human Rights Commission, *Immigration detention at Curtin: Observations from visit to Curtin Immigration Detention Centre and key concerns across the detention network*, September 2011 at [5.2].

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