



Australian
Human Rights
Commission

Mr EL v Commonwealth of Australia
(Department of Home Affairs)

[2025] AusHRC 179

June 2025

ABN 47 996 232 602
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
National Info Service 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

The Hon Michelle Rowland MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

Pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), I attach a report of the inquiry by the former President of the Australian Human Rights Commission, Emeritus Professor Rosalind Croucher AM into a complaint by Mr EL against the Department of Home Affairs (the Department).

Mr EL is from Vietnam, and has been resident in Australia since his arrival in 1980, at the age of seven. Between 1994 and 2018, Mr EL was convicted of numerous criminal offences, which resulted in the cancellation of his visa. Upon his release from criminal custody in February 2019, he was transferred into closed immigration detention at Melbourne Immigration Transit Accommodation (as it was then known).

Mr EL has complained that his detention was arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

Although Professor Croucher acknowledged that the Department deemed Mr EL a 'high risk' due to his previous criminal convictions, she was concerned that the Department had not considered less restrictive alternatives to held detention, including community detention or bridging visas with conditions. Consequently, Professor Croucher found that the Department's failure to refer Mr EL to the Minister for consideration of an alternative to held detention under either section 195A or section 197AB of the Migration Act contributed to his detention becoming arbitrary, contrary to article 9(1) of the ICCPR. Professor Croucher recommended that the Department prepare a submission for referral of Mr EL's case to the Minister, for the Minister to consider whether to use his personal, discretionary powers to intervene in Mr EL's case.

The Department accepted the Commission's recommendation. I have set out the Department's response dated 9 September 2024 in Part 8 of this Report.

The Commission has been advised by Mr EL's representatives that Mr EL has been released from detention as of December 2024, pursuant to the High Court of Australia's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37. I note, therefore, that the Commission's

recommendation in relation to the Minister's consideration of Mr EL's detention has, in practical terms, been resolved.

In the time between the issuing of the notice making findings in this matter, and the preparation of this report, I assumed the role of President at the Australian Human Rights Commission.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'H de Kretser', written over a horizontal line.

Hugh de Kretser

President

Australian Human Rights Commission

June 2025

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1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr EL against the Commonwealth of Australia (Department of Home Affairs) (Department), alleging a breach of human rights. The inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. The Commission's decision in relation to this complaint, including its findings and recommendations, was made in July 2024. At that time, Mr EL was in immigration detention, where he had been since 26 February 2019. In December 2024, following the finalisation of this decision, Mr EL was released from detention, pursuant to the High Court of Australia's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37. The contents of this report are current as at the date the Commission provided the Department with the notice of its findings and recommendations in relation to Mr EL's complaint, during which Mr EL was still in held detention.
3. Without a visa, Mr EL is liable to be removed from Australia to Vietnam, but for various reasons, his removal has not been possible to date.
4. Mr EL complains that his detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
5. The right to liberty and freedom from arbitrary detention is not directly protected in the Australian Constitution or in legislation. As a result, there are limited avenues for an individual to challenge the lawfulness of their detention, outside seeking a writ of *habeas corpus*, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.¹
6. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights. Detention may be lawful under domestic law but still arbitrary and contrary to international human rights law.
7. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary, and proportionate on the basis of the individual's particular circumstances. There is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the immigration policy, for example the imposition of reporting obligations, sureties or other conditions, in order to avoid the conclusion that detention was 'arbitrary'.
8. This document comprises a report of the Commission's findings in relation to this inquiry and recommendations to the Commonwealth.

9. Mr EL has requested that a pseudonym be assigned to any report published by the Commission, noting that he has applied for asylum in Australia, and that this notice contains sensitive information regarding his criminal offending. Professor Croucher considered it necessary for the protection of Mr EL's privacy and human rights to make a direction under section 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

2 Summary of findings and recommendations

10. As a result of this inquiry, the previous President of the Commission, Emeritus Professor Rosalind Croucher found that the failure of the Department to refer Mr EL's case to the Minister in order for the Minister to consider whether to exercise their discretionary powers under section 195A or section 197AB of the Migration Act contributed to Mr EL's detention becoming arbitrary, contrary to article 9(1) of the ICCPR.
11. Professor Croucher made the following recommendation:

Recommendation 1

The Commission recommends that the Department prepare a submission for referral of Mr EL's case to the Minister, for the Minister to consider whether to use the personal, discretionary powers to intervene in Mr EL's case.

As set out above, Mr EL was released from immigration detention in December 2024. As such, this recommendation in relation to the Minister's consideration of Mr EL's detention has, in practical terms, been resolved.

3 Background

12. Mr EL has been resident in Australia since 1980, when he arrived in Australia from Vietnam at the age of seven years.
13. Between 1994 and 2018, Mr EL was convicted of approximately 200 offences, involving theft and burglary, drug possession, assaults, carry offensive weapon, driving offences and breaches of bail.
14. On 7 December 2017, the Department cancelled Mr EL's visa under section 501(3A) of the *Migration Act 1958* (Cth) (Migration Act).
15. Mr EL was released from criminal custody and subsequently detained under section 189(1) of the Migration Act on 26 February 2019, as he no

longer held a visa to remain in Australia. He was transferred to the Melbourne Immigration Transit Accommodation (MITA), now known as the Melbourne Immigration Detention Centre (MIDC).

16. Mr EL requested revocation of the decision to cancel his visa, but on 15 November 2019, the Department decided against revoking the cancellation. On 7 February 2020, the Administrative Appeals Tribunal (AAT) affirmed the Department's decision, but that decision was quashed by the Federal Court on 2 March 2020, and the decision was remitted to the AAT.
17. On 14 April 2021, the AAT again affirmed the decision not to revoke the cancellation of Mr EL's visa, and he sought judicial review of the decision at the Federal Court. After the Federal Court dismissed the application, Mr EL appealed to the Full Court of the Federal Court and then sought special leave to appeal to the High Court but was unsuccessful in each of those applications.
18. Accordingly, on 8 December 2022, Mr EL was referred for involuntary removal from Australia.
19. The Department informed the Commission that Mr EL has been diagnosed with Hepatitis B and D, gastric reflux, and osteoarthritis of both his left and right knee. In addition, he has also had surgery for carpal tunnel syndrome. Mr EL is also a former illicit drug user and is currently on a Methadone program (or Opioid Substitution Therapy Program (OSTP)).

3.1 Removal from Australia

20. Section 198 of the Migration Act places a duty on the Department to remove, as soon as reasonably practicable, unlawful non-citizens in certain circumstances.
21. It is the Department's policy not to remove unlawful non-citizens who are pursuing review of decisions relating to their visa application or cancellation, as Mr EL was between 20 November 2019 and 8 December 2022. Since that date, the Department has been making efforts to remove Mr EL to Vietnam.
22. On 3 March 2023, the Department lodged an application to obtain a travel document for Mr EL with the Consulate General of Australia in Ho Chi Minh City. On 20 March, advice was received that the information provided was inadequate to progress the application. The Department informed the Commission that this was because Mr EL does not have any identity documents and refuses to provide information to assist with the 'Memorandum of Understanding' process, which has resulted in delays to the issuance of a travel document.

23. On 6 April 2023, the Commission requested that the Department not take steps to remove Mr EL until it had completed its investigation into his complaint. The Department was unwilling to provide such assurance in light of section 198 of the Migration Act.
24. The Department provided a further update to the Commission on 9 January 2024. In the update, the Department informed the Commission that:

In the most recent interview on 12 October 2023, Mr [EL] had not been able to provide any address in Vietnam for either himself or other family members, and while he was co-operative, he continues to be involuntary towards his removal.

On 22 November 2023, further information was identified through archived files of family members. This information has been sent to post for their consideration. The enquiry is currently being progressed with Vietnamese Ministry of Public Security – Immigration Department (MPSI).
25. On 8 February 2024, Mr EL’s representative contacted the Commission with the information that Mr EL had been told by the Department that a passport had been secured for him, and that his removal from Australia was due to occur the following week. His representative also informed the Commission that Mr EL would be lodging an application for a protection visa shortly, which was likely to delay the proposed removal.
26. The Commission was further informed by the representative on 26 February 2024 that Mr EL’s removal had been cancelled while the Department considered his protection visa application.
27. Since issuing the preliminary view in relation to Mr EL’s complaint, the Commission has been informed that the Department is now considering whether Mr EL’s visa application could be refused pursuant to sections 36(1C)(b) and 36(2C)(b)(i) of the Migration Act, on the basis that he is a danger to the Australian community, or to Australia’s security.

4 Legal Framework

4.1 Functions of the Commission

28. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with, or contrary to, any human right.
29. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is

inconsistent with, or contrary to, any human right.

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

4.2 What is an 'act' or 'practice'

31. The terms 'act' and 'practice' are defined in section 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
32. 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.
33. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.²

4.3 What is a human right?

34. The phrase 'human rights' is defined in section 3(1) of the AHRC Act to include, among others, the rights and freedoms recognised in the ICCPR.

5 Ministerial intervention powers

35. At the time of his detention, Mr EL was an unlawful non-citizen within the meaning of the Migration Act, which required that he be detained.
36. Mr EL is unable to make a visa application due to the legislative bar imposed by section 501E of the Migration Act.
37. There are a number of powers that the Minister could exercise either to grant a visa, or to allow the detention in a less restrictive manner than in a closed immigration detention centre.
38. Section 197AB of the Migration Act permits the Minister, where the Minister thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. The residence determination may be made subject to other conditions such as reporting requirements.
39. In addition to the power to make a residence determination under section 197AB, the Minister also has a discretionary non-compellable power under section 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account

their specific circumstances.

40. While the Minister is not limited with respect to the subclass of visa granted pursuant to section 195A, the most common type of visa granted in the Commission's experience is a Bridging E visa.
41. In addition, the Minister also has a personal, discretionary power conferred by section 501J of the Migration Act, to substitute a more favourable decision for that of the AAT. This power is enlivened by the fact that Mr EL had a decision affirmed by the AAT on 14 April 2021, not to revoke the cancellation of his visa.
42. Again, the Minister is not limited to any particular visa subclass when substituting a more favourable decision.
43. A ministerial instruction has been issued with respect to each of these discretionary powers available to the Minister. Presently, the relevant instructions or guidelines are as follows:
 - 'Guidelines on Minister's detention intervention power (s195A of the Migration Act 1958)' as signed in November 2016 (the 195A Guidelines)³
 - 'Minister for Immigration and Border Protection's residence determination power under section 197AB and section 197AD of the Migration Act 1958' as signed on 10 October 2017 (the 197AB Guidelines)⁴
 - 'Minister's guidelines on ministerial powers (s351, s417 and s501J)' as signed on 11 March 2016 (the 501J Guidelines)⁵
44. The 195A Guidelines include as criteria for referral to the Minister:
 - the person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department.
 - there are strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or permanent resident), or there is an impact on the best interests of a child in Australia.
 - the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable

...

- there are other compelling or compassionate circumstances which justify the consideration of the use of my public interest powers and there is no other intervention power available to grant a visa to the person.

45. The 197AB Guidelines state:

priority cases that are to be referred to me are detainees who arrived in Australia before 1 January 2014 and to whom the following circumstances apply:

- unaccompanied minors

I will also consider families and single adults if they have any of the following circumstances:

- disabilities or congenital illnesses requiring ongoing intervention;
- diagnosed Tuberculosis where supervision of medication dispensing is required;
- ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention; and
- elderly detainees requiring ongoing intervention.

I will also consider cases where:

- there are unique or exceptional circumstances; ...

46. The 501J Guidelines state:

Cases that have one or more unique or exceptional circumstances, such as those described below, may be referred to me for possible consideration of the use of my intervention powers:

...

- compassionate circumstances regarding the age and/or health and/or psychological state of the person that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to the person

...

- a person's particular circumstances or personal characteristics provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity if they return to their country of origin, but the mistreatment does not meet the criteria for the grant of any type of protection visa. For

example, systematic harassment or denial of basic rights available to others in their country, or the person has experienced torture or trauma in their country of origin and is likely to experience further trauma if returned to that country

- the person is excluded from the grant of a protection visa or has had a protection visa cancelled or refused on character grounds and their circumstances have been assessed as engaging Australia's non-refoulement obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm as provided in section 36(2A) of the Act.

47. These powers in the context of detainees who had visas cancelled or refused, and the legislative framework within the Migration Act regarding the character test, were outlined in the Commission's 2021 report, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*.⁶
48. Specifically, that report highlighted that the 195A Guidelines and the 197AB Guidelines exclude referral of cases where the person does not meet the character test, unless there are exceptional circumstances.⁷ The recommendation was made to amend the guidelines to allow for all people in immigration detention to be referred to the Minister, regardless of whether they have had a visa refused or cancelled under section 501.⁸
49. Each set of guidelines must now be viewed in light of the High Court's assessment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs*,⁹ that the Ministerial Instructions used by the Department exceeded the statutory limitation of the power invested in the Minister by inviting Departmental officers to evaluate what is in the public interest.¹⁰ The criticisms levelled by the Court on the 501J Guidelines may equally apply to the 195A Guidelines and 197AB Guidelines, and the Commission understands that work is underway to revise them.
50. Since November 2023, the Department has also utilised the Bridging (Removal Pending) visa (BVR) in order to release detainees whose removal from Australia is not practicable in the reasonably foreseeable future.

6 Arbitrary detention

51. Mr EL complains about his detention from 26 February 2019 when he was detained in closed immigration detention. This requires consideration to be given to whether his detention is 'arbitrary' contrary to article 9(1) of

the ICCPR.

6.1 Law on article 9 of the ICCPR

52. Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

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

- 'detention' includes immigration detention¹¹
- 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 system¹²
- 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 predictability¹³
- detention should not continue beyond the period for which a State party can provide appropriate justification.¹⁴

54. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR Committee) found detention for a period of 2 months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.¹⁵

55. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.¹⁶

56. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the UN HR Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable,

necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.¹⁷

57. 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.¹⁸ A similar view has been expressed by the UN HR Committee, which has said:

if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law ... information of the reasons must be given ... and court control of the detention must be available ... as well as compensation in the case of a breach.¹⁹

58. 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.²⁰
59. A short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, closed detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.²¹
60. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, closed immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth) in order to avoid being arbitrary.²²
61. Accordingly, where alternative places or modes of detention that impose

a lesser restriction on a person's liberty are reasonably available, and in the absence of particular reasons specific to the individual, prolonged detention in an immigration detention centre may be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.

62. It is therefore necessary to consider whether the detention of Mr EL in a closed immigration facility can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

6.2 Act or practice of the Commonwealth

63. The act or practice relevant to Mr EL's complaint is the failure of the Department to refer his case to the Minister for consideration by the Minister to use his personal powers to allow Mr EL to reside in the community, either in community detention, or on a visa, while steps are taken to give effect to the obligation to remove him.

6.3 Consideration

64. In response to Mr EL's arbitrary detention complaint, the Department informed the Commission that the reason for his detention was that, as a person who did not hold a visa to remain in Australia, he was liable to be detained under section 189(1) of the Migration Act. They also stated that he remained in held detention for the purpose of being involuntarily removed from Australia.
65. The Department informed the Commission that Mr EL's detention was being reviewed at regular intervals to ensure that his placement remained appropriate, and to consider new information or barriers to case progression.
66. The Department also responded to indicate that Mr EL is considered a high risk of harm to the community, through the application of their risk assessment tool.
67. There are two tools used by the Department and Serco to assess risk with respect to detainees, and their suitability for release into the community.
68. The Community Protection Assessment Tool (CPAT) is a risk-based placement tool used by the Department to help make assessments of the suitability of detainees for release into the community.²³ The CPAT results in a risk category or 'tier' that corresponds to a recommended placement

for a detainee.

69. The Security Risk Assessment Tool (SRAT) is a document produced by Serco which uses a series of risk indicators which then impact the placement of a detainee within the immigration detention network, and, for example, whether or not restraints are used by Serco on transfers within and outside of immigration detention.
70. Issues with respect to the quality of risk assessments arising from the CPAT and SRAT have been discussed in previous Commission reports.²⁴
71. The CPATs conducted regarding Mr EL have all recommended a tier 3 held detention placement. This placement recommendation stems from the 'high' risk rating assigned to his criminal profile.
72. The most recent SRAT conducted about Mr EL identifies him as 'high' risk for aggression/violence and criminal profile and 'low' risk for demonstration, escape and self-harm. His placement and escort risk profiles are both 'high'. Low numbers of incidents including for contraband, minor damage, minor disturbances and minor assaults appear on the SRAT but limited information about what was involved in each is available.
73. While the Commission has not been provided with a complete list of the offences for which Mr EL has been convicted, according to the AAT decision his record includes multiple offences involving breaches of bail and other court orders.
74. The medical evidence provided supports the Department's contention that Mr EL's conditions were able to be managed appropriately in the detention environment.
75. In their first assessment of Mr EL's detention under section 486O of the Migration Act tabled in Parliament on 27 October 2021, the Commonwealth Ombudsman noted that Mr EL had been identified as a detainee who would be at risk if there were a COVID-19 outbreak in the detention centre due to his health issues. The Ombudsman reminded the Commonwealth of its duty of care to detainees.
76. A second assessment was tabled on 23 March 2023 without any additional material of relevance. No recommendations were made by the Commonwealth Ombudsman in either assessment.
77. Between 26 February 2019 and 8 December 2022, Mr EL had legal proceedings on foot – a revocation request with the Department, and merits and judicial review. During that time, therefore, no plans for his removal were underway.

78. Case reviews provided by the Department during this time include the notation:

There has been no case progress this period. Mr [EL] has ongoing JR lodged on 20/12/2021.

...

Planned next month:

Monitor JR appeal outcome

79. For Mr EL's detention not to be considered arbitrary during this particular period of time, Professor Croucher expected to see the Department deliberating over the prolonged nature of his detention. By the date of this particular case review (8 July 2022), Mr EL had been detained for over 3 years.
80. Professor Croucher acknowledged that Mr EL was deemed a high risk based on an extensive criminal history, and that he had convictions based on breaches of bail and other court orders. The AAT found that there was a 'real and significant' risk that Mr EL may relapse back into drug use, and that if that occurred, his risk of engaging in offending similar to his previous offending was 'extremely high'.
81. However, the Department did not consider the option of community detention (which can be imposed with conditions suited to the individual circumstances of the detainee), or of a Bridging E visa with conditions. Had these options been properly considered, and discounted, that may have been sufficient to demonstrate that his detention was necessary, reasonable and proportionate. The case reviews relied upon by the Department merely considered whether Mr EL's placement remained appropriate, rather than considering whether detention was necessary, given alternatives available.
82. As discussed in the Commission's report, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*,²⁵ there are several other conditions that can be imposed on various visas under immigration legislation in Australia. For example, the *Migration Regulations 1994 (Cth)*²⁶ (the Migration Regulations) prescribe a number of conditions applicable to particular visas. In addition to compulsory conditions for particular visas, the type and number of conditions can also be tailored to the particular visa recipient. As a residence determination is not attached to a visa, there are no visa conditions prescribed for such purposes.
83. The Commission considers that there are a number of existing conditions prescribed for the purposes of visas granted under the Migration Act that could appropriately be applied to a person issued with a residence determination. These are illustrative of the types of conditions that could

be imposed to manage any risk, real or perceived, to the community and are not exhaustive:

- be prevented from working (condition 8101)
- be limited to a prescribed type and amount of work (conditions 8102–8110)
- obtain approval from the Department to take up specified employment (condition 8551)
- be of good behaviour (condition 8303) and not engage in criminal conduct (condition 8564)
- not associate or communicate with certain entities or prescribed organisations (condition 8556)
- report within a specified time and place (conditions 8401–8402)
- notify the Department of the person’s residential address (condition 8513) or any change in that address (condition 8565)
- make satisfactory arrangement to obtain a passport (condition 8510)
- be required to leave Australia by a specified date (condition 8512).

84. A number of these conditions are mandatory for the grant of a BVR,²⁷ with the addition that conditions of electronic monitoring and curfews must be imposed unless the Minister is satisfied that the visa holder does not pose a risk to the community.²⁸
85. The Department relied solely on their assessment of Mr EL’s risk to justify his detention during this time, without seeking to balance that risk against his right not to be arbitrarily detained.
86. Since 8 December 2022, Mr EL has been on an involuntary removal pathway. The Department is obliged to remove him as soon as reasonably practicable. This obligation has now been further delayed by Mr EL’s protection visa application.
87. The material before Professor Croucher did not suggest to her that Mr EL’s detention was unlawful within the meaning given to indefinite detention considered by the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, nor in the more recent case of *ASF17 v Commonwealth* [2024] HCA 17.

88. These cases can be distinguished due to the fact that, first, Mr EL does not have the benefit of a protection finding within the meaning of section 197C of the Migration Act; and secondly, it appears that Mr EL has the capacity to cooperate with attempts to remove him from Australia and that if he provided that cooperation his removal would be reasonably capable of being achieved.
89. Professor Croucher considered it reasonable therefore that the Department would hold the view that removal of Mr EL was reasonably practicable in the foreseeable future, if he is found not to be owed protection obligations as a refugee or under Australia's complementary protection framework.
90. The test of arbitrariness, however, is not equivalent to that of lawfulness, and Mr EL's removal pathway has already been of over one year's duration, with no end date in sight.
91. The UN HR Committee has found detention not to be arbitrary in *Jalloh v The Netherlands* where there were 'reasonable prospects for expulsion', and the complainant had a history of evading expulsion.²⁹ Mr EL has a history of breaching bail and other court orders, and he has indicated since 8 December 2022 that he is unwilling to be voluntarily removed from Australia. However, he does not have a history of evading expulsion from Australia as he has not been afforded any opportunity to demonstrate that he would be willing to comply with conditions placed on his release from detention. Mr EL's most recent CPAT assessed him as being of medium risk of not engaging with the Department, but it is difficult to see what information has led to this rating. Under the heading, 'Engagement with Status Resolution', the following appears: 'Long term in Australia (greater than 10 years). Arrived in 1980 ...'. It was noted that Mr EL provided consistent identity information to the detaining officer during his intake, and that no issues in detention were identified on the CPAT.
92. Had the Department considered an alternative to held detention for Mr EL between 26 February 2019 and 8 December 2022, it might have been easier to gauge whether his subsequent detention was necessary for the purpose of preparing for his removal, based on his compliance with any conditions imposed upon him during that time. For example, if he had been considered for a Bridging E visa or community detention with condition 8510 or 8512 imposed, then any failure on his behalf to make arrangements to obtain a passport and depart Australia, could have resulted in the cancellation of his visa, or the revocation of a residence determination.
93. Professor Croucher was concerned that the Department did not appear to have considered these possibilities. Mr EL was on an involuntary pathway towards removal for over one year prior to his lodgement of a protection visa application. Case reviews provided by the Department to the Commission demonstrate that Mr EL's detention was being regularly

reviewed by the Department. This review includes a Status Resolution Officer seeking updates from 'removals', but a note appears on the most recent case review: 'At this stage minimal intervention is required as Mr [EL] is on invol removal pathway with no pending immi matters with department'. It was inferred from this that the intention of Status Resolution was to take no action with respect to Mr EL's ongoing detention while his removal was in progress. No consideration as to what duration this could be appears on the case review. Similarly, Mr EL's most recent CPAT assesses him as not being 'removal ready'.

94. On 4 March 2024, Professor Croucher wrote to the Department, informing them of her preliminary view of Mr EL's complaint. The Department responded by letter dated 19 June 2024, stating that, in its view, 'it has adequately demonstrated that it adhered to its legislative, policy and procedural requirements'.
95. For the reasons set out above, Professor Croucher found that Mr EL's detention had become arbitrary, contrary to article 9(1) of the ICCPR. The relevant act or practice of the Commonwealth is the failure of the Department to consider referring Mr EL to the Minister for consideration of an alternative to held detention under either section 195A or section 197AB of the Migration Act.
96. It is further noted that Mr EL has a serious and chronic health condition. The AAT has previously made findings that:
 - Mr EL suffers from Hepatitis B and D, was previously drug addicted, and has had surgery for carpal tunnel syndrome³⁰
 - Mr EL takes anti-viral medication for management of his conditions³¹
 - without anti-viral medication on an ongoing basis there is a risk Mr EL will suffer a worsening of his present condition including cirrhosis, joint pain and potentially liver failure or cancer with the possibility of an earlier than expected death³²
 - while the appropriate medication is available in Vietnam, Mr EL will not have financial means to afford to pay for it, and cannot access it through a social health insurance scheme, therefore is unlikely to have access to anti-viral medication in Vietnam³³
 - Mr EL is unlikely to have access to mental health services, and may be more likely to relapse back into drug use³⁴
 - Mr EL is unlikely to be able to obtain post-surgery follow up for carpal tunnel syndrome.³⁵

97. While Professor Croucher’s finding that Mr EL’s detention had become arbitrary is based on a failure to refer under sections 195A or 197AB, she noted that Mr EL’s circumstances also appeared to fall within the scope of the section 501J guidelines outlined at paragraph 41.
98. The Department, in its response to Professor Croucher’s preliminary view, indicated that Mr EL’s case did not enliven section 501J, because his application for a protection visa remained ongoing. Professor Croucher referred to the decision of the AAT dated 14 April 2021 which, in her view, did have the effect of enlivening the Minister’s discretion under this section.

7 Recommendations

99. 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.³⁶ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.³⁷ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.³⁸

Recommendation 1

The Commission recommends that the Department prepare a submission for referral of Mr EL’s case to the Minister, for the Minister to consider whether to use his personal, discretionary powers to intervene in Mr EL’s case.

As set out above, Mr EL was released from immigration detention in December 2024. As such, this recommendation in relation to the Minister’s consideration of Mr EL’s detention has, in practical terms, been resolved.

8 The Department’s response to the Commission’s findings and recommendations

100. On 11 July 2024, Professor Croucher provided the Department with a notice of her findings and recommendations.
101. On 9 September 2024, the Department provided the following response to Professor Croucher’s findings and recommendations:

The Department of Home Affairs (the Department) values the role of the Australian Human Rights Commission (the Commission) to inquire into

human rights complaints and acknowledges the findings identified in this report and the recommendations made by the President of the Commission.

The Department does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, article 9(1) of the *International Covenant on Civil and Political Rights*.

Recommendation 1 - Agree

The Commission recommends that the Department prepare a submission for referral of Mr EL's case to the Minister, for the Minister to consider whether to use the personal, discretionary powers to intervene in Mr EL's case.

The Department will refer Mr EL's case to the Minister under sections 195A and/or 197AB of the *Migration Act 1958*.

102. I report accordingly to the Attorney-General.



Hugh de Kretser
President
Australian Human Rights Commission
June 2025

Endnotes

- ¹ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154.
- ² See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Note in particular 212–3 and 214–5.
- ³ Accessed on LEGENDcom.
- ⁴ Accessed on LEGENDcom.
- ⁵ Accessed on LEGENDcom.
- ⁶ [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, 21-24.
- ⁷ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, 36.
- ⁸ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, 94.
- ⁹ [2023] HCA 10.
- ¹⁰ *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs* [2023] HCA 10, [38].
- ¹¹ UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, *Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); UN Human Rights Committee, *Communication No 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) (*C v Australia*); UN Human Rights Committee, *Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (2003) (*Baban v Australia*).
- ¹² UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014) [18]; UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).
- ¹³ *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee, *Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) (*Van Alphen v The Netherlands*); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) (*Spakmo v Norway*).
- ¹⁴ UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- ¹⁵ *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- ¹⁶ *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communication No 1255,1256,1259,1260,1266,1268,1270,1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (2007) (*Shams & Ors v Australia*); *Baban v Australia*, CCPR/C/78/D/1014/2001; UN Human Rights Committee, *Communication No 1050/2002*, 87th sess, CCPR/C/87/D/1050/2002 (2006) (*D and E and their two children v Australia*).

- ¹⁷ UN Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 [18].
- ¹⁸ Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 [77].
- ¹⁹ UN Human Rights Committee, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons)*, 60th sess, UN Doc HRI/GEN/1/Rev.1 (1982) [4]. See also UN Commission on Human Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc E/CN.4/826/Rev.1 (1962) [783]–[787].
- ²⁰ UN Human Rights Committee, *Communication No 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (2004) ('Mansour Ahani v Canada') [10.2].
- ²¹ UN Human Rights Committee, Communication No. 794/1998, 74th sess, UN Doc CCPR/C/74/D/794/1998 (2002) ('Jalloh v The Netherlands') [8.2]; *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001.
- ²² UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- ²³ Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, August 2016, p 52, at <https://www.homeaffairs.gov.au/reports-and-pubs/files/dcr-final-report.pdf>.
- ²⁴ For example, see the discussion of the SRAT contained within Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130, pp 34-41.
- ²⁵ [2021] AusHRC 141, 24 [5.2(c)].
- ²⁶ Pursuant to s 41(1) of the *Migration Act 1958* (Cth).
- ²⁷ Subcl 070.612(1) of Schedule 2 to the Migration Regulations 1994 (Cth).
- ²⁸ Subcl 070.612A(1)-(2) of Schedule 2 to the Migration Regulations 1994 (Cth).
- ²⁹ *Jalloh v The Netherlands*, UN Doc CCPR/C/74/D/794/1998 [8.2].
- ³⁰ *HRZN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1035, [115]-[117], [119].
- ³¹ *HRZN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1035, [115].
- ³² *HRZN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1035, [116].
- ³³ *HRZN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1035, [124].
- ³⁴ *HRZN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1035, [133]-[134].
- ³⁵ *HRZN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1035, [115] – [135].
- ³⁶ *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act'), s 29(2)(a).
- ³⁷ AHRC Act, s 29(2)(b).
- ³⁸ AHRC Act, s 29(2)(c).