



**Australian Human  
Rights Commission**

# **Ms BH v Commonwealth of Australia (Department of Home Affairs)**

**[2025] AusHRC 189**

September 2025



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## Australian Human Rights Commission

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

Dear Attorney

I have completed my inquiry, pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into the human rights complaint of Ms BH, alleging a breach of her human rights by the Department of Home Affairs (Department).

Ms BH fled from New Zealand to Australia in March 2009 because of a real risk that she may be killed by criminal networks in New Zealand. She absconded from immigration detention in September 2010 because she was concerned that her involuntary removal to New Zealand was imminent. While in the community, Ms BH gave birth to a son who is an Australian citizen. In August 2015, Ms BH was located and returned to closed immigration detention and in early 2016 she was seriously assaulted while in detention. A protection finding was made in Ms BH's favour in December 2017, however, Ms BH remained in immigration detention. While in immigration detention, Ms BH complained repeatedly that she faced a real risk of harm. In September 2019, the Administrative Appeals Tribunal found that Ms BH was 'at risk in detention of injury as a result of the very circumstances which led to the [protection] finding', and that her continued detention 'would keep her in a dangerous environment'. Although two portfolio Ministers who personally considered Ms BH's case accepted the Tribunal's findings, Ms BH's detention continued until she agreed to be returned to New Zealand in January 2023. She said that she eventually agreed to return to New Zealand because she feared for her life in immigration detention in Australia.

As a result of this inquiry, I have found that Ms BH's human rights were breached in three respects.

First, the acts of the Department, or its service provider Serco, to place two alleged perpetrators of violence against Ms BH back into an open compound with her within two weeks of the attack, and without an appropriate risk assessment, was contrary to Ms BH's rights under article 10(1) of the ICCPR. That conduct failed to treat Ms BH with humanity and respect for her dignity as a person deprived of her liberty. The subsequent inaction of the Department and portfolio Ministers in response to Ms BH's expressed fears for her safety in detention was also contrary to article 10(1).

Secondly, Ms BH's prolonged detention was arbitrary, contrary to her rights under article 9 of the ICCPR. Appropriate available alternatives were not pursued, including consideration of less restrictive forms of detention, the grant of a temporary visa subject to conditions that had been determined to be appropriate in Ms BH's case by the Tribunal, or the grant of a protection visa. Further, I consider that Ms BH's detention was unlawful for a period of 17 months from 12 August 2021 until she was removed from Australia on 10 January 2023 based on the decision of the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137.

Thirdly, Ms BH's prolonged detention also amounted to arbitrary interference with her family, in breach of articles 17 and 23 of the ICCPR.

On 25 October 2024, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 6 January 2025. That response can be found in Part 8 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J. King', with a large, stylized flourish at the end.

James King  
**Delegate of the President**  
Australian Human Rights Commission  
August 2025

# 1. Introduction to this inquiry

1. The Australian Human Rights Commission (**Commission**) has conducted an inquiry into a complaint made by Ms BH alleging breaches of her human rights by acts or practices engaged in by or on behalf of the Commonwealth of Australia or under an enactment, specifically, by the Department of Home Affairs (**Department**) and officers and service providers under the *Migration Act 1958* (Cth) (**Migration Act**).
2. The inquiry was undertaken pursuant to ss 11(1)(f) and (p) and s 20(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).
3. Ms BH, a national of New Zealand, fled to Australia in March 2009 because of a real risk that she may be killed in New Zealand. Between 10 August 2015 and 10 January 2023, a period of seven years and five months, she was detained by the Commonwealth in a closed immigration detention centre in Australia.
4. On 2 June 2016, Ms BH complained to the Commission that the Commonwealth had breached and was continuing to breach her human rights. In particular:
  - (a) Ms BH alleges that the Commonwealth was subjecting her to arbitrary detention contrary to article 9(1) of the International Covenant on Civil and Political Rights (**ICCPR**).
  - (b) Ms BH alleges that the Commonwealth breached her right to security of person and her right to be treated with humanity and with respect for the inherent dignity of the human person contrary to articles 9(1) and 10(1) of the ICCPR. She alleges that the Department failed to provide her with a safe place of detention at Villawood Immigration Detention Centre (**VIDC**). She alleges that, on 25 February 2016, she was physically assaulted in her bedroom in the Banksia compound of VIDC by two female detainees from New Zealand. The incident was classified as ‘major serious’ by the Department and she was taken to the Fairfield Hospital for assessment and treatment. On the same morning, the

same perpetrators encountered the Detention Service Officer (**DSO**) on duty as she was writing up her report of the incident, and threatened the DSO to such an extent that she called for protection for herself. SIS Intel assessed the risk of a further assault on Ms BH as 'PROBABLE'. Within two weeks, the alleged perpetrators were returned to the compound with Ms BH.

- (c) Ms BH alleges that the Commonwealth subjected her to arbitrary interference with her family contrary to articles 17(1) and 23 of the ICCPR.
5. On 18 December 2017, the Commonwealth recognised Ms BH as a person in respect of whom Australia has protection obligations. As the determination of protection status is declaratory rather than constitutive, and Ms BH satisfied the international law criteria for complementary protection at the time of her arrival in Australia in March 2009, she was entitled to complementary protection at all material times.
  6. During the course of the inquiry, I became aware of statements apparently made by or on behalf of the Commonwealth to the Federal Court of Australia to the effect that the Executive Government intended to remove Ms BH to New Zealand in circumstances where the Minister for Home Affairs accepted that to do so would risk irreparable harm including her death.<sup>1</sup> I sought an assurance from the Department that Ms BH would not be removed from Australia until the Commission has finished its inquiry into her complaint, unless she asks the Minister, in writing, to be so removed. On 23 March 2021, the Department informed the Commission that Ms BH 'is not currently on a removal pathway as she has unresolved visa related matters', and the Department 'will not remove [her] until those matters are finalised'.
  7. On 10 January 2023, Ms BH was voluntarily removed to New Zealand, having asked the Minister in writing on 7 December 2022 to be so removed. During a removal planning interview on that date, Ms BH said that she remains 'fearful, however [I] need to get out of detention. My life is in danger in detention.'
  8. Given that Australia owes protection obligations in respect of Ms BH and having regard to all the circumstances, I was satisfied that the preservation of her anonymity is necessary to protect

her privacy and human rights, and I made a direction under s 14(2) of the AHRC Act prohibiting the disclosure of her identity as a complainant to the Commission.

9. As a result of the inquiry, I find that the following acts and practices of the Commonwealth were inconsistent with and contrary to Ms BH's rights under article 10(1) of the ICCPR:
  - (a) the decision of the Department, or its service provider Serco, to place two alleged perpetrators back into an open compound with Ms BH within two weeks of an alleged serious attack on her, without undertaking a documented risk assessment process or taking other adequate measures to ensure she is safe in detention, in circumstances where the same perpetrators had threatened a Detainee Service Officer to such an extent that the DSO called for protection for herself and SIS Intel had assessed the risk of a further assault on Ms BH by those perpetrators as 'PROBABLE';
  - (b) the inaction of the Department and portfolio Ministers in response to Ms BH's expressed fears for her safety, and to her apparent risk of serious harm from her ongoing detention.
  
10. As a result of the inquiry, I find that the following acts and practices of the Commonwealth were inconsistent with and contrary to Ms BH's rights under articles 9(1), 17(1), and 23 of the ICCPR:
  - (a) the repeated failure by the Department to refer Ms BH to the Minister for consideration of less restrictive forms of detention in circumstances where the Tribunal had found that Ms BH would abide by bridging visa conditions (including compliance with Australian law) upon security being given;
  - (b) the decision of Minister Dutton on 23 July 2020 to refuse a protection visa to Ms BH knowing that at that time Australian law required her removal to New Zealand in circumstances where the Minister accepted that to do so would risk irreparable harm to her including her death;
  - (c) the extremely prolonged nature of her detention having regard to any objective assessment of the risk she posed to

the community and the available options for managing any risk in community-based detention;

- (d) the unlawfulness of Ms BH's detention for a period of 17 months from 12 August 2021 until she was removed from Australia on 10 January 2023 in circumstances where:
  - (i) Ms BH had a protection finding in her favour and the Migration Act prohibited her from being returned to New Zealand;
  - (ii) the Minister acknowledged that there was no known prospect of removing Ms BH to any other country;
  - (iii) her substantive visa application was finally determined and she faced the prospect of indefinite detention.

- 11. As a result of these findings, I make a number of recommendations described in more detail at the end of this report.

## 2. Background and migration history

12. Ms BH's migration history in Australia is lengthy and complicated. It is not necessary for the purposes of this inquiry to canvass it fully. Its most pertinent aspects are set out below.
13. In forming my view about Ms BH's circumstances, I have had regard to the findings made by the then Administrative Appeals Tribunal (now the Administrative Review Tribunal) (**Tribunal**) in the course of its reviews of decisions relating to Ms BH's visa applications. Under Australian law, the Tribunal is an independent body established by the federal Parliament to review the merits of decisions of Commonwealth officers within its jurisdiction. A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, must for all purposes relevant to this inquiry be deemed to be a decision of that person.<sup>2</sup>
14. Ms BH is a national of New Zealand. On 28 December 1992, when she was 14 years old, she first arrived in Australia pursuant to the 1973 Trans-Tasman Travel Arrangement. Between 1992 and 2009, she travelled from and to Australia on numerous occasions. From 1 September 1994, the entry of New Zealand nationals to Australia was regulated by the grant of special category visas on the presentation of a valid New Zealand passport and incoming passenger card to immigration officials upon arrival. Ms BH was granted numerous such visas between 1994 and 2009.
15. On 19 March 2009, Ms BH most recently arrived lawfully in Australia, having fled New Zealand because she faced a real risk of significant harm due to a bounty offered for her murder by criminal networks in New Zealand. Upon her arrival in Australia, she presented a New Zealand passport in a false identity, and was granted a special category visa. Although not a refugee under the Refugee Convention as amended, Ms BH was entitled to complementary protection under the ICCPR.<sup>3</sup> At the time of her arrival, Australian law did not recognise complementary protection as a criterion for the grant of a protection visa, and she did not apply for a protection visa.

16. In early August 2010, Ms BH was arrested by the Northern Territory Police for possession of cannabis and a utensil for administering it, and in relation to a false identity she gave to the police at the time of her arrest.
17. On 24 August 2010, the Department issued Ms BH with a notice of intention to consider cancellation of her special category visa.
18. In a statement dated 26 August 2010, Ms BH responded to that notice, including by making a protection claim to the effect that she came to Australia in March 2009 because she was in grave danger and feared for her life in New Zealand due to a bounty of some \$100,000 NZD that a named person had offered to criminal gangs for her murder.
19. On 10 September 2010, Ms BH was convicted by the NT Magistrates Court at Darwin of certain minor offences, for which she was sentenced to 28 days' imprisonment (wholly backdated) and fined \$250. On the same date, a delegate of the Minister decided to cancel her special category visa under s 109 of the Migration Act for providing incorrect information on her incoming passenger card in March 2009. She was detained at the Northern Immigration Detention Centre and transferred to the Botanic Gardens Apartments as an alternative place of detention.
20. On or about 13 September 2010, Ms BH absconded from detention. She claims that she absconded because she was advised that she could not satisfy the criteria for a protection visa and her involuntary removal to New Zealand was imminent. She claims that she was terrified of being returned to New Zealand. Ms BH proceeded to live in the Australian community for five years. During that time, she gave birth to a son who is an Australian citizen.
21. On 24 March 2012, the Parliament amended the Migration Act to provide for complementary protection as a criterion for the grant of a protection visa.
22. On 10 August 2015, Ms BH was located by officers of the Department and detained, and she was held in closed immigration detention at Villawood Immigration Detention Centre.

23. On 21 September 2015, Ms BH made a valid application for a protection visa, which included claims that were broadly consistent with the protection claims she had made in her written statement in response to the notice of intention to consider cancellation of her special category visa in late 2010.
24. Ms BH pursued a number of legal avenues while in immigration detention, including making an application for a protection visa as noted above. She also made multiple applications for bridging visas. The most significant legal proceedings are discussed below.
25. On 5 April 2017, Ms BH made a valid application for a Subclass 050 (Bridging (General)) visa, commonly referred to as a Bridging visa E.
26. On 20 April 2017, the Tribunal reviewed a decision of a delegate of the Minister to refuse to grant that bridging visa to Ms BH. The Tribunal remitted the matter for reconsideration with the direction that Ms BH meets the criterion in clause 050.223 of Sch 2 to the Migration Regulations.<sup>4</sup> The Tribunal also directed the primary decision-maker to indicate to Ms BH that conditions 8401 (report at times and at a place specified by the Minister), 8505 (live at specified address), and 8564 (not engage in criminal conduct) will be imposed if the visa is granted, and to require a security of \$10,000 AUD for compliance with the conditions.
27. In particular, the Tribunal found that, if a bridging visa is granted to Ms BH, she will abide by the conditions imposed on it, provided that an amount of \$10,000 AUD is made available to secure her compliance. Although the Tribunal identified a significant risk of Ms BH seeking to remain in Australia unlawfully, not reporting to the Department, or not keeping the Department informed of her address, the Tribunal was satisfied that requiring and taking security in the amount of \$10,000 AUD would provide a reasonable assurance for Ms BH's compliance with visa conditions, including conditions 8401, 8505, and 8564. On that basis, the Tribunal was satisfied that Ms BH would abide by those conditions, if imposed on any bridging visa granted to her. In my view, absent a material change in circumstances, any subsequent consideration of the grant or refusal of a bridging visa to Ms BH within the Department had to proceed in accordance with the

Tribunal's finding that she would comply with those conditions (including that she would not engage in criminal conduct and would report as required by the Minister) if the conditions were imposed and the relevant security for compliance were required and taken.

28. On 3 July 2017, a delegate of the Minister refused to grant a bridging visa to Ms BH on the ground that she did not satisfy the character test under s 501(1) of the Migration Act. The Tribunal affirmed that decision on 8 October 2017. The Tribunal's decision was the subject of judicial review proceedings and Ms BH's bridging visa application was not finally determined until 18 April 2019, as noted below.
29. On 18 December 2017, the Tribunal decided that Ms BH is a person in respect of whom Australia has protection obligations because she satisfies the complementary protection criterion in s 36(2)(aa) of the Migration Act.
30. In particular, the Tribunal made the following findings:
  - (a) The Tribunal found that a named person had offered a bounty for the murder of Ms BH, and 'as recently as 2015, some seven years after the "hit" was put out, criminal networks in New Zealand that are sympathetic with [the named person]'s concerns continue to be eager to claim the bounty'.
  - (b) The Tribunal gave some weight to Ms BH's belief that the women who assaulted her in VIDC in 2016 'knew of the betrayal of which [the named person] has accused her, if not also of the bounty'.
  - (c) The Tribunal found that the named person 'is still alive, that he has put out the word that Ms [BH] betrayed him in 2008, that he also put out a bounty for her murder, and that interest in claiming the bounty for her killing still exists in New Zealand'.
  - (d) The Tribunal found that 'there is a real chance and therefore a real risk that [the named person] could trace Ms [BH] in New Zealand and inflict significant harm upon her in the event of her removal to that country. I am not satisfied that it would be possible, let alone reasonable for Ms [BH] to relocate to part of New Zealand where there would not be

a real risk that she will suffer significant harm ... I accept her arguments that the country is small and the population relatively easy to trace.'

- (e) The Tribunal noted that motorcycle gang activity is rife throughout both of New Zealand's main islands, with violent gangs reported to have deep roots in society. Independent reporting showed that the authorities in New Zealand were under strain to keep up with the violent behaviour of motorcycle gangs and were not resourced to deal with them.
  - (f) The Tribunal was not satisfied that Ms BH 'could obtain, from an authority in New Zealand, protection such that there would not be a real risk that she will suffer significant harm'.
  - (g) The Tribunal found that Ms BH has no right to enter and reside in a third country.
31. On 25 January 2018, the Department issued Ms BH with a notice of intention to consider refusal of her protection visa application under s 501 of the Migration Act.
32. On 5 April 2018, the Federal Court set aside the decision of the Tribunal made on 3 October 2017 affirming the decision of the delegate made on 3 July 2017 to refuse to grant a bridging visa to Ms BH under s 501(1), and remitted the matter of Ms BH's bridging visa application to the Tribunal constituted by a different member.
33. It is significant to observe that, at this point in time, successive decisions of the Tribunal had found that:
- (a) Ms BH is a person in respect of whom Australia has protection obligations; and
  - (b) Ms BH would abide by visa conditions if they were imposed (including conditions that she report at times and at a place specified by the Minister, that she live at a specified address, and, significantly, that she not engage in criminal conduct), provided that security of \$10,000 AUD was required and taken for compliance.
34. In those circumstances, and while there remained no material change to those circumstances, there appears to have been little or no room for some countervailing view that Ms BH's release from detention, on a visa subject to those conditions

with that security being required and taken, would pose an unacceptable risk to the community. The Department refuted that characterisation, and I have addressed that submission at [201]-[206] below.

35. On 27 August 2018, the Department advised the Commission of its view that Ms BH's case 'is impacted by the Court's judgment in *AQM18 v Minister for Immigration and Border Protection* [2018] FCA 944, which was handed down on 21 June 2018'. Although the Full Federal Court allowed an appeal on the basis of a factual error, their Honours adopted the same view of the law as the primary judge,<sup>5</sup> which was that ss 197C and 198 of the Act as then in force required the removal of an unlawful non-citizen 'as soon as reasonably practicable' even if such removal would constitute refoulement in breach of a protection obligation owed by Australia in respect of the person.
36. On 7 September 2018, a delegate of the Minister refused to grant a protection visa to Ms BH on the grounds that she did not pass the character test in s 501(6)(d)(i) of the Migration Act, and that the residual discretion should be exercised to refuse to grant the visa. The basis for the decision was said to be the risk that Ms BH would engage in criminal conduct in Australia, which the delegate found was 'low', but 'more than a minimal or remote chance'. The delegate 'could not rule out the possibility of further offending' and said that '[t]he Australian community should not tolerate any further risk of harm'. As noted below, following further merits review and judicial review proceedings, the Tribunal ultimately set aside that decision on 18 September 2019.
37. On 18 April 2019, the Tribunal affirmed the decision of the delegate made on 3 July 2017 to refuse to grant a bridging visa to Ms BH under s 501(1) of the Migration Act. The findings made by the Tribunal on this occasion were expressly overtaken by its decision on 18 September 2019, as noted below.
38. On 18 September 2019, the Tribunal set aside the decision of the delegate made on 7 September 2018 to refuse to grant a protection visa to Ms BH, and the Tribunal decided that Ms BH is not to be refused a protection visa under s 501(1) of the Migration Act.<sup>6</sup>

39. In making that decision, Deputy President Rayment OAM QC found:
- (a) 'The applicant has been in immigration detention for the last four years. In that period she has on several occasions been attacked by other persons in detention and believes that those persons are in touch with the New Zealand gang and attacked her to pursue its objectives or to gain a bounty offered for her death. The attacks started in 2016 (as the Migration and Refugee Division found) and occurred again recently. These circumstances have made the applicant terrified to remain in detention, and very anxious to leave it.'
  - (b) 'She has a criminal record but the courts have dealt with her without imposing any custodial sentence, except on one occasion in 2010 in Australia when she was sentenced to 28 days in prison.'
  - (c) Good government required that the discretion conferred by s 501 be exercised in favour of Ms BH because 'sending her back to New Zealand would breach Australia's international obligations'; the alternative would be indefinite or prolonged detention; and 'strong humanitarian reasons' favoured the exercise of the discretion.
  - (d) Ms BH has 'every incentive to avoid a future brush with the law'.
  - (e) The Tribunal was 'not satisfied there is a risk if [Ms BH] was allowed to remain in Australia, and was released into the community, that she would engage in criminal conduct'.
  - (f) The Tribunal declined to treat the previous Tribunal decision made on 18 April 2019 to affirm the bridging visa refusal under s 501 as normative, on the basis that the decision was made on the papers, by a non-presidential member to whose attention relevant judicial decisions were not drawn; who did not have the benefit of six days of hearing including the opportunity to observe Ms BH being cross-examined in the witness box; and whose principal concerns about the character of Ms BH arising from a letter in the name of the father of Ms BH's child were overtaken by the father himself giving evidence supportive of Ms BH before the Tribunal.

- (g) 'The applicant is at risk in detention of injury as a result of the very circumstances which led to the finding that non-refoulement obligations are owed in respect of her, and remission of the matter would keep her in a dangerous environment.'
40. It is significant to observe that, at this point in time, successive decisions of the Tribunal had again found not only that Ms BH is a person in respect of whom Australia has protection obligations, but also that she was not to be refused a protection visa under s 501(1) of the Act on the basis of her character or her past and present general or criminal conduct or otherwise. The Tribunal was 'not satisfied there is a risk' of criminal conduct. In those circumstances, there again appears to have been little or no room for some countervailing view that Ms BH's release from detention on a protection visa would pose an unacceptable risk to the community. Further, the Tribunal *was* satisfied that Ms BH 'is at risk in detention of injury as a result of the very circumstances which led to the finding' of protection, and to remit the matter 'would keep her in a dangerous environment'. Ms BH was kept in detention.
41. During the course of subsequent judicial review proceedings, it became apparent that the Minister was satisfied that Ms BH had satisfied all other criteria for the grant of a permanent protection visa under s 65(1)(a), and that she was entitled to be granted that visa subject only to the possibility of the supervening exercise of a personal ministerial power under s 501A.<sup>7</sup>
42. Both the Minister and Ms BH commenced judicial review proceedings in the Federal Court, the former seeking an order quashing the Tribunal's decision for jurisdictional error, and the latter seeking an order in the nature of a writ of mandamus compelling the Minister to determine her application for a protection visa according to law.
43. On 14 October 2019, the Minister applied twice to the Federal Court for a stay of the Tribunal's decision made on 18 September 2019 pending the Minister's application for judicial review of that decision. The applications were dismissed by Rares J and Stewart J because the Minister refused to provide the usual undertaking as to damages and, in the latter case, on the additional basis that his Honour was not satisfied that the

balance of convenience favoured the grant of a stay, observing: 'Aside from risk of reoffending, this case is certainly at the lower end of the "bad character" spectrum.'<sup>8</sup>

44. On 17 October 2019, the Minister gave notice to Ms BH that he was considering the exercise of his personal power under s 501A(2) of the Migration Act to set aside the Tribunal's decision made on 18 September 2019 and to refuse to grant the protection visa under that section on the grounds that he reasonably suspected Ms BH did not pass the character test, she had not satisfied him that she passed the character test, and he was satisfied that refusal was in the national interest.
45. On or about 26 October 2019 and 7 November 2019, Ms BH provided responses to the Minister's notice.
46. On 25 November 2019, Rares J delivered judgment in favour of Ms BH, holding that the Tribunal's decision did not involve jurisdictional error.<sup>9</sup> On Ms BH's application for mandamus, his Honour found: 'I am satisfied that the deprivation of the applicant's liberty while she awaits a final decision, after over four years in which her application for the visa has been pending, has created sufficient urgency to justify the imposition of a time limit for the Minister to make a decision under s 65(1)(a).' His Honour made an order in the nature of a writ of mandamus requiring the Minister to determine Ms BH's application for a protection visa pursuant to s 65 of the Migration Act according to law on or before 6 December 2019.
47. On 6 December 2019, the Hon David Coleman MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, purported to exercise power under s 501A(2) of the Migration Act to set aside the Tribunal's decision and refuse to grant a protection visa to Ms BH. In making that decision, the Minister indicated that he did not require a submission on alternative management options under ss 195A or 197AB.
48. On 9 December 2019, Ms BH commenced proceedings seeking judicial review of Minister Coleman's purported exercise of power under s 501A(2).
49. On 18 December 2019, the Minister appealed from the judgment given by Rares J, which on 18 May 2020 was dismissed as moot by Flick, Perry and Thawley JJ.<sup>10</sup>

50. On 9 July 2020, Rares J delivered judgment in favour of Ms BH, holding that Minister Coleman's decision involved jurisdictional error.<sup>11</sup> His Honour found that the Minister had failed to comply with the order in the nature of a writ of mandamus that his Honour had made on 25 November 2019, and ordered the Minister to do so within 14 days, that is, on or before 23 July 2020.
51. On 23 July 2020, the Hon Peter Dutton MP, Minister for Home Affairs, exercised his personal power under s 501A(3) of the Migration Act to set aside the Tribunal's decision and refuse to grant a protection visa to Ms BH. In making that decision, the Minister indicated that he did not require a submission on alternative management options under ss 195A or 197AB.
52. On 24 July 2020, Ms BH commenced proceedings seeking judicial review of Minister Dutton's purported exercise of power under s 501A(3).
53. On 2 October 2020, Mortimer J dismissed Ms BH's application for judicial review.<sup>12</sup> On 27 November 2020, the Full Court dismissed Ms BH's appeal.<sup>13</sup> On 12 August 2021, Gageler and Gleeson JJ refused special leave to appeal on the basis that the prospects of success were 'not such as to warrant the grant of special leave'.<sup>14</sup>
54. Given that Ms BH was found to be a person in respect of whom Australia has protection obligations, decisions to refuse her visas on character or national interest grounds meant that she would remain in immigration detention for an indefinite period. She could not safely or even lawfully (from 25 May 2021)<sup>15</sup> be returned to New Zealand and she had no right to enter and reside in any other State.

## 3. Legal framework

### 3.1 Functions of the Commission

55. Section 11(1)(f) of the AHRC Act provides that the Commission has the function of inquiring into any ‘act’ or ‘practice’ that may be inconsistent with or contrary to any human right.
56. Section 20(1)(b) of the AHRC Act requires that the Commission perform this function when a complaint is made in writing to the Commission, by or on behalf of a person aggrieved by an act or practice, alleging that the act or practice is inconsistent with or contrary to any human right.
57. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President. On 20 November 2018, pursuant to s 19(2) of the AHRC Act, the President of the Commission delegated to me the relevant powers, functions, and duties under the AHRC Act to inquire into Ms BH’s complaint.

### 3.2 Human rights

58. The expression ‘human rights’ is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR. The following articles of the ICCPR are relevant to the acts and practices the subject of the present inquiry.
59. 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.
60. 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.

61. 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.

62. 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.

63. The UN Human Rights Committee is an independent body that was established by the ICCPR specifically to supervise the application of that treaty, and it has published its views on the proper interpretation and application of the relevant articles on many occasions. 'Considerable weight' should be given to the interpretations adopted by the UN Human Rights Committee.<sup>16</sup>

### 3.3 Act or practice of the Commonwealth

64. 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. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.

65. In performing the functions identified in s 11(1)(f) of the AHRC Act, it is not open to the Commission to disregard the legal duties of the officer who does the act or engages in the practice.<sup>17</sup> If a law requires that an act or practice be done or engaged in by or on behalf of the Commonwealth, and there is no room for discretion or decisional freedom, the act or practice required by law is not itself inconsistent with or contrary to a human right and it is not the Commission's function under s 11(1)(f) to inquire into the operation of the law.

66. For the purposes of this inquiry, I have given principal attention to the following acts and practices of the Commonwealth:

(a) *Safe place of detention*—

- i. The apparent decision of the Department, or its service provider Serco on its behalf, to place two perpetrators back into an open compound with Ms BH within two weeks

of an alleged serious attack on her without undertaking a documented risk assessment process or taking other adequate measures to ensure that she was safe in detention, in circumstances where a Detainee Service Officer had also been threatened to such an extent as to call for protection for herself, and SIS Intel had assessed the risk of a further assault on Ms BH as 'PROBABLE'.

- ii. The apparent failure of the Department and portfolio Ministers to respond to Ms BH's ongoing concerns that she faced a real risk of serious harm in detention including death.
- iii. The apparent failure of the Commonwealth to take action in response to the apparent acceptance by the Tribunal and portfolio Ministers that Ms BH remained at risk of serious harm in detention including death.

(b) *Arbitrary detention*—

- i. Whether Ms BH's detention was authorised and required by Australian law, and if so, the extent to which it was so authorised and required, including decisions made not to release her from detention or to consider her release from detention.
- ii. The apparent failure of the Department and Ministers to consider whether any risks apparently posed by Ms BH could be managed by less restrictive deprivations of liberty, including by the means identified by the Tribunal on 20 April 2017.

(c) *Arbitrary interference with the family*—The apparent failure of the Department and the Minister to consider whether any risks posed by Ms BH could be managed by lesser deprivations of liberty that would allow her greater contact with her family, including her son.

67. I find that the foregoing matters fall within the expansive definitions of acts and practices in s 3 of the AHRC Act.

## 3.4 Conciliation

68. In its response dated 6 March 2017, the Department stated that it preferred to rely on the established factual information as detailed in its response, and thus would not be responding to questions of alleged breach. The Department stated that, should the President of the Commission issue a preliminary view, the Department will provide the necessary written submissions in relation to allegations of breaches at that time.
69. On 25 October 2018, a delegate of the President decided that Ms BH's complaint could not be resolved through a conciliation process and would be given further consideration including possible reporting by the President.
70. On 23 September 2021, as the delegate of the President, I issued a document to Ms BH and the Department containing my preliminary views in relation to this inquiry. Both Ms BH and the Department provided written submissions in response to my preliminary view and I have taken those submissions into account in reaching the findings contained in this report.

# 4. Complaint of unsafe place of detention

## 4.1 Incident on 25 February 2016

71. Ms BH alleges that, on 25 February 2016, she was physically assaulted in her bedroom in Villawood Immigration Detention Centre by two female detainees from New Zealand, resulting in an ambulance being called and Ms BH being taken to hospital for treatment. For the purposes of this inquiry, I will refer to the alleged perpetrators as Ms YY and Ms ZZ.
72. I note at the outset that the Tribunal and two Ministers have already found that Ms BH was, in fact, assaulted as she alleged, and further that she remained at risk in detention, as discussed below (at [179]-[189]).
73. On the material before the Commission, I am also satisfied that an assault occurred on 25 February 2016 as alleged by Ms BH.
74. In her complaint to the Commission dated 2 June 2016, Ms BH characterised the assault in the following terms:

I have already been attacked by not one, but two Maori New Zealander's, who must have learnt of the 'Hit' on me over there. These detainee's where trying to kill me and came to my room while I was sleeping with the intent of leaving me dead. Whilst I am in Immigration detention I am at risk of being harmed by New Zealander's who have contacts with N.Z gang's and affiliates, because of the contract on my life in New Zealand. ...

I suffer from a permanent neck injury caused by the injuries I sustained during the assault. One of the aggressor's restrained me on my bed, while the other one repeatedly bashed my head with their fists and knee, she then cut off my windpipe with her knee pressed down over my throat trying to suffocate me. Then they attempted to break my neck. There is still swelling on the area of my neck that was injured over three months ago. It causes me a lot of pain and I get frequent migraines and suffer from dizziness as a result of the injury.

75. The Department provided the Commission with a document titled 'VIDF Post Incident Review' dated 3 March 2016, on a Serco letterhead, which states:

At approx. 0455hrs on the 25 Feb 16 a female detainee from Banksia compound was allegedly assaulted by another two (2) female detainees while she was sleeping in her room. The detainee sustained a number of injuries including swelling and grazing above and below her left eye, swelling to her mouth and right temple and redness to her neck area.

The HAS line was contact and as a result of the injuries NSW Ambulance was called and seen the detainee and advised staff that she will need to be taken to hospital for further treatment / assessment.

Detainee departed with NSW Ambulance, staff and attended to Fairfield hospital.

76. The review classified the incident type as 'Assault Serious' and as a 'Major' incident (where the possible classifications were 'Minor', 'Major', or 'Critical'). The review identified, as one of the contributing factors to the incident, that '[a]ll three (3) detainees have a history with each other and have been involved in previous incidents'.
77. The Department also provided reports of officers that record observations made after the incident that are generally consistent with Ms BH's account. Ms BH made contemporaneous reports of an assault. The officers rostered as the Detention Services Manager and the Facility Operations Manager both observed Ms BH 'dressed in a dressing gown distraught, upset and crying'. The Facility Operations Manager arranged for photos to be taken of the injuries Ms BH had sustained; called HAS to obtain a medical opinion on the injuries; and 'listed the numerous injuries to the HAS Nurse in particular where [Ms BH] was assaulted around the head area'. The Facility Operations Manager decided to call an ambulance and, if required, send Ms BH 'to hospital for medical assessment due to her head injuries, to which the HAS nurse agreed'. The Facility Operations Manager noted advice from the attending ambulance paramedics to the effect that 'due to the head injuries sustained [Ms BH] would be required to attend Fairfield hospital for further assessment and monitoring'. The Detention Services Manager was also present during those events and corroborated their occurrence.

78. In a file note recorded at 6.57 am, the Facility Operations Manager stated that Ms BH ‘sustained injuries above her left eye (graze and swelling), below left eye (swelling), left hand side of her mouth, right temple (swelling), right ear (swelling) and redness to her neck (front, right side and rear)’.
79. The Commission has also been provided with medical evidence from the Emergency Department of Fairfield Hospital from the night of the alleged assault. The medical records noted that Ms BH complained of being kned in the throat and the right side of her face during an assault that lasted roughly 5-10 minutes. She reported not being able to see out of her right eye, although that was said to be improving, having a headache, neck pain, and injury to her left elbow. Upon examination she was found to have a mild frontal head injury and bruising and tenderness of the spine. The records noted that, whilst there was no evidence of an acute cervical spine injury, there were degenerative changes at the lower cervical spine with possible impingement of nerve roots. Ms BH was discharged with pain relief.
80. In her complaint to the Commission dated 2 June 2016, Ms BH stated that she has suffered permanent neck injuries as a result of the assault. She claimed that ‘there is still swelling on the area of my neck that was injured over three months ago. It causes me a lot of pain and I get frequent migraines and suffer from dizziness as a result of the injury.’ Ms BH has repeated these concerns in writing on many occasions since the incident.
81. On 28 February 2016, Ms BH signed a notification requesting that the incident be referred to an investigation authority such as the Australian Federal Police and noting that she would be willing to give a statement about the matter to the investigation authority if required.
82. On 4 March 2016, an officer of the Australian Federal Police (AFP22174) interviewed by telephone the Detainee Service Officer who was working the morning of the alleged assault on Ms BH. The officer’s case note records that the DSO stated the following during the interview (emphasis added):
- About 0440hrs she left the Banksia compound ... At this time [Ms YY and Ms ZZ] were at the fence saying their goodbyes.

- When [DSO] returned to the Banksia compound, [Ms BH] then approached [DSO] and [another officer] to report the alleged incident.
- The fence where [Ms YY and Ms ZZ] were saying their goodbyes is not very far from [Ms BH's] room. They would have had enough time to get there before [DSO] returned.
- [DSO] next came into contact with [Ms YY and Ms ZZ] about 0745 hrs, they both wanted to know what [DSO] was writing in her report regarding the incident and then started making threats against her [DSO]. [DSO] then called for protection against [Ms YY and Ms ZZ].
- [DSO] could not be sure what [Ms YY and Ms ZZ] did between the hours of 0455 and 0745.
- [DSO] is sure [Ms YY and Ms ZZ] assaulted [Ms BH] as [Ms BH] would not lie about something like that.

83. In an affidavit sworn on 13 September 2016, Ms BH described the incident as follows (at [30]):

On the 25 February, I was violently attacked by two New Zealand detainees, who at the time had been notified by the DIBP, of their flights to be returned to NZ. The vicious attack could have been fatal for me. One of the aggressor's, restrained me on my bed, while the other smashed me in the head with a large Ecoya pump bottle, I had in my room. They kneed me in the head and hit me in my head, tried to suffocate me, and then attempted to break my neck. Leaving me with a painful deteriorating cervical spinal cord injury. There was no other reason for the attack on my life, other than they had heard from their contacts in New Zealand that I was a Police Informant, and found out about the "Hit" on my life, for being a Police Informant. This was an unprovoked attack.

84. In a decision made on 3 October 2017, the Tribunal found that Ms BH 'was assaulted by two detainees on 25 February 2015 and taken to hospital for treatment' (at [40]).
85. Ms BH's descriptions of the incident have been consistent over time and she has made repeated written complaints arising from the incident.

## 4.2 Response of the Department and its service provider

86. As noted above at [75], following the alleged assault on 25 February 2016, a document titled 'VIDF Post Incident Review', on a Serco letterhead, was completed.

87. The review is dated 3 March 2016. The review recorded that Serco had notified the on-call Department staff of the alleged 'serious' assault within 15 minutes of becoming aware of it.

88. Under the heading 'Analysis of Actions Taken in Response to Incident', the reviewer stated:

Staff gave first aid to the injured detainee.  
The alleged perpetrators were placed into Hotham Obs 4  
Victim is seeking police intervention / assistance.

89. Under the heading 'Identified gaps in processes, procedures or training needs', the reviewer stated:

Staff not following warning signs and regular patrols of the dorms.

90. Under the heading 'Recommended Service Improvements', the reviewer stated:

Introduction on the ITC of warning signs and indicators of how detainees interact with each other.

91. In response to the Commission's request for advice as to the steps taken by Serco or the Department to implement that recommendation, on 4 August 2017, the Department advised the Commission as follows:

The Post Incident Review recommendation did not acknowledge the Induction Training Course (ITC) content. Following the Post Incident Review recommendation it was verified by Serco national office that there is already information of this nature contained in the ITC and that information was in place at the time of the alleged assault.

92. It appears that, despite the flaws identified by the Department in the post incident review recommendation, there was no further review of the 'identified gap', or why staff who had ostensibly been trained to follow warning signs and regularly patrol dorms were nevertheless failing to do so.

## 4.3 Return of the perpetrators to Ms BH's compound

93. Ms BH complains that she held significant fears for her personal safety once the alleged perpetrators were moved back into her compound following the alleged assault.
94. The Department set out the movements of Ms BH and Ms YY and Ms ZZ following the alleged incident on 25 February 2016 in its response to a request for further information from the Commission dated 13 December 2017. In summary, it stated 'following allegations of assault by Ms BH, the two detainees were immediately placed into a separate area to Ms BH, however, we confirm that this placement was only for a short period of time'.
95. At the time of the assault, Ms BH was living in the Tweed Unit of the Banksia compound at Villawood Immigration Detention Centre. Ms YY and Ms ZZ were also detained in the Tweed Unit.
96. Following her return from Fairfield Hospital, Ms BH was returned to her room in the Tweed Unit of the Banksia compound.
97. On 25 February 2016, immediately following the alleged assault, Ms YY and Ms ZZ were both transferred to the Hotham 'high care' accommodation area at Villawood Immigration Detention Centre, but only for a short period:
  - (a) Ms YY remained at the Hotham 'high care' accommodation facility until 4 March 2016 when she was transferred back to the Tweed Unit of the Banksia compound.
  - (b) Ms ZZ remained at the Hotham 'high care' accommodation facility until 7 March 2016 when she was also transferred back to the Tweed Unit of the Banksia compound.
98. In its response dated 13 December 2017, the Department acknowledged that 'this placement was only for a short period of time'. In response to my preliminary view in this inquiry, the Department described this as a 'cooling off period'. The Department noted: "Both alleged offenders were immediately placed on Behaviour Management Plans for their involvement in the alleged assault against [Ms BH]. Consistent with the standard operating procedure, the alleged perpetrators' Security

Risk Assessment Tool (SRAT) were updated to reflect their involvement in the incident. [Ms BH's] SRAT was also updated as part of the incident." Ms YY was returned to Ms BH's compound 9 days after the alleged assault and Ms ZZ was returned 12 days after the alleged assault.

99. On 7 March 2016, being the day Ms ZZ was returned to the Banksia compound, Ms BH lodged a formal detainee complaint (#15-03):

I fear for my safety with the release of [redacted] back into Banksia. I have had a traumatic experience being attacked in my bedroom by [redacted] and [redacted]. They tried to break my neck. I have panic attacks when I hear her. I can not go to medical when she is there. [Redacted] needs to be moved to another centre please.

100. The complaint form is stamped as having been received on 8 March 2016.

101. On 9 March 2016, the Department received correspondence from the New Zealand Consulate-General in Sydney stating they had been contacted by Ms BH who advised that two detainees had broken into her room and assaulted her, and that they were initially placed in holding cells but were now returned to the general women's population causing Ms BH to be concerned for her safety. The Consulate-General requested 'a comment and reassurance from the Australian authorities [to] pass to [Ms BH] to help alleviate her concerns'.

102. By letter dated 14 March 2016, the Security & Risk Manager of Villawood Immigration Detention Centre responded to Ms BH's complaint dated 7 March 2016 (#15-30):

Your current accommodation in Banksia has been reviewed and is deemed safe for all detainees.

The detainee you have mentioned in your complaint has been spoken with and is currently on a Behaviour Management Plan and is aware that any breaches of the Management plan may result in Police or other investigative service referral.

If at any stage you are directly threatened by this detainee you are encouraged to report this to staff at the first instance.

103. On 15 March 2016, one week after the return of Ms YY and Ms ZZ, Ms BH lodged a formal detainee complaint (#49-03):

This morning [redacted] was coming out of the area where I am living and shoved me. [Redacted] & [redacted] do not stay in that area and should not be allowed to enter the area. I am unsafe in here there is no lock on my door and nothing to stop another attack on me, from the two aggressors. I am going to commence a lawsuit against Serco for not keeping me safe in their care if this is not taken seriously.

104. The complaint form is stamped as having been received on 17 March 2016.

105. On 15 March 2016, all female detainees residing in the Tweed Unit, including Ms BH, Ms YY, and Ms ZZ, were relocated to the Lima Unit at Villawood Immigration Detention Centre due to infrastructure works. The Department noted that ‘the only permanent accommodation available for females at the Villawood Immigration Detention Facility was Lachlan 2 – Lima’. In response to my preliminary view in this inquiry, the Department said that the availability of only one compound for female detainees ‘significantly restricted operational placement options of female detainees’. While that may have been true in relation to long-term accommodation, it appears that short-term accommodation in the Hotham compound was available (and was eventually used for Ms BH) and that it was also open to the Department to transfer detainees between centres in the national immigration detention network. The Department also said: ‘Prior to [Ms BH] being transferred to Lachlan 2 Compound (Lima) [together with all other female detainees,] Serco officers were briefed to closely monitor [Ms BH] to ensure her safety while she remained in Banksia’. I understand this to mean that:

- (a) For a period of about 11 days commencing with the return of Ms YY to Banksia on 4 March 2016, Serco officers were briefed to closely monitor Ms BH ‘while she remained in Banksia’.
- (b) All female detainees were transferred from Banksia to Lima on 15 March 2016, including Ms BH, Ms YY, and Ms ZZ.
- (c) Serco officers were not briefed to closely monitor Ms BH to ensure her safety while she remained in Lima with the offenders until 24 March 2016, or thereafter.

106. On 19 March 2016, in response to Ms BH's complaint of 15 March 2016, a Serco investigator appears to have completed a complaint investigation form, in which the investigator stated that the accused detainee had denied anything happened. The investigator noted that the accused detainee 'is scheduled to depart SKSA on 08.04.16' and concluded that '[i]ssues will be ongoing between these 2 detainees while they are in this compound'. The investigator recommended: 'Lima officers to be vigilant with these two detainees and this has been added to the briefing notes.'

107. By letter dated 19 March 2016, the Acting Facilities Operation Manager of Villawood Immigration Detention Centre responded to Ms BH's complaint dated 15 March 2016 (#49-03):

The detainee that is party to your complaint has been spoken to about her inappropriate behaviour and reminded of her rights and responsibilities signed upon induction to the centre.

The detainee has also been advised to not enter the accommodation area that you reside in.

If there are further issues in relation to this detainee speak to the officers on shift that will assist to resolve the matter.

108. On 23 March 2016, four days later, Ms BH lodged a formal detainee complaint (#60-03) from the Lima Unit:

[Redacted] & [redacted] have been able to get away with serious assault and are continuing to threaten and intimidate me.

I have suffered more than enough of this anti social & violent aggressive behaviour. [Redacted] was nutting off at me right in front of the officers threatening to stomp on my head. She said, 'Your fucken dead, I don't care I'm just getting on my plane! Your little boy will never see you again!' If any body else was yelling death threats and carrying on this way they would be removed from the compound.

I have been warned they are planning another attack.

I am not putting up with this. I do not feel safe, I am at risk, this behaviour, it should not be condoned. If this is allowed to continue then I need to be released by DIAC on a B.V.E. or the two woman are to remain in Hotham until they leave. My life is in danger with these two dangerous violent aggressive female detainees.

They are still entering into the living area where I am and [redacted] barged into my room tonight. Luckily [redacted] was present.

109. There is no record of any interview with the witness who Ms BH named as present when the offenders had ‘barged into’ her room earlier that night.
110. In its response to my preliminary view, the Department said: ‘On 23 March 2016, [Ms BH] allegedly assaulted one of the alleged offenders from the 25 February 2016 incident’, and the incident was referred to the Australian Federal Police. The date of 23 March 2016 is the same as Ms BH’s written complaint about death threats and trespass to her room extracted above. The Department described this event as ‘one major incident where [Ms BH] allegedly stabbed another detainee in the palm which resulted in the victim being hospitalised (no charges were laid)’. Although the Commission requested on 14 June 2017 all incident reports in relation to any incidents involving Ms BH and Ms YY or Ms ZZ, no reports were produced relating to this incident. Ms BH denies that she assaulted anyone. Her explanation of what occurred is, on one view, consistent with a literal reading of the Department’s description, but suggests that the Department’s description is materially incomplete:

Whilst I was writing one of many complaints, regarding the foreseeable risk to my safety and my fears for my safety inside Detention, [Ms YY] attempted to whack me in the head, she lunge at me to hit me, and I put my right hand up to protect my head and [Ms YY’s] hand hit my pen. This was self defence I wasn’t even trying to hit [Ms YY] with my pen. SERCO documented that I stabbed [Ms YY] with my pen, when it was actually self defence. ... It was after this that SERCO moved me to a separate area from those two detainees that were constantly threatening me, and trying to kill me...

111. On the material before me, taking the Department’s description at face value, there is no reason to doubt Ms BH’s account, and I accept it.
112. I am deeply concerned that, even many years after the event, the Department continues to overstate events occurring in detention by omitting material facts, and omitting fair and balanced evaluative analysis, in a manner that may later be

relied upon to the prejudice of detainees. The words ‘stabbed’ and ‘hospitalised’, without context, are evocative of a knife or similar weapon being deliberately wielded with intent to inflict serious wounds requiring urgent medical attention. Even if one is unsure about the extent to which each of Ms YY and Ms BH was responsible for the escalation of the event, those words are not appropriate to describe an incident involving a pen held by Ms BH while she was using the pen to write a complaint about fears for her safety in detention. If Ms BH had intended to stab Ms YY, it is implausible that she would have attempted to do so from a desk, mid-complaint, using a pen, targeting the palm of Ms YY’s hand. It is even less plausible that she would have done so without at least some form of provocation from Ms YY, if not an imminent fear for her own safety as she described. When regard is had to all the circumstances, it is inappropriate and materially misleading for the Department to describe the event as a ‘major incident’ in which Ms BH ‘stabbed another detainee’ so as to count against her release from detention.

113. On 24 March 2016, Ms BH was relocated to the Hotham high care accommodation facility. In response to my preliminary view, the Department said that this was ‘part of a risk management process to ensure the safety of all detainees, including [Ms BH]’. From this time, it does not appear that she had any further contact with Ms YY and Ms ZZ, who were subsequently removed from Australia on 7 and 8 April 2016. Ms BH was returned to Lima compound on 18 April 2016.
114. On the basis of the information before the Commission, from 4 March 2016 until 23 March 2016, Ms BH was detained first in the Tweed Unit of the Banksia compound and then in the Lima Unit of the Lachlan compound with one or both of the detainees who assaulted her.
115. By letter dated 30 March 2016, the Acting Facilities Operation Manager of Villawood Immigration Detention Centre responded to Ms BH’s complaint dated 23 March 2016 (#60-03):

The detainees that are party to your complaint were spoken to about the alleged assault and threats at the time of the incident and reminded of their rights and responsibilities signed upon induction to the centre.

The alleged assault was referred to the AFP who since attended Villawood IDF and have obtained a statement from you.

These detainees are no longer able to enter your accommodation area as you now reside in a different compound to them.

116. In its request for further information dated 12 April 2019, the Commission asked the Department to provide copies of any risk assessment conducted by either the Department or Serco relating to the placement of either Ms ZZ or Ms YY back into the same compound as Ms BH following the alleged assault, including those arising out of complaints by Ms BH.

117. The Department advised that it does not conduct risk assessments relating to the placement of specified detainees. The Department provided the following response:

Placement was managed as part of standard operational incident management response, with ongoing close Serco monitoring following return of detainees to general accommodation areas. In their Post Incident Response (PIR) Serco have not raised any concerns about detainees being accommodated in the same compound. There are no risk assessments conducted by departmental officers relating to the placement of specified detainees.

At the time of the incident, Banksia Compound was accommodation placement for single adult females. The compound structure of the centre did not allow for single adult females to be placed in accommodation areas shared by detainees of the opposite sex, further affecting available placement options.

118. In response to my preliminary view in this inquiry, the Department said that 'no information was provided by law enforcement or the ABF that would indicate an increased risk to [Ms BH]' from being accommodated in the same compound as two other detainees who had allegedly assaulted her.

119. As part of this inquiry, the Commission obtained documents from the Australian Federal Police that were created by the Australian Federal Police during its investigation into the 25 February 2016 assault on Ms BH or provided to the Australian Federal Police by the Department or Serco.

120. In a document titled 'Security Information Report' and dated 25 February 2016, being the day of the assault on Ms BH, on Serco letterhead, the following report appears (original emphasis):

On 25 February 2016, Security FOM and SIS Intel Manager placed detainee [Ms ZZ] on a BMP after an alleged assault on detainee [Ms BH] by det [Ms ZZ] and [Ms YY]. [Ms ZZ] was aggressive and argumentative during the interview. After the interview while detainee [Ms ZZ] was being escorted to Hotham 4 she stated **QUOTE** When that cunt gets back, I will stomp on her fucking head, I don't care if I do it in front of staff **END QUOTE**.

SIS Intel assess as **PROBABLE** Detainee [Ms BH] will be further assaulted/threatened by Detainee [Ms ZZ] and Detainee [Ms YY] and **POSSIBLY** their associates at VIDC.

121. It is not apparent why this document was not provided to the Commission by the Department.
122. In circumstances where the risk of a future attack on Ms BH by Ms ZZ and Ms YY had been contemporaneously assessed by detention centre staff as 'PROBABLE', and the Detention Service Officer on duty had herself been threatened by and called for protection from Ms ZZ and Ms YY, it is of significant concern that the Commission has not been provided with any evidence to suggest that a documented risk assessment process was undertaken before the alleged perpetrators were returned to the same open compound as Ms BH within a fortnight.

## 4.4 Case reviews

123. The Department provided copies of monthly case reviews conducted by Ms BH's case officer. With one exception noted below, all of the case reviews for 2016 state that Ms BH does not have any significant health or welfare issues, which appears to be inconsistent with Ms BH's written complaints of such issues. Between 25 February 2016 and 20 June 2016, all of the case reviews state that 'no other issues have been flagged by DIBP or [Ms BH] relating to her health and/or welfare' and do not make any reference to an assault, notwithstanding that Serco had promptly notified the Department of a serious assault on 25 February 2016.

124. The case review dated 27 June 2016 includes the following:

health concerns raised by [Ms BH], IHMS response:- [Ms BH] had been sent to hospital after the alleged assault on 25/2/2016 [Ms BH] was reviewed at Fairfield hospital where she underwent a CT scan of her Neck. The result of this scan showed no fracture or acute concerns. Since [Ms BH's] return to Villawood, she has been regularly reviewed by the IHMS GP for this issue.

125. That was the first and last reference to the assault in Ms BH's case reviews for 2016. The above text was omitted from subsequent case reviews. There is no other reference to Ms BH's complaints with respect to her safety in any of the 2016 case reviews. Some historical reference to the assault is made in case reviews in subsequent years.

## 4.5 Articles 9(1) and 10(1) of the ICCPR

126. Australia has obligations under articles 9(1) and 10(1) of the ICCPR, respectively, to uphold the right to security of person, and to ensure that people in detention are treated with humanity and respect for the inherent dignity of the human person.<sup>18</sup>

127. The right to security of person protects individuals against intentional infliction of bodily or mental injury, including where the victim is detained.<sup>19</sup> The right to personal security also obliges States parties to take appropriate measures to protect individuals from foreseeable threats to life or bodily integrity proceeding from private actors. States parties must take both measures to prevent future injury and retrospective measures, such as enforcement of criminal laws, in response to past injury.

128. The rights guaranteed in article 10(1) of the ICCPR are afforded to people held in immigration detention centres<sup>20</sup> – both private and State facilities.<sup>21</sup>

129. Article 10(1) imposes a positive obligation on States to ensure that detainees are treated with humanity and respect for their dignity.<sup>22</sup> This is in recognition of the fact that detained persons are particularly vulnerable because they are wholly reliant on a relevant authority to provide for their basic needs.<sup>23</sup> In this case, the relevant authority is the Commonwealth of Australia through the Department and the service providers who act on its behalf.

130. These international law commitments require Australia to ensure that people in immigration detention are treated fairly and reasonably, and in a manner that upholds their dignity.
131. Related obligations are recognised by the common law of Australia and through the common law duty of care that the Department and its service providers owe to people in immigration detention.
132. General Comment No 21 of the United Nations Human Rights Committee (UN HR Committee) sets out the content of the obligation in article 10(1) of the ICCPR, stating:

Article 10, paragraph 1, imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.<sup>24</sup>

133. Professor Manfred Nowak has commented on the threshold for establishing a breach of article 10(1), when compared to the related prohibition against 'cruel, inhuman or degrading treatment' in article 7 of the ICCPR, as follows:

In contrast to article 7, article 10 relates only to the treatment of persons who have been deprived of their liberty. Whereas article 7 primarily is directed at specific, usually violent attacks on personal integrity, article 10 relates more to the general state of a detention facility or some other closed institution and to the specific conditions of detention. As a result, article 10 primarily imposes on States parties a positive obligation to ensure human dignity. Regardless of economic difficulties, the State must establish a minimum standard for humane conditions of detention (requirement of humane treatment). In other words, it must provide detainees and prisoners with a minimum of services to satisfy their basic needs and human rights (food, clothing, medical care, sanitary facilities, education, work, recreation,

communication, light, opportunity to move about, privacy, etc).  
... Finally it is again stressed that the requirement of humane treatment pursuant to article 10 goes beyond the mere prohibition of inhuman treatment under article 7 with regard to the extent of the necessary 'respect for the inherent dignity of the human person'.<sup>25</sup>

134. These conclusions are also evident in the jurisprudence of the UN HR Committee, which discusses the positive obligation on relevant authorities to treat detainees with humanity and respect for their dignity.<sup>26</sup>
135. I also note that Joseph and Castan recognise that article 10(1) obliges State Parties to provide protection for detainees from other detainees.<sup>27</sup> In reaching that conclusion, the authors cited comments made by the UN HR Committee in its 'Concluding Observations on Croatia' when it stated that the 'Committee is concerned at reports about abuse of prisoners by fellow prisoners and regrets that it was not provided with information by the State party on these reports and on the steps taken by the State party to ensure full compliance with article 10 of the [ICCPR]'.<sup>28</sup>
136. The content of article 10(1) has also been developed through a number of UN instruments that articulate minimum international standards in relation to people deprived of their liberty,<sup>29</sup> including:
- (a) the Standard Minimum Rules for the Treatment of Prisoners (**Mandela Rules**),<sup>30</sup> and
  - (b) the Body of Principles for the Protection of all Persons under Any Form of Detention (**Body of Principles**).<sup>31</sup>
137. In 2015, the Mandela Rules were adopted by the United Nations. They provide a restatement of a number of United Nations instruments that set out the standards and norms for the treatment of prisoners, and represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.<sup>32</sup>
138. The UN HR Committee invites State Parties to indicate in their periodic reviews the extent to which they are applying the Mandela Rules and the Body of Principles.<sup>33</sup> At least some of those principles have been determined to be minimum standards

regarding the conditions of detention that must be observed, regardless of a State's level of development.<sup>34</sup>

139. Several of the Mandela Rules are relevant to the safety of detainees in respect of the behaviour of other detainees, and the general security and good order of detention facilities, including the following:

**Rule 1:** All prisoners shall be treated with the respect due to their inherent dignity and value as human beings ... the safety and security of prisoners ... and visitors shall be ensured at all times.

**Rule 2:** ... prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings.

**Rule 12:** ... Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the prison.

**Rule 36:** Discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well ordered community life.

140. From the above, the following conclusions may be drawn:

- (a) article 10(1) of the ICCPR imposes a positive obligation on State parties to take action to ensure that detained persons are treated with humanity and dignity;
- (b) the threshold for establishing a breach of article 10(1) of the ICCPR is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of article 7 of the ICCPR, which is a negative obligation to refrain from such treatment;
- (c) article 10(1) of the ICCPR may be breached if a detainee's rights, protected by one of the other articles of the ICCPR, are breached—unless that breach is necessitated by the deprivation of liberty;
- (d) minimum standards of humane treatment must be observed in detention conditions, including immigration detention; and
- (e) article 10(1) of the ICCPR requires that detainees and prisoners are provided with a minimum of services to satisfy their basic needs.

141. In my view, and consistent with past Commission inquiries,<sup>35</sup> I consider that detainees in immigration detention have a basic need for their safety and security to be protected while in detention. Australia must ensure that immigration detainees have this basic need met in order to fulfil the obligations imposed on it by article 10(1) of the ICCPR to treat detainees with humanity and respect for the inherent dignity of the human person.

## 4.6 Policies regarding violence between detainees

142. In a request for further information dated 12 April 2019, the Commission requested copies of ‘any departmental or Serco policy relating to the management of violent or abusive behaviour between detainees that existed on 25 February 2016 or subsequently.’

143. In its reply dated 17 May 2019, the Department said:

The Detention Services Manual – Chapter 8 – Safety and security – Incident Management and reporting issued on 1 September 2015, was in effect until 2 September 2016.

In September 2016, a revised suite of detention standard operating procedures were issued in relation to incident management in immigration detention facilities and the management of detainee behaviour.

144. The Department has identified the Detention Services Manual (**DSM**) issued on 1 September 2015 as the key operational document setting out its policies in respect of detainee-on-detainee violence and the obligations of the Department and its service providers at the time of the alleged assault on Ms BH on 25 February 2016.

145. I understand that the reference to ‘FDSP’ in the following excerpts is a reference to the facilities and detainee service provider – in this case, Serco. ‘DIBP’ is a reference to the Department of Immigration and Border Protection, which was the name of the present department in 2015.

146. Chapter 8 of the relevant DSM provides that:

The department is committed to providing a safe environment for staff, detainees and the public. However, incidents do happen in the detention network. Effective planning is aimed at minimising risks to staff and others and will assist staff to respond appropriately and in a timely and coordinated manner to such incidents.

...

As part of the contractual obligations between the FDSP and the department, the FDSP must use reasonable endeavours to prevent incidents from occurring and actively continue to assess current and planned activities and areas of responsibility for potential incidents. The FDSP must also implement plans, practices and procedures to prevent potential incidents from occurring.<sup>36</sup>

147. Chapter 8 does not provide any further detail about the 'reasonable endeavours' that service providers must use to prevent 'incidents'. Nor does it make any specific reference to the risk of violent or abusive behaviour between detainees, or to the conduct of individualised risk assessments tailored to the circumstances of particular detainees.

148. Chapter 8 does note that:

Under the *Work Health and Safety Act 2011* ("the WHS Act") the department and the facilities and detainee service provider (FDSP) have a duty to ensure, as far as is reasonably practicable, the health and safety of workers, detainees and other persons at an immigration detention facility (IDF).<sup>37</sup>

149. The duty of care owed to detainees in closed immigration detention centres is further discussed in other sections of the DSM. In Chapter 1, it states:

DIBP and the FDSP owe a duty of care to all persons in all types of held immigration detention. This means that DIBP and the FDSP are legally obliged to exercise a reasonable care to prevent detainees from suffering reasonably foreseeable harm.

...

DIBP requires service providers, including the FDSP, to exercise reasonable care for the day-to-day needs, as well as the safety and welfare, of all detainees. It extends to taking reasonable care

to prevent harm that could stem from the foreseeable activities of a detainee or from third persons.

...

A risk may be reasonably foreseeable if it is a risk which the authority knew or ought to have known or anticipated. Many risks of harm are reasonably foreseeable. A risk that is “not unlikely to occur” can be characterised as reasonably foreseeable, as opposed to one that is “far-fetched or fanciful”.<sup>38</sup>

150. The Commission has not been provided with any further documentation about how the Department or Serco assessed the specific risk of violence between detainees during the relevant time period. I sought further information from the Department on this point at the time of issuing my preliminary view. In response to my preliminary view, the Department said only that it ‘assesses and takes steps to minimise risk in the placement of all individuals’. It said that it ‘considers individual needs, including medical needs, in line with [its] duty of care to all detainees’ and that it ‘takes all safety concerns seriously, and refers identified risks to appropriate areas for consideration and potential action’.
151. The Department recognises that international human rights standards should inform the standard of care that a detainee receives while held in an immigration detention facility.<sup>39</sup>
152. When the Department contracts out the provision of services to people in held detention to third parties, the DSM recognises that the Department has a responsibility to ensure the contracted service providers are qualified and can meet the standards outlined in the contract.
153. While third parties such as Serco must also discharge their own duty of care obligations to a detainee in held detention, that duty is additional to, and does not substitute, the Department’s duty of care.<sup>40</sup>
154. The DSM discusses the division of responsibilities for duty of care between the detention service provider and the Department as follows:

Responsibility for the duty of care owed to detainees is shared between DIBP, service providers and the detainee. The level to which a detainee will be responsible for their own safety

depends on their individual circumstances and it is expected that a detainee will act in accordance with their capacity in any given situation.

In assessing the capacity a detainee has to share responsibility for their safety and security, factors including, but not limited to the following should be taken into account:

- the age of the detainee
- the type of detention the detainee is in
- the education level of the detainee
- the English language ability of the detainee
- the detainee's country of origin and the amount of time they have spent in Australia
- the physical and mental health of the detainee: for example, to what extent does a medical professional believe that a detainee's ability to care for themselves is restricted
- the level of control that a detainee has over their situation
- the standard of care required of DIBP or their FDSPs.<sup>41</sup>

155. With respect to detainee safety, the DSM provides that the primary guiding principle is to 'ensure the safety and wellbeing of all employees, detainees and the general public'. The secondary guiding principle is 'compliance with the department's duty of care, as incidents are a major risk to the safety and security of those who are either held in, work at, or visit an IDF ...'.<sup>42</sup>

156. The DSM also provides that the duty of care includes ensuring that immigration detention is 'reasonably safe' for detainees:

## **12 Safety of premises**

DIBP has a duty of care to ensure that an immigration detention facility/building in which a detainee is accommodated, or directed to live, is reasonably safe. This would include an assessment of the potential occupants, the condition of the premises and any detainees sharing the accommodation. Attention will need to be given to the potential occupants of the property as premises that might be safe for adults may pose different risks for minors.<sup>43</sup>

## 4.7 Consideration

157. As discussed above, article 10(1) of the ICCPR requires that the safety and security of people in detention is protected.
158. On the evidence before the Commission, I am satisfied that Ms BH was the victim of a violent assault at Villawood Immigration Detention Centre on the night of 25 February 2016.
159. On the same morning as the assault, a Detention Service Officer called for protection for herself from Ms ZZ and Ms YY because they had threatened her while she was writing up her report of the assault. A risk assessment conducted on the night of the assault assessed the likelihood that Ms BH would be assaulted or threatened by Ms ZZ and Ms YY again as 'PROBABLE'.
160. Yet within nine days, one of the alleged perpetrators of this attack was placed back into an open compound with Ms BH. Within 12 days, both alleged perpetrators had been returned. Ms BH immediately raised concerns for her personal safety and the fact that she was living in fear of future attacks. In the circumstances, I do not consider that speaking to one of the alleged perpetrators about her 'inappropriate behaviour', reminding her of her rights and responsibilities and placing her on a Behaviour Management Plan was a sufficient response to the complaints raised by Ms BH. Despite the distress that she was expressing, it took over two weeks for Ms BH to be moved away from the alleged perpetrators.
161. The Department has provided the Commission with copies of general policies about protecting detainees from reasonably foreseeable risks that were in effect at the relevant time. However, it has not provided any policies or guidance about managing the specific risk of detainee-on-detainee violence. Additionally, it has not produced any documents to show that, before returning the alleged perpetrators to the Banksia compound, proper consideration was given by anyone to whether the women posed a further risk to Ms BH's safety in an open compound environment and, if so, how these risks could be managed. Given the serious nature of the alleged assault, I consider that this was a necessary step in assessing and protecting Ms BH's basic right to safety.

162. That apparent omission is particularly concerning given that, in a decision dated 18 December 2017, the Tribunal subsequently accepted Ms BH's claims that a person with links to organised crime had offered a bounty for her murder because of suspicion that she was a police informant and that criminal networks in New Zealand were eager to claim the bounty. The Tribunal also gave 'some weight' to Ms BH's belief that the two New Zealand women who assaulted her on 25 February 2016 knew of her suspected status as police informant and possibly the bounty. The Tribunal acknowledged that the risk to Ms BH's safety was significant.
163. In response to my preliminary view, the Department said that there was no incident of violence against Ms BH during the period in which she was placed back into the same compound as the two women who had allegedly assaulted her. The Department claimed that this 'demonstrat[ed] Serco was able to ensure [Ms BH's] safety'. I am not persuaded by this submission. In circumstances where Ms BH made credible complaints of threats to her safety in detention and named witnesses to threats, it is in my view disingenuous to suggest, without more, that the reason the threats were not carried out was because Serco was 'able to ensure' Ms BH's safety and security. The lack of a further serious assault on Ms BH may have been attributable more to good fortune than good management. This is particularly so given the availability of alternative short-term accommodation in Hotham compound, which was only eventually used for Ms BH from 24 March 2016.
164. On the information before the Commission, given the apparent lack of a documented risk assessment process, I find that Serco and the Department failed to take adequate steps to protect Ms BH's safety following her alleged assault. Consequently, I find that Ms BH was not treated with humanity and with respect for her inherent dignity as required by article 10(1) of the ICCPR.

## 4.8 Ongoing concerns for Ms BH's safety in detention

165. In her complaint to the Commission dated 2 June 2016, Ms BH stated: 'Detention is having a severe negative impact on my mental health. Especially, because of the serious risk of harm I face of being assaulted and murdered in detention'. Since her complaint, Ms BH maintained that she continued to be at risk of serious harm or injury in detention, including her murder.
166. On 14 June 2018, the Commission advised the Department of Ms BH's 'concerns that she is not safe in detention at Villawood IDC and that she believes there are people in detention with her that are connected to New Zealand gangs'. The Commission drew the Department's attention to Ms BH's request that she be transferred to a different detention centre, and her claim that 'there is a detainee at Villawood who is a relative of the main Bikie gang in New Zealand that has been hunting to kill her'. The Commission advised the Department that Ms BH 'is terrified that they are planning an attack on her inside detention'.
167. On 15 June 2018, the Department noted that it had 'forwarded your concerns below to the centre and they have acknowledged receipt'.
168. On 31 August 2018, Ms BH emailed Minister Coleman to congratulate him on his new appointment as the Minister for Immigration, and enclosed a lengthy statement in which she reiterated that she faces a risk of serious 'life-threatening' harm in immigration detention:

The department is holding me in detention where I have been assaulted and suffer serious injurious, and could have been killed and where I am in danger of being seriously harmed again, for the reason of my Protection visa.

That is no exaggeration, I am being held in a dangerous, life threatening situation, in prolonged and particularly burdensome conditions in Villawood Immigration Detention, where it seems obvious that the case management are corrupted and intentionally leaving me in real risk of harm and in danger of being killed.

169. On 1 September 2018, Ms BH forwarded the email she had sent to Minister Coleman to numerous other public officials, including the Hon Alex Hawke MP and the Hon Scott Morrison MP.
170. By letter dated 14 September 2018, a Senior Adviser to Prime Minister Morrison replied to Ms BH's email on the Prime Minister's behalf:

While I appreciate that this is a very difficult time for you and your family, the Prime Minister is unable to intervene in this matter under Australian legislation. The matters you raise in your letter fall under the responsibilities of the Minister for Immigration, Citizenship and Multicultural Affairs, the Hon David Coleman MP.

I have therefore taken the opportunity to refer your letter to Minister Coleman, for his consideration.

171. It appears that there was no response to Ms BH's correspondence by or on behalf of Minister Coleman.
172. Ms BH has provided to the Commission certain documents produced to her by the Department pursuant to the *Freedom of Information Act 1982* (Cth). In an internal departmental email sent on 23 July 2020 at 10.17 am, an officer in the position of 'Assistant Director', 'National Allocations and Finalisations Section (Team 4)', referred to Ms BH's case in the following terms:

This is a case with a very long history, which I understood to be well known across the network due to ongoing JR matters and persistent, scattergun submissions from the applicant and her partner. Notably, I understood this case to have a 'do not respond' principle applied to the ongoing correspondence because at some earlier point in time it had been considered 'vexatious'.

173. I invited the Department to comment on the application of the 'do not respond' principle in Ms BH's case. In response, the Department said:

The "do not respond" principle relates to correspondence received from the general public, and which is addressed to the Department or Portfolio Ministers. A departmental officer may choose to close a piece of correspondence without a response for a very limited number of reasons, including if the contents of the letter are argumentative, offensive, or contain no new relevant information. This is a decision made after careful consideration

and with appropriate clearance from senior officers. Application of this policy is made on a case-by-case basis with each piece of correspondence. It is not a blanket policy covering all correspondence relating to a specific individual.

To date, the Department has received 41 pieces of correspondence from [Ms BH]. Of these, the Department has closed 17 pieces of correspondence without responding. Nine were closed as the contents were identical to a letter that had already been responded to. The remaining eight were closed due to offensive or argumentative content, or as they contained no new relevant information. The Department maintains that it has responded reasonably and proportionately to written complaints received by [Ms BH].

174. The Department did not address the Assistant Director's stated understanding that 'this case' (which I infer meant Ms BH's case) had 'a "do not respond" principle applied to the ongoing correspondence because at some earlier point in time it had been considered "vexatious"' (which I infer meant that the Assistant Director understood there to be a blanket policy covering all correspondence relating to Ms BH because at some earlier time her correspondence had been considered vexatious). I am comforted by the Department's assurance that the Assistant Director's understanding was not in accordance with policy, but troubled by the absence of any explanation for why or how the Assistant Director's understanding came to exist in the first place. It suggests that any policy was misunderstood or misapplied.
175. In Ms BH's case, her correspondence was particularly significant because she expressly claimed 'life-threatening' conditions 'leaving me in real risk of harm and in danger of being killed'. The circumstances in which a gaoler can lawfully choose not to respond to a detainee's fears of imminent murder must be few. Approximately one year after Ms BH's correspondence, the Tribunal expressly found that Ms BH 'is at risk in detention of injury as a result of the very circumstances which led to the finding' of protection, and that her continued detention 'would keep her in a dangerous environment'. Portfolio Ministers accepted this finding (see [182]-[185] below).
176. Indeed, when Ms BH was voluntarily removed from Australia on 10 January 2023, she told an interviewing officer that she

remains 'fearful, however [I] need to get out of detention. My life is in danger in detention.'

177. It is significant that the Department's response is that its silent treatment of Ms BH's complaints was justified as 'reasonabl[e] and proportionat[e]': it is not that Ms BH was safe. If the Department's view was that Ms BH was safe, it should have told her, and, significantly, explained why its view differed to the view of her safety taken by the Tribunal and Ministers.
178. I note with concern the understanding at least between some officers responsible for Ms BH's file that they were entitled to disregard at least some of her correspondence. That concern is heightened having regard to the very serious allegations contained in that correspondence that were later held to be substantiated.

## 4.9 Findings made by the Tribunal and Ministers

179. As noted above, the Tribunal and two Ministers who personally considered Ms BH's case found that Ms BH was, in fact, assaulted as she alleged, and that she remained at risk in detention.
180. In its decision on 18 December 2017, in the Migration and Refugee Division, the Tribunal recorded Ms BH's evidence that she 'was assaulted by two Maori women who were awaiting deportation', and having apparently accepted that evidence, the Tribunal was prepared to give some weight to Ms BH's belief that the women who assaulted her 'knew of the betrayal of which [she had been accused], if not also of the bounty' (at [25], [35]).
181. In a guidelines assessment under s 195A dated 29 November 2018, a case officer recorded:

On 23 June 2018 [Ms BH] filed a detainee complaint form, asking to be transferred to an alternative detention centre. [She] stated that her detention was placing her in the company of those from whom she sought protection (New Zealand gang associates). These allegations were consistent in correspondence from her husband ... who on 27 June 2018 wrote to the Department alleging that [her] life was in danger in detention.

182. In its decision on 18 September 2019, the Tribunal found that Ms BH had ‘on several occasions been attacked by other persons in detention’ (at [11]). The Tribunal said: ‘The attacks started in 2016 (as the Migration and Refugee Division found) and occurred again recently. These circumstances have made the applicant terrified to remain in detention’. The Tribunal concluded that Ms BH ‘is at risk in detention of injury as a result of the very circumstances which led to the finding that non-refoulement obligations are owed in respect of her’, and that remission of the matter ‘would keep her in a dangerous environment’ (at [67(a)]).
183. In his personal decision dated 6 December 2019, Minister Coleman found that Ms BH ‘has been subjected to physical and verbal abuse at the hands of other detainees’, and has required treatment in a hospital, noting that her ‘allegations of assault in detention are generally supported by a detention client incident report. Charges were laid against other detainees for the assaults upon [Ms BH], and these charges remained pending at the time of the AAT hearing in September 2019’ (at [98]).
184. Minister Coleman noted that Ms BH ‘alleges she suffered a cervical spine injury in the course of an assault by two detainees whom she alleges tried to kill her’ (at [155]). Minister Coleman accepted the Tribunal’s findings in its decision of 18 September 2019 to the effect that Ms BH ‘had been attacked in detention “on several occasions”’ and is ‘at risk in detention of injury as a result of the very circumstances’ which led to the finding that she is owed non-refoulement obligations (at [156]). Minister Coleman concluded that Ms BH’s ‘allegations of two assaults in detention are generally supported by a detention client incident report’ (at [156]).
185. In his personal decision dated 23 July 2020, Minister Dutton made findings in identical terms to those made by Minister Coleman recorded above (at [103], [166]-[167]). Minister Dutton added that ‘I note that she has come into conflict with other detainees as recently as 20 April 2020’ (at [167]).
186. It is of great concern to me that Ms BH remained in immigration detention, in materially the same conditions, in circumstances where the Tribunal and two Ministers who personally considered her case apparently accepted that she was ‘at risk in detention of injury as a result of the very circumstances’ which led to

the finding that she is owed non-refoulement obligations. The circumstances which led to that finding were that a significant bounty had been offered by criminal networks in New Zealand for her murder.

187. Although the Department in its response to my preliminary view noted that I had formed the preliminary views expressed above, the Department did not respond to those views more particularly than the general submission that the Department's processes for considering individual needs were followed in any instance where Ms BH expressed fear for her safety in detention.
188. In particular, the Department did not respond to my preliminary view that:
  - (a) the Tribunal, Minister Coleman, and Minister Dutton recognised that Ms BH was at risk of serious harm in detention; and
  - (b) no action was taken in response to that risk.
189. I find that the inaction of the Department and portfolio Ministers in response to Ms BH's expressed fears for her safety, and in response to her apparent risk of serious harm in detention, were inconsistent with and contrary to Ms BH's right to be treated with humanity and with respect for the inherent dignity of the human person under article 10(1) of the ICCPR.

## 5. Complaint of arbitrary detention

190. Ms BH complains that her ongoing detention in a closed immigration detention centre under the control of the Commonwealth was inconsistent with and contrary to her human rights. This requires consideration to be given to whether her detention was ‘arbitrary’ contrary to article 9(1) of the ICCPR.

### 5.1 Article 9 of the ICCPR

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

- (a) ‘detention’ includes immigration detention;<sup>44</sup>
- (b) lawful detention may become ‘arbitrary’ when a person’s deprivation of liberty becomes unjust, unreasonable, or disproportionate in the particular circumstances;<sup>45</sup>
- (c) ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, or lack of predictability;<sup>46</sup>
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>47</sup>

192. In *Van Alphen v The Netherlands*, the UN HR Committee found detention for a period of two months to be ‘arbitrary’ because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence, or recurrence of crime.<sup>48</sup>

193. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the State Party’s immigration policy (for example, the imposition of reporting obligations, sureties, or other conditions) in order to avoid the conclusion that detention was ‘arbitrary’.<sup>49</sup>

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

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.<sup>50</sup>

195. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty—in this case, continuing closed immigration detention—must be necessary and proportionate to a legitimate aim of the State Party—in this case, the Commonwealth of Australia—in order to avoid being ‘arbitrary’.<sup>51</sup>

196. It is therefore necessary to consider whether the detention of Ms BH in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to her, and in light of the available alternatives to closed detention. If her 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(1) of the ICCPR.

197. The obligation lies on the Commonwealth to demonstrate that there is not a less invasive way than held detention in a closed centre to achieve the aims of its immigration policy.

## 5.2 Whether detention is authorised by Australian law

198. Detention that is not lawful under Australian law is ‘arbitrary’ within the meaning of article 9(1) of the ICCPR. It follows that it is necessary to consider whether Ms BH’s detention was authorised by Australian law.

### Reasonable suspicion that Ms BH was an unlawful non-citizen

199. On 10 September 2010, a delegate of the Minister cancelled Ms BH’s special category visa under s 109 of the Migration Act, at which time she apparently became an unlawful non-citizen. In the absence of any suggestion to the contrary, I am prepared to assume for the purposes of this inquiry that officers of the Department reasonably suspected that Ms BH was an unlawful non-citizen at all material times thereafter.

200. In those circumstances, ss 189(1) and 196(1) of the Migration Act prima facie authorised Commonwealth officers to detain Ms BH and keep or cause her to be kept in immigration detention, subject to the Act and the Constitution.

### Effect of the Tribunal’s decision dated 20 April 2017

201. On 20 April 2017, the Tribunal decided to remit the matter of Ms BH’s application for a bridging visa for reconsideration as follows:

The Tribunal remits the matter for reconsideration with the direction that the applicant meets the following criterion for a Subclass 050 (Bridging (General)) visa:

- cl.050.223 of Schedule 2 to the Regulations.<sup>52</sup>

The Tribunal also directs the primary decision-maker:

- to indicate to the applicant that conditions 8401, 8505 and 8564 will be imposed if the visa is granted;<sup>53</sup> and
- to require a security of \$10,000 for compliance with the conditions.

202. The effect of the Tribunal's decision was to record a factual finding that, if a bridging visa is granted to Ms BH subject to those conditions and security for compliance is required and taken, she will abide by those conditions. The finding was accompanied by, and related directly to, a direction that those conditions be imposed. In effect, those findings were the basis for the direction. This should have been one of the bases upon which the primary decision-maker then acted in deciding whether to grant a visa. The Tribunal was clearly indicating to the primary decision-maker how issues of character that related to anticipated criminal offending were to be dealt with.

203. The Department refuted that characterisation of Ms BH's circumstances, submitting that:

Whilst the decision maker is required to follow the directions of the AAT, if a non-citizen does not satisfy the delegate that they pass the character test under s 501 of the *Migration Act 1958* (the Act) their visa application must be referred to the Visa Applicant Character Consideration Unit (VACCU) for a character assessment', and in the case of Ms BH, 'the BVE decision maker determined that [Ms BH] may fail the character test (s501(6)) due to her substantial criminal record, and therefore her BVE application was submitted to VACCU for consideration. The section 501 delegate decided on 3 July 2017 to refuse [Ms BH's] BVE application under section 501 of the Act and the AAT affirmed the decision on 3 October 2017.

204. Although I accept the Department's submission that the power to refuse to grant a bridging visa to Ms BH under s 501 remained available to be exercised in appropriate circumstances, I do not accept that it was open to a delegate to ignore the substance of the Tribunal's decision by, for example, reaching a contrary view about the probability of Ms BH engaging in criminal conduct or disappearing into the community without reporting to the Department, unless there had been a material change to the circumstances before the Tribunal on 20 April 2017 and the delegate's view was based on that change. The Minister must 'give effect to' the Tribunal's directions.<sup>54</sup>

205. To the extent that the Department seeks to distinguish between 'directions of the AAT', which the Department accepts decision-makers are required to follow, and findings falling short of

directions, the distinction is immaterial in this case having regard to the terms in which the Tribunal's decision was expressed.

206. In other words, absent such a material change of circumstances, any delegate considering whether to grant or refuse a visa to Ms BH (whether under s 501 or otherwise) should have proceeded on the basis that, if the visa conditions and security referred to by the Tribunal were imposed and taken, Ms BH would not engage in criminal conduct, would live at a specified address, and would report to the Department as specified by the Minister. That leaves little or no room for a conclusion that she presents an unacceptable risk to the community. In the case of Ms BH, the ground of the character test considered by the delegate was the ground in s 501(6)(d)(i), namely, whether there was a risk that the visa applicant will engage in criminal conduct in Australia. The delegate did not consider any past criminal conduct not already considered by the Tribunal. In assessing the risk of future criminal conduct at [30]-[56], the delegate did not refer at all to the directions of the Tribunal. Further, in exercising their discretion and assessing whether Ms BH posed an 'unacceptable risk' at [57]-[107], the delegate did not refer at all to the directions of the Tribunal and the ways the Tribunal found that the risk of future criminal conduct could be addressed. In the events that occurred, the Tribunal affirmed the delegate's decision on 3 October 2017, and the Federal Court set aside that decision on 5 April 2018, remitting the matter to the Tribunal constituted by a different member. Ms BH was kept in detention.

## **Effect of the Tribunal's decision dated 18 September 2019**

207. On 18 September 2019, having previously decided that Ms BH satisfies the complementary protection criterion for the grant of a protection visa, the Tribunal decided that Ms BH is not to be refused a protection visa under s 501(1) of the Migration Act.<sup>55</sup>
208. That represented a significant development for Ms BH's legal position. Section 65(1) of the Migration Act imposed a duty on the Minister to grant a protection visa to Ms BH if satisfied that she met the criteria for that visa.
209. As the Minister apparently admitted in subsequent proceedings for judicial review of the Tribunal's decision,<sup>56</sup> it follows that Ms BH had satisfied all criteria for the grant of a protection visa,

subject only to the possible exercise of the Minister's personal powers to intervene under s 501A of the Migration Act. The result was that, under Australian law, Ms BH had a right to the grant of a protection visa unless the Minister lawfully decided to exercise, and did lawfully exercise, such a power.

210. If Ms BH had a right to the grant of a protection visa at any time, she may have had a right to be released from immigration detention, having regard to s 196(2)-(3). Further, any suspicion that Ms BH continued to be an unlawful non-citizen might have, in those circumstances, ceased to be reasonable.<sup>57</sup>
211. The legality of the exercise of the Minister's personal powers under s 501A is therefore relevant to my consideration of the legality of Ms BH's detention.
212. On 25 November 2019, Rares J made an order in the nature of a writ of mandamus requiring the Minister to determine Ms BH's application for a protection visa pursuant to s 65 of the Migration Act according to law on or before 6 December 2019.<sup>58</sup>
213. On 6 December 2019, Minister Coleman purported to exercise power under s 501A(2) of the Migration Act to set aside the Tribunal's decision and refuse to grant a protection visa to Ms BH.
214. On 9 July 2020, Rares J ordered that Minister Coleman's decision under s 501A(2) be set aside. His Honour found that the Minister had failed to comply with the order in the nature of a writ of mandamus that his Honour made on 25 November 2019, and ordered the Minister to do so within 14 days, that is, on or before 23 July 2020.<sup>59</sup>

## **Legality of the Minister's decision dated 23 July 2020**

215. On 23 July 2020, Minister Dutton exercised his personal power under s 501A(3) of the Migration Act to set aside the Tribunal's decision and refuse to grant a protection visa to Ms BH. I note that Minister Dutton and Minister Coleman made their decisions in the exercise of different personal powers attracting the operation of different statutory duties.
216. On the material before the Commission, Minister Dutton made his decision on the last possible day for compliance with the order made by Rares J. In those circumstances, there may be reason to

think that the power given by s 501A(3) was no longer available to the Minister at the time at which he purported to exercise it, because it was no longer possible for the Minister to comply with his statutory duties with respect to revocation under s 501C. 'Exercise by the Minister of the power conferred by s 501A(3) is excused by s 501A(4) from compliance with procedural fairness, but triggers application of s 501C through the operation of s 501C(1).'<sup>60</sup> The exercise of power under s 501A(3) is subject to '[t]he further qualifications imposed by s 501C'.<sup>61</sup>

217. The cover letter to Ms BH enclosing the Minister's decision invited her, pursuant to s 501C(3)(b), to make representations to the Minister about revocation 'within seven (7) days of you being given this notice (please note this timeframe cannot be extended)'. Ms BH was 'entitled' to make representations because she was a detainee (reg 2.52(7)(a)). Section 501C(4) conferred a power on the Minister to revoke the original decision if Ms BH made representations in accordance with the invitation and satisfied the Minister that she passed the character test, relevantly, s 501(6)(c). Section 501C(6) provided that, if the Minister revoked the original decision, the original decision was taken not to have been made. In the event the original decision was taken not to have been made within the time ordered by Rares J, the Minister may not have complied with the order.
218. I consider that there are reasonable arguments that the timing of the Minister's decision, having been made on the last possible day for compliance with the order made by Rares J, left no room for the operation of s 501C. On that view, the statutory scheme for representations and revocation for which provision is made by that section appears to have been stultified. The High Court has held that a decision to cancel a visa under s 501(3) based on a misconception as to the opportunity of the visa holder to seek revocation of the decision involves jurisdictional error.<sup>62</sup> There is no reason to think that a decision to refuse to grant a visa under s 501A(3) on the same erroneous footing is any different.
219. In Ms BH's case, in response to a recommendation that the Minister '[n]ote ... she has a right to seek revocation pursuant to s501C(3)', the Minister circled the word 'noted'. The Minister's reasons also show that he proceeded on the basis that Ms BH would be 'invited to make representations about possible revocation', and if she satisfied him that she passed the character

test, the revocation power would be enlivened (at [10]-[11]). The Minister acknowledged that ‘some nine months have passed since [Ms BH] provided submissions to the Department, and her circumstances or those of her family may have changed’ (at [13]). Notably, Ms BH had satisfied the Tribunal that she passed the character test over the course of six days of hearing during which it had the opportunity to observe her in the witness box under cross-examination by experienced counsel for the Minister. The Minister’s power of revocation could have been enlivened, and might have been exercised in her favour by the deadline set by the Court for the determination of her visa application, had the Minister’s decision been made earlier.

220. Justice Rares had allowed a period of 14 days for the making of the decision, having previously allowed the same period to Minister Coleman, that period being ‘common ground’.<sup>63</sup> The timeframe was double the prescribed period for the making of representations about revocation under s 501C. The Minister could have made a decision under s 501A(3) at a time that would have accommodated representations and revocation under s 501C and the lawful determination of her visa application in compliance with Rares J’s order. Once the time for compliance with that order had passed, however, the Minister could only remain in compliance with the order for so long as he did not revoke his decision. If the Minister could not lawfully revoke his decision in circumstances where revocation may have been the appropriate outcome, it may be that it was not lawful for the Minister to make the decision in the first place. In those circumstances, it may be that the only lawful decision available to the Minister, on the last day for compliance, was to grant the visa.

221. In the Department’s submission to Minister Dutton, it was said (at [11]):

A decision under s501A(3) of the Act will mean that you have complied with the Court’s order. If you decide not to exercise the power in s501A(3), a Departmental delegate will make a decision on [Ms BH’s] application for a protection visa under s 65 of the Act, and will grant her the protection visa, as no other criteria remain outstanding.

222. The first sentence of that paragraph appears to have been legally erroneous. There would be compliance with Rares J’s order only

if the Minister's decision was not revoked, and it could not be assumed that the Minister's power of revocation would never be enlivened and exercised in Ms BH's favour. The second sentence reveals the magnitude of what was at stake for Ms BH.

223. The legal position was serious. Ms BH had been detained for almost five years. Two orders in the nature of mandamus had been made requiring Ministers to make a decision according to law, non-compliance with which may have resulted in the responsible officer 'being committed to prison for contempt of court'.<sup>64</sup> Absent the lawful exercise of the Minister's personal power to refuse to grant the visa for which she had applied, '[p]erformance of the writ's command at or before the time fixed for its return would have obliged the Minister to grant a Protection (Class XA) visa'.<sup>65</sup> Ms BH may have had a claim to a permanent protection visa and to her freedom.

224. In its response to my preliminary view, the Department disagreed, saying:

[T]he Department does not agree that the timing of the Ministerial decision precluded the operation of section 501C. The Court's orders required the application for a protection visa to be determined. That occurred when the application was refused under section 501A(3). Nothing in the Court's orders affected [Ms BH's] operational entitlement to seek revocation of that decision, nor (had she elected to do so) required the Minister to make the legally separate and distinct decision about whether to revoke his decision in any particular timeframe.

225. There was no response to the legal significance of s 501C(6). The Department also noted that Ms BH was in fact invited to make submissions about revocation and did not do so. It seems to me, however, that the validity of the Minister's decision must be considered at the time the decision was made.

226. In my view, it is reasonably arguable that the making of the Minister's decision on the last possible day for compliance was not according to law, in particular, the statutory scheme provided for by ss 501A(3) and 501C, as it was no longer possible for the Minister to comply with both the duties imposed by s 501C and with the order made by Rares J. It is reasonably arguable that the Minister proceeded upon an erroneous legal assumption that

a decision under s 501A(3) of the Act at that time would mean compliance with Rares J's order.

227. On 24 July 2020, Ms BH commenced a new proceeding in the Federal Court for judicial review of Minister Dutton's decision.
228. In her amended originating application before Mortimer J, Ms BH sought a peremptory writ of mandamus commanding the Minister to grant her a protection visa on the ground that the Minister's decision under s 501A(3) was 'invalid' and did not comply with the orders made by Rares J. Justice Mortimer recorded Ms BH's submissions to the effect that a protection visa was required to be granted to her under s 65; should have been granted after the Tribunal's decision; and that 'she has a legal entitlement to a protection visa'.<sup>66</sup> Ms BH represented herself before the Federal Court.
229. Justice Mortimer described the Minister's decision as follows (at [91]):

In substance, the Minister accepted there was a "real risk" (the language of s 36(2)(aa)) the applicant may be tortured, beaten, or the victim of "violent retribution". His findings appeared to include, as senior counsel accepted, a finding there was a "real risk" the applicant would be killed. To repeat, the Minister accepted there was a real risk the applicant would lose her life if returned to New Zealand. He accepted this risk weighed in favour of not refusing a protection visa but simply was not moved to allow that risk (or the other considerations which two Tribunals had accepted) to guide the exercise of his discretion.

230. Justice Mortimer acknowledged that the legal reasonableness of such a decision might be open to question (at [93]), citing her Honour's previous dicta in *KYMM* to the following effect:

Contrary to my understanding of the Minister's submissions, it is not the case the Tribunal found there was a real chance the applicant would be killed if he were returned to South Sudan. At [130], the Tribunal rejected a contention put on the applicant's behalf which pitched this risk as "certain". Otherwise, as far as I can see, the Tribunal made no finding about the level of harm rising to this absolute level. If it had, as I observed during oral argument, the Court would have expected to see considerably more reasoning about how such a prospect could be outweighed by even a high risk of reoffending in the Australian community.

It would be an extraordinary situation where protection of the Australian community could be said to justify forcing a person to face a likelihood of death in another country.

231. In the event, however, Mortimer J did not consider whether the Minister's decision was legally unreasonable. Her Honour said (at [92]-[93]): 'In her amended application, the applicant did not advance a ground of legal unreasonableness. ... Therefore, whether any Minister, acting reasonably, could have refused to grant the applicant a protection visa is not a matter for this Court to determine.'
232. Similarly, on appeal, the Full Court said (at [65]): 'Neither below nor in the appeal did the appellant challenge the Minister's assessment on the ground of legal unreasonableness.' Ms BH was again self-represented. By consent, the appeal was determined on the papers without an oral hearing.
233. On 12 August 2021, Gageler and Gleeson JJ declined to grant special leave to appeal on the basis that the prospects of success were not such as to warrant the grant of special leave.
234. The orders made in the judicial review proceeding before Mortimer J are valid and binding unless and until set aside or quashed. Having regard to the operation of the privative clause, the effect of those orders is, at least, that the Minister's decision did not involve the jurisdictional errors alleged in that proceeding. That does not necessarily mean that the decision was made 'according to law' within the wider meaning of the order in the nature of mandamus made by Rares J. There is no reference to the statutory scheme for revocation in the judgments. As the proceedings concerned the exercise of different personal powers by different portfolio Ministers, the parties to the proceedings were different. The proceeding taken before Mortimer J appears to have been approached as a fresh application for judicial review for jurisdictional error of a different personal power by a different portfolio Minister, rather than by reference to the principles governing a challenge to the sufficiency of a return to a mandamus such as might have permitted Ms BH to seek to enforce compliance with the writ by having the Court issue a peremptory mandamus to the same portfolio Minister.<sup>67</sup>

235. I have discussed above a reasonably arguable basis for concluding that the Minister's decision was not made according to law. So far as I am aware, however, Ms BH did not seek to relist the matter before Rares J to challenge the sufficiency of the Minister's return to the mandamus, and no further applications have been made to the High Court. The Minister's decision was judicially reviewed by a superior court for jurisdictional error and was not quashed. The matter having been left on that basis, it seems to me that I should not take the further step of considering whether Ms BH might have otherwise had any entitlement to a peremptory mandamus for the grant of a protection visa.
236. Reconciling those circumstances as best I can, I consider that, on the material presently before me, I should proceed on the basis that:
- (a) the Minister's decision dated 23 July 2020 may not have been made according to law because it was made too late for the Minister to comply with the duties imposed by s 501C consistently with the order made by Rares J;
  - (b) the Minister's decision nevertheless has legal force and effect.
237. Accordingly, subject to the consideration of the prospect of indefinite detention (discussed immediately below) I find that Ms BH's detention during the course of her judicial proceedings was authorised by Australian law.

## **Legality of indefinite detention**

238. Once Ms BH had no outstanding legal proceedings in relation to the grant of a visa, she was subject to removal from Australia under s 198 of the Migration Act.
239. On 25 May 2021, the provisions of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) commenced. The effect of the amendments made to s 197C of the Migration Act was that Australian law no longer authorised the refoulement of Ms BH to New Zealand. As she had no right to enter and reside in any other State, Ms BH faced the prospect of being detained indefinitely. In his decision made on 23 July

2020, Minister Dutton accepted 'that there is currently no known prospect of removing [Ms BH] to any other country' (at [160]).

240. In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, the High Court held that if an alien, such as Ms BH, has failed to obtain permission to remain in Australia, she can no longer lawfully be held in immigration detention if there is no real prospect of her removal from Australia becoming practicable in the reasonably foreseeable future.<sup>68</sup> While this decision was handed down after Ms BH was removed from Australia, the High Court was describing a constitutional limit that applied during her detention.
241. I have formed the view that, as a result of the *NZYQ* decision, the detention of Ms BH was no longer authorised by the Migration Act from at least 12 August 2021. I have reached that conclusion based on the following circumstances:
- (a) On 18 December 2017, in the course of the Tribunal reviewing a decision with respect to Ms BH's application for a protection visa, a 'protection finding' within the meaning of s 197C(5)(b) of the Migration Act was made in her favour with respect to New Zealand.
  - (b) On 23 July 2020, the Minister acknowledged that there was no known prospect of removing Ms BH to any country other than New Zealand.
  - (c) On 25 May 2021, s 197C of the Migration Act was amended, with the effect that Ms BH was prohibited from being returned to New Zealand.
  - (d) On 12 August 2021, the High Court refused Ms BH special leave to appeal in relation to her challenge to the Minister's refusal to grant her a protection visa. By this date, her protection visa application was finally determined. From that date, she was no longer being detained for the purpose of assessing whether to grant her a visa, and (absent a request by her to be returned to a country in respect of which she had protection findings in her favour) there was no real prospect of her removal from Australia becoming practicable in the reasonably foreseeable future.
242. After 12 August 2021, Ms BH was involved in further litigation with the Department, but it did not relate to the question of

whether or not she should be granted a visa. Instead, Ms BH was seeking orders in the nature of habeas corpus to release her from immigration detention,<sup>69</sup> or orders in the nature of mandamus to compel the Minister to remove her to a third country.<sup>70</sup> The applications in each set of proceedings were dismissed, although the courts in the first set of proceedings dealing with the question of habeas corpus did not have the benefit of the High Court's reasons in *NZYQ*.

243. It was only after those cases challenging the lawfulness of her detention were ultimately decided against her that Ms BH agreed to be returned to New Zealand. At the time that she made that decision on 7 December 2022, she also made clear to an interviewing officer that she remained 'fearful, however [I] need to get out of detention. My life is in danger in detention'.
244. I find that Ms BH's detention from 12 August 2021 until she requested to be removed from Australia on 7 December 2022, a period of approximately 16 months, was not authorised by the Migration Act and was unlawful as a matter of Australian law.
245. In response to my preliminary view in respect of that finding, the Department said only the following:

The Department is considering how the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (*NZYQ*) may impact past immigration detainees. However, as there is active litigation that is before the Courts dealing with these issues, it is inappropriate to comment further. The Department notes that it is open to [Ms BH] to seek legal advice in respect of how the High Court's decision in *NZYQ* would impact her situation.

The Department notes that notwithstanding the High Court's decision, all decisions made in relation to the management of [Ms BH] were in line with the policy and legal frameworks at the time.

246. To the extent it is submitted that 'all decisions made in relation to the manage of [Ms BH] were in line with the ... legal frameworks at the time', I accept that the decision-makers involved believed they were making their decisions according to law, but I otherwise reject the submission. The applicable legal framework at the time is that explained by the High Court in *NZYQ*.

## 5.3 Whether detention is otherwise arbitrary

### Detention is not required by Australian law

247. Section 195A(2) of the Migration Act confers upon the Minister a personal discretionary power to release a person from detention by the grant of a visa. Subject to the Act, the visa may be granted for such period, and subject to such prescribed conditions, including reporting conditions, as the Minister thinks appropriate. The visa may also be cancelled pursuant to other powers conferred by the Act, or by the operation of other provisions.
248. The only express condition for the exercise of the power given by s 195A is that the Minister thinks that it is in the public interest to grant a visa of a particular class to the detainee. The breadth of the public interest criterion is capable of accommodating Australia's international obligations and the personal circumstances of the detainee. I consider that, generally speaking, it is open to the Minister to think that it is in the public interest to grant a visa to a detainee on the basis that the grant of the visa would facilitate compliance with Australia's international obligations.
249. By the enactment of s 195A and related provisions, Parliament has authorised (but not required) the Minister to administer the Migration Act in a manner that ensures that no unlawful non-citizen is subjected to arbitrary detention within the meaning of article 9(1) of the ICCPR. Section 195A(4) provides that the Minister does not have a duty to consider whether to exercise the power, but that does not deny that the Minister may choose to consider the exercise of the power, and may exercise the power, where the Minister thinks it is in the public interest to do so, such as to comply with Australia's international obligations in a proper case. The existence of the power cannot be ignored.
250. Although the power given by s 195A(2) may only be exercised by the Minister acting personally, it is not necessary that the assessment of cases that may justify consideration of the exercise of the power be undertaken personally by the Minister. The Minister has power under s 499 of the Act to give binding

directions to any person having functions or powers under the Act, including officers on whose behalf unlawful non-citizens are detained. The Minister may also promulgate policies or guidelines with or without the exercise of power under the Act. So far as I am aware, the Minister has not exercised power under s 499 to direct officers to conduct periodic reviews of detention for the purpose of s 195A. The Minister has, however, issued guidelines from time to time to the Department for the assessment and referral of cases to the Minister for possible consideration of the exercise of power under s 195A(2).

251. The enactment of s 195A and the issuance of ministerial guidelines for the assessment and referral of cases for possible consideration of the exercise of that power demonstrate that immigration detention may, in practice, be discretionary rather than mandatory. There have been occasions on which the Minister has decided that entire cohorts of asylum seekers would be considered under ss 46A and 195A, with such consideration to proceed by reference to guidelines that were also issued by the Minister.<sup>71</sup> The Minister has also sought to grant visas to entire cohorts of detainees.<sup>72</sup> The extent to which immigration detention is, in practice, discretionary, may vary according to the content of the ministerial guidelines and the manner in which the Act is administered in respect of particular detainees.
252. For those reasons, I must consider all the circumstances of Ms BH's detention in determining whether it was otherwise arbitrary.

## **Detention and ministerial intervention powers**

253. In its response to my preliminary view, the Department submitted:

It is not a legal requirement that a detention case be considered for assessment against Ministerial Intervention guidelines, or be referred to the Minister to consider exercising their personal intervention powers. The Department only refers cases to the Minister where it is determined a case meets the Ministerial Intervention guidelines, or where requested by a Minister.

254. However, the High Court has held that, in some circumstances, decisions by departmental officers *not* to refer a case to the Minister for consideration were unlawful. In *Davis v Minister*

*for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 1, the High Court held that decisions by departmental officials not to refer cases to the Minister, purportedly in compliance with guidelines issued by the Minister, on the basis that the officer had formed the view that the case did not demonstrate ‘unique or exceptional circumstances’, were beyond the executive power of the Commonwealth and were unlawful. This is because the Migration Act reserved to the Minister personally the function of deciding whether or not it was in the public interest for the intervention power to be exercised.

255. The Department acknowledges that:

- a) ‘Between 16 March 2016 and 8 October 2018, [Ms BH’s] case was referred for consideration of Ministerial Intervention under sections 195A and/or 197AB of the Act on four separate occasions’, all of which were finalised without referral to the Minister;
- b) ‘Between 20 November 2015 and 29 March 2017, [Ms BH] sought ministerial intervention under sections 351 and/or 417 of the Act on five separate occasions’, all of which were finalised without referral to the Minister; and
- c) ‘Between 28 May 2021 and 3 February 2022, [Ms BH’s] case was assessed [by departmental officials] against the sections 195A and 197AB guidelines on three separate occasions’, all of which were finalised without referral to the Minister.

256. It follows that some or all of the many occasions on which Ms BH’s case was not referred to the Minister for personal consideration of a public interest power may have involved decisions that were unlawful. At least some of those decisions explicitly found that there were no ‘unique or exceptional circumstances’ in her case warranting referral (for example, s 195A assessments on 6 April 2016 and 1 December 2016 and a s 417 assessment on 22 August 2016).

257. When I raised those decisions and the possibility of that conclusion in a letter to the Department, the Department submitted:

The Minister accepts that, because of the High Court judgment in *Davis v Minister for Immigration; DCM20 v Secretary of*

*Department of Home Affairs* [2023] HCA 10 (*Davis*), the decision not to refer the request for Ministerial intervention to the Minister was made in excess of the executive power of the Commonwealth.

The Department is preparing new ministerial instructions for the Minister following the High Court's decision in *Davis*. Further information about the Department's approach will be made available in due course.

258. The Department did not identify “the decision” or “the request” to which it was referring in that response, but I understand the submission to be referring to the non-referral decisions identified in the Department's previous response and repeated in my letter to the Department, being the 12 non-referral decisions made between 2016 and 2022 enumerated at [255] above.
259. Of those 12 non-referral decisions, at least three were made because an officer found that there were no ‘unique or exceptional circumstances’ in Ms BH's case warranting referral to the Minister, which are materially the same as the facts of *Davis*. On the material before the Commission, it is probable that all non-referral decisions were made for that reason.
260. I accept the Department's submission that those decisions not to refer Ms BH's requests for ministerial intervention to the Minister were made in excess of the executive power of the Commonwealth.
261. In those circumstances, I find that:
- (a) on 12 occasions between 2016 and 2022, departmental officers unlawfully deprived Ms BH of the opportunity of her requests for liberty being considered personally by the then Minister; and
  - (b) Ms BH's 12 requests for ministerial intervention were never lawfully finalised during her period of detention.
262. Those conclusions do not mean that the continuing detention of Ms BH was unlawful at domestic law, but the occurrence of a pattern of unlawful executive action foreclosing lawful consideration of ministerial powers which might have granted her liberty is material to my consideration of whether her detention was or became arbitrary at international law, as discussed below.

## **Detention must be reasonable, necessary, and proportionate**

263. It is significant to note that, on 20 April 2017, the Tribunal decided that it was satisfied that Ms BH would abide by the conditions imposed by a Bridging visa E upon security being given. In making this decision, the Tribunal noted that Ms BH had married an Australian citizen and ‘was impressed by the obvious strength of the bond between them’. It also noted Ms BH’s apologies for her past breaches of Australia’s migration laws and the fact that she had not been convicted of any criminal offences since 2010. It also gave weight to evidence from people who had noted positive changes in Ms BH’s behaviour.
264. The Tribunal found that it would be appropriate to impose the following conditions on Ms BH’s bridging visa: reporting conditions, residing at a specific address, not engaging in criminal conduct, and requiring a security of \$10,000 to ensure compliance with the conditions. Those findings were the product of an individualised assessment of Ms BH’s circumstances. Ms BH’s continuing detention could not be justified at international law unless contrary findings were made through another individualised assessment of her circumstances.
265. Sections 195A and 197AB of the Migration Act give powers to the Minister to allow unlawful non-citizens to live in the community while their immigration status is resolved, including by the making of a residence determination or the grant of a visa such as a bridging visa. It appears that neither of those powers was considered by the Minister in relation to Ms BH, and Ms BH’s requests for ministerial intervention pursuant to those powers were never lawfully finalised during her period of detention.
266. The Department said that between 16 March 2016 and 8 October 2018, Ms BH’s case was referred internally within the Department for consideration for ministerial intervention under ss 195A and/or 197AB on four occasions. However, on each occasion the Department determined that Ms BH’s case did not satisfy the ministerial guidelines for referral to the Minister. Similarly, between 28 May 2021 and 3 February 2022, Ms BH’s case was assessed against the ss 195A and 197AB guidelines on three further occasions, and on each occasion the Department determined that Ms BH’s case did not meet the criteria for

referral to the Minister. The Department now accepts that those decisions were unlawful under Australian law (see [257]-[258]).

267. The Department did not provide details of why departmental officers assessed Ms BH's case as failing to qualify for referral to the Minister. However, the Department said that each of the guidelines 'stipulate that persons who present character issues or whose visa has been refused or cancelled under section 501 of the Act should generally not be referred to the Minister for consideration'.
268. Detainees whose visas have been refused or cancelled under s 501 and related provisions should not, on that basis alone, be excluded from consideration for community detention or bridging visas. In the Statement of Compatibility accompanying the *Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth)*, the Commonwealth acknowledged alternatives to closed immigration detention for this cohort:
- The Government has processes in place to mitigate any risk of a person's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman Own Motion enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister's personal intervention powers to grant a visa or residence determination where it is considered in the public interest.<sup>73</sup>
269. Failing the character test under s 501 of the Migration Act is not a licence for arbitrary or indefinite immigration detention. At international law, detention cannot lawfully continue unless an individualised assessment of the person's circumstances finds that a definite period of detention is reasonable, necessary, and proportionate. Alternatives to detention must be considered as a matter of course for all non-citizens who have had their visas refused or cancelled (whether under s 501 or otherwise), albeit conditions may be imposed to mitigate identified risks as necessary and appropriate. Held detention in closed immigration detention centres must only be used in exceptional circumstances as a last resort where identified risks cannot be managed through less restrictive means.
270. On 30 November 2018, Ms BH's case was assessed by the Department as 'not meeting' the Minister's s 195A guidelines for referral for consideration of a bridging visa.

271. In this guideline assessment it is noted that Ms BH was assessed through the Community Protection Assessment Tool (CPAT) on 13 August 2018. CPAT considers removal readiness, risk to the community and engagement with status resolution processes. Based on this assessment, a placement of ‘Tier 3 – Held Detention’ was recommended for Ms BH. The guideline assessment noted ‘The CPAT assessed Ms BH as a high risk to the community and a high risk of not engaging with the Department.’

272. The guideline assessment outlines Ms BH’s criminal record as follows:

On 9 February 2005, [Ms BH] was convicted by the Local Court of New South Wales of *Assault Occasioning Actual Bodily Harm* for which she was ordered to pay a \$400 fine.

On 10 September 2010, [Ms BH] was convicted by the Northern Territory Court of the following offences:

- *Possess Schedule 2 Substance Commercial* – 28 days imprisonment
- *Furnish False Name to Member* – Fine \$250
- *Possess a Dangerous Drug (Cannabis)* – Convicted without penalty
- *Possess Thing-Administer Dangerous Drug* – Convicted without penalty

[Ms BH’s] criminal record in New Zealand spans 1992 to 2008 and comprises thirty-two convictions. Seventeen of these are driving offences; there are several dishonesty-related offences in 1994, 1995 and 1997, and three drug related offences in 2005 and 2007. [Ms BH] also has convictions relating to theft, property damage and wounding with intent to harm. Three of these cases resulted in ‘sentence if called upon’ to the cumulative total of 2 years. [Ms BH] has spent a total of 28 days in prison.

In 2015 [Ms BH] was charged with *Assault/Obstruct Police Officer* and *Serious Assault Police Officer by Biting, Spitting etc.* The charges were dismissed by a Magistrate on 29 January 2016.

[emphasis in original]

273. Although the assessment uses expressions such as ‘dishonesty-related’ and ‘drug-related’ to describe certain offences, those expressions do not permit a reasonable view to be formed about the seriousness of the offences in the absence of detail as to the actual circumstances in which the offences occurred. It is

significant that Ms BH has never been sentenced to a term of imprisonment, whether in New Zealand or Australia, other than in 2010 for 28 days for possession of cannabis. Even that period was wholly backdated to the time of her arrest and was not served in a prison. She has apparently not offended at all in the past 10 years.

274. The guideline assessment also outlines ‘incidents’ apparently considered to be relevant to an assessment of Ms BH’s behaviour in detention as follows (original emphasis):

[Ms BH] has been the subject of multiple incidents in detention, including:

- four instances of *abusive/aggressive behaviour*, 2018
- *threat of self-harm*, 2018
- *assault* - minor, 2018
- *assault* - serious, major, 2018
- *serious illness (ambulance required)* - client contacted NSW Ambulance service due to not receiving medication from IHMS, 2018
- *contraband* (non-functional mobile phone, not the owner), 2018

All incidents are considered closed.

275. The descriptions of those incidents are not sufficient to provide a reasonable basis for an individualised assessment of Ms BH. Some appear to be incapable of reflecting adversely on her at all, such as the incident described as ‘serious illness (ambulance required)’. None of them purport to record findings, as opposed to mere allegations, and even the particulars of the allegations are absent. It is significant to note that none of those ‘incidents in detention’ appear to have been referred for criminal prosecution or have resulted in a finding of guilt to a criminal standard, or even the civil standard.

276. It is also important to note that, while Ms BH’s criminal record does include two offences of violence — *assault occasioning actual bodily harm* and *wounding with intent to harm* — both of these offences occurred more than 14 years ago. Indeed, the *wounding with intent to harm* offence was committed when Ms BH was just 15 years old.

277. The offence of *assault occasioning actual bodily harm* can cover a range of conduct, from the infliction of temporary bruises and scratches, to more permanent injury. That Ms BH was fined \$400 in 2005, and not given a custodial sentence, suggests that her offence was considered to fall at the lower end of the scale of objective seriousness.
278. Ms BH was sentenced to 28 days for an offence related to possessing cannabis. In total, she spent seven years and five months in closed immigration detention. This disparity illustrates the gravity of the situation faced by the Commonwealth in continuing to administratively detain individuals who have minor criminal convictions.
279. It is of concern to me that Ms BH spent vastly more time in closed immigration detention than in custody for the criminal offences that underpinned the refusal of her visas under s 501 of the Migration Act. The period of her administrative detention was more than 90 times the period of her only custodial criminal sentence.
280. The Department conducted monthly case reviews to consider if Ms BH's placement in detention was justified. However, these reviews tended to focus on whether there was any need for Ms BH to be released from detention, rather than whether it was necessary to continue to detain her.
281. In my preliminary view, I noted that, whilst the CPAT process assessed Ms BH as posing a 'high risk to the community' there is no information before the Commission to indicate how that conclusion was reached, the nature of the particular risk or risks, or whether any consideration was given to why the particular risks perceived to be posed by Ms BH could not be satisfactorily mitigated if she is allowed to reside in the community. I welcomed further information from the Department on that point, and I have addressed the Department's response below.
282. This is particularly significant given the express findings of the Tribunal on 20 April 2017 that it was satisfied that Ms BH would abide by the conditions imposed by a bridging visa if security were given. That decision has never been quashed or set aside and is to be taken to be a decision of the Minister.

283. As discussed above, in order to avoid detention being considered arbitrary under international human rights law, there is an obligation on the Commonwealth to demonstrate that there is not a less invasive way than closed detention to achieve the ends of the immigration policy.
284. To comply with this obligation the Department needs to conduct individualised risk assessments to determine whether any risks an individual may pose to the community can be mitigated. To be meaningful and fit for purpose, every such assessment must be fair and balanced. This does not appear to have occurred in Ms BH's case.
285. In its response to my preliminary view, the Department provided a list of seven bullet points corresponding to information that 'was taken into account in completing the CPAT and assessing [Ms BH] against the sections 195A and 197AB guidelines'.
286. Two of the seven bullet points are objectively neutral to Ms BH as they do no more than state the dates and outcomes of various administrative and judicial decisions made from time to time in relation to her migration proceedings.
287. Two of the seven bullet points are favourable to Ms BH, and are expressed as follows:
- [Ms BH] has been the victim of alleged assaults while in detention and claims to fear harm from other detainees.
  - [Ms BH] has ties to the Australian community including a partner, and a minor child who is in the legal custody of his father.
288. Those matters must have weighed in Ms BH's favour. In my view, the Department's reference to Ms BH's 'claims' to fear harm from other detainees materially understates her circumstances, because her claims were accepted by the Tribunal and portfolio Ministers, who found that she was in fact at risk of harm from other detainees.
289. Of the three bullet points adverse to Ms BH, one says only that Ms BH 'escaped held detention in the Northern Territory in September 2010 and remained unlawful in the community until she was located in August 2015'. However, so framed, that

circumstance does not permit any conclusions to be drawn about the risk that she posed to the community during this period.

290. Another bullet point refers to what is said to be her 'extensive criminal history', but which does not seek to place the historical matters relied upon in a fair and balanced context. For example, the reference to 'grievous bodily harm' omits that the offence dates from 1994 when Ms BH was 15 years old and for which she was sentenced by the Wanganui Youth Court in New Zealand to three months of 'supervision with residence (YC)' orders.
291. The remaining bullet point asserts, compendiously, that between 2015 and 2022 Ms BH 'was involved in 82 incidents' in detention 'where she has been identified as the alleged offender or responsible person'. The Department summarises these incidents as including 'verbal abuse, aggressive behaviour, minor assaults and one major incident where Ms BH allegedly stabbed another detainee in the palm which resulted in the victim being hospitalised (no charges were laid)'.
292. I have not undertaken a comprehensive review of each of these incidents. I note that many of them on their face are minor and could not reasonably justify keeping a person in administrative detention for more than seven years. The most significant incident relates to an allegation of an assault, where no charges were laid, and where Ms BH provided a very different and exculpatory account of what occurred as I note at [110]-[113] above.
293. Ms BH's case was assessed seven times against the Minister's guidelines on ss 195A and 197AB of the Migration Act. On each occasion, the Department determined that her case did not meet the guidelines for referral to the Minister. In a practical sense, the Department acts as a gatekeeper for the exercise of these discretionary Ministerial powers. Because her case was not referred for consideration, successive Ministers were not in a position to indicate whether they wished to consider exercising these powers.
294. The Department suggested that a referral was not made because the relevant guidelines indicate that 'generally' people who present character issues should not be referred. However, each

of the guidelines also provides that cases may be referred where there are 'unique or exceptional circumstances'.

295. The phrase 'unique or exceptional circumstances' is not defined in the guidelines, but the same phrase is defined in similar guidelines that have been in force since 11 March 2016 and that relate to the Minister's power to grant visas in the public interest.<sup>74</sup> In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
- strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible 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 Australian permanent resident;
  - the Department has determined that the person cannot be returned to their country/countries of citizenship or usual residence due to circumstances outside the person's control;
  - 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.
296. Each of those exceptional circumstances was present in Ms BH's case. She is a member of an Australian family unit that includes her son, who is an Australian citizen. Her indefinite and arbitrary detention was likely to result in serious, ongoing and irreversible harm and continuing hardship to that family unit.
297. The Department determined that Ms BH could not be returned to New Zealand due to circumstances outside her control. She was excluded from the grant of a protection visa on character grounds, and her circumstances were assessed as meeting Australia's non-refoulement obligations.
298. Both because her case demonstrated unique or exceptional circumstances and because her detention had become arbitrary, and because the Department was legally obliged to do so at

domestic law (see [261] above), the Department should have referred Ms BH's case to the Minister so that less restrictive alternatives to closed detention could be considered.

299. Ms BH was facing indefinite detention. Having considered the material before me, I cannot be satisfied that her lengthy detention in a closed immigration detention centre was necessary or proportionate to the Commonwealth's legitimate aim of ensuring the effective operation of its migration system.
300. There is no information before me to suggest that any consideration was given to why the particular risks perceived to be posed by Ms BH could not be satisfactorily mitigated in the manner found by the Tribunal if she were allowed to reside in the community.
301. I am not satisfied that the detention of Ms BH in closed detention facilities was reasonable, necessary and proportionate on the basis of particular reasons specific to her, and in light of the available alternatives to closed detention. Her ongoing detention was disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system. As a result, I find that Ms BH's detention was 'arbitrary' under article 9(1) of the ICCPR.
302. For completeness, I note that although article 4(1) of the ICCPR permits Australia to take measures derogating from article 9(1) '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed', no such public emergency relating to immigration detention has ever been officially proclaimed. The result is that Australia must comply with article 9(1) and failed to do so in the circumstances of this case.

## 6. Complaint of arbitrary interference with the family

303. Ms BH also complains that the Commonwealth has engaged in acts and practices that are inconsistent with or contrary to her rights under articles 17 and 23 of the ICCPR.

304. Ms BH advances this claim in relation to her separation from her 12-year old son.

### 6.1 Articles 17 and 23 of the ICCPR

305. 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.

306. 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.

307. For the reasons set out in the Australian Human Rights Commission report *Nguyen and Okoye v Commonwealth* [2007] AusHRC 39 at [80]-[88], the Commission is of the view that in cases alleging a State's arbitrary interference with a person's family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person's family, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).

### 6.2 'Family'

308. To make out a breach of article 17 of the ICCPR, complainants must be identifiable as a 'family'.

309. In its General Comment 16, the UN HR Committee states:

Regarding the term 'family', the objectives of the Covenant require that for the purposes of article 17 this term be given

a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.<sup>75</sup>

310. The UN HR Committee has confirmed that, while the term ‘family’ is to be interpreted broadly,<sup>76</sup> some degree of effective family life or family connection must still be shown to exist.<sup>77</sup>
311. By virtue of an order made in May 2016 under the *Children and Young Person’s (Care and Protection) Act 1998* (NSW), Ms BH does not have parental responsibility for her son. Parental responsibility was allocated to the father until the son turns 18, and he is cared for by his father and paternal grandmother.
312. However, the father provided the Children’s Court with an undertaking that he would facilitate supervised contact with Ms BH once per month while she remained in NSW until her son is 12 years old. There is no information before the Commission to suggest that the father failed to uphold this undertaking.
313. In addition, in a decision dated 3 October 2017, the Tribunal accepted the evidence of the father that he took the son to visit Ms BH at Villawood Immigration Detention Centre.
314. Furthermore, in a more recent decision dated 18 April 2019, a differently constituted Tribunal stated that ‘[Ms BH] and [her son] have established a suitably deep and affectionate relationship with each other’.
315. I find that, notwithstanding her lack of formal parental responsibility, Ms BH and her son can be considered a ‘family’ for the purposes of article 17 and 23 of the ICCPR.

## 6.3 ‘Interference’

316. Ms BH was detained in Villawood Immigration Detention Centre from 10 August 2015 when her son was three years old. The Department notes that Ms BH was permitted to have supervised personal visits which provided her with access to her son.
317. Although Ms BH was only entitled to supervised contact with her son once per month as a result of court orders, and he was able to visit her at VIDC I find that her detention in a closed immigration detention facility nevertheless amounted to an ‘interference’ with her family life.

318. This is because the activities and experiences of family life that Ms BH and her son could enjoy together in a closed immigration detention centre environment were fewer, and of a materially different kind, than those available in the community.

## 6.4 'Arbitrary'

319. In its General Comment on article 17, the UN HR Committee confirmed that a lawful interference with a person's family may be arbitrary where the interference is not in accordance with the purposes, aims, and objectives of the Covenant and is not reasonable in the particular circumstances.<sup>78</sup>

320. In *Canepa v Canada*, the UN HR Committee discussed what could be seen to constitute 'arbitrary' interference:

The Committee observes that arbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person's rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant. The separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal.<sup>79</sup>

321. It follows that the prohibition against arbitrary interference with family incorporates a reasonableness test. In relation to the meaning of reasonableness, the UN HR Committee stated in *Toonen v Australia*:

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.<sup>80</sup>

322. Whilst the *Toonen* case concerned a breach of article 17(1) in relation to the right to privacy, these comments apply analogously to an arbitrary interference with the family.

323. As discussed above, I have found that Ms BH's lengthy and ongoing detention in a closed immigration detention facility was neither reasonable nor proportionate to the Department's

legitimate aim of protecting the community from non-citizens who pose an unacceptable risk to the community.

324. Given my finding that Ms BH's detention is arbitrary in contravention of article 9(1) of the ICCPR, I find that it also amounts to an arbitrary interference with her family in breach of articles 17 and 23 of the ICCPR.

## 7. Recommendations

325. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.<sup>81</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>82</sup> The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.<sup>83</sup>

### 7.1 Updating Ministerial guidelines

326. In this case, a woman who satisfied the requirements for a protection visa was administratively detained for more than seven years. She was unable to access the only path out of detention because of departmental assessments of her character, being assessments that were inconsistent with decisions of the Tribunal. The Department says that it was constrained by the guidelines issued by the Minister for the exercise of the relevant Ministerial powers.

327. There is a need for a change both in the process of referring detainees to the Minister for consideration of alternatives to detention, and in the consideration by the Minister of the exercise of those powers, so that historical conduct does not pose an absolute barrier to any consideration of release from closed detention and so that the increasing burden of protracted detention is appropriately weighed against any risk to the community.

328. The Minister's community detention guidelines were last revised on 10 October 2017. The Minister's s 195A guidelines which deal with the power to grant a visa to a person in immigration detention were last revised in November 2016.

329. Following the High Court's judgment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural*

*Affairs* (2023) 279 CLR 1, it seems clear that there will need to be amendments made to the guidelines issued by the Minister to the Department about the exercise of ministerial intervention powers, including under ss 195A and 197AB. In particular, it is no longer open to the Minister to give the Department the capacity *not* to refer cases on the basis that the Department has formed the view that the cases do not have ‘unique or exceptional circumstances’ or that it is otherwise not in the public interest for the Minister to exercise these powers.

330. It seems clear that any revised guidelines issued by the Minister should contain clear, objective criteria for referral.<sup>84</sup> The Commission has previously made recommendations that these guidelines be revised to more appropriately balance questions of risk to the community and the impact of prolonged detention on people in immigration detention. I reiterate those recommendations and ask that the Department raise with the Minister amendments to the guidelines having regard to this case and similar cases.

### **Recommendation 1**

I recommend that the Department provide a submission to the Minister for review of the s 195A and s 197AB guidelines, to provide:

- (a) that people in immigration detention are eligible for referral under s 195A and s 197AB where their detention has been protracted, where it appears likely that their detention will continue for any significant period, or where a Commonwealth officer has found they face a risk of harm in detention;
- (b) that people in immigration detention are eligible for referral under s 195A and s 197AB whether or not they have had a visa cancelled or an application for a visa refused under s 501 of the Migration Act, or it appears they may fail the character test in s 501;
- (c) where the Minister has previously decided not to consider exercising the powers under either s 195A or s 197AB in relation to a person, or has considered exercising those powers and declined to do so, the Department may nevertheless re-refer that person to the Minister if the person

has remained in closed detention for a further protracted period, or if a Commonwealth officer has found they face a risk of harm in detention;

- (d) in the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility (whether for reasons relevant to the ‘character test’ in the Migration Act or otherwise), the Department include in any submission to the Minister under s 195A or s 197AB:
  - (i) a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, any response of the detainee to that assessment or evidence, and a description of the inquiries undertaken by the Department in forming its assessment;
  - (ii) an assessment of whether any identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, any response of the detainee to that assessment or evidence, and a description of the inquiries undertaken by the Department in forming its assessment;
  - (iii) a detailed description and assessment of any material countervailing factors, such as a finding by a Commonwealth officer that the detainee faces a risk of harm in detention.

## 7.2 Placement decisions

331. In this case, it is clear that Serco felt constrained in its decisions about where to place female detainees by the fact that there was only one compound dedicated to housing female detainees at Villawood Immigration Detention Centre. Statistics published by the Department indicate that as at 30 September 2024 there were 49 women in closed immigration detention facilities throughout Australia (out of a total of 984 detainees).<sup>85</sup> More than half of those women were detained at Villawood

Immigration Detention Centre. Some facilities do not currently have any female detainees.

332. It is clear that there need to be a variety of options available to separate female detainees when this is necessary to prevent a real risk to their safety.

**Recommendation 2**

I recommend that the Department require Serco to develop an operational plan to facilitate the physical separation of female detainees into different accommodation areas, which may involve transfers between centres, where this is necessary to prevent a real risk to their safety.

## 8. Department's response to the Commission's findings and recommendations

333. On 25 October 2024, I provided the Department with a notice of my findings and recommendations.

334. On 6 January 2025, the Department provided the following response to my findings and recommendations:

The Department of Home Affairs (the Department) values the role of the Australian Human Rights Commission (the Commission) 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 articles 9(1), 10(1), 17(1) and 23 of the *International Covenant on Civil and Political Rights* (ICCPR).

### **Recommendation 1 – Partially agree**

*I recommend that the Department provide a submission to the Minister for review of the section 195A and section 197AB guidelines, to provide:*

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

*a further protracted period, or if a Commonwealth officer has found they face a risk of harm in detention;*

d) *in the event the Department considers there is evidence that a person might pose a risk to the community if allowed to reside outside a closed detention facility (whether for reasons relevant to the 'character test' in the Migration Act or otherwise), the Department include in any submission to the Minister under section 195A and section 197AB:*

(i) *a detailed description of the specific risk the individual is said to pose, including an assessment of the nature and extent of that risk, the evidence said to support that assessment, any response of the detainee to that assessment or evidence, and a description of the inquiries undertaken by the Department in forming its assessment;*

(ii) *an assessment of whether any identified risk could be satisfactorily mitigated if the person were allowed to reside in the community, including a description of the evidence said to support that assessment, any response of the detainee to that assessment or evidence, and a description of the inquiries undertaken by the Department in forming its assessment;*

(iii) *a detailed description and assessment of any material countervailing factors, such as a finding by a Commonwealth officer that the detainee faces a risk of harm in detention.*

The Department **partially agrees** to Recommendation 1.

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

The Department will provide the Commission's recommendations to the Minister for consideration when briefing the Minister on options to review the sections 195A and 197AB Ministerial Intervention guidelines.

The Department notes sub points i), ii) and iii) appear to be detailed recommendations about risk assessment processes that would not necessarily be addressed through the setting of Ministerial Intervention instructions.

The Department previously considered developing an internal dynamic risk assessment tool as part of the Alternatives to Held Detention (ATHD) program. The ATHD program is being re-considered in light of the High Court judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (S28/2023) [2023] HCA 37 (NZYQ). In response to NZYQ, the department formed the Community Protection Board, introduced Enhanced Status Resolution Support Services for the NZYQ-affected cohort and a Bridging Visa (Removal Pending) case management capability, which employs a validated risk/needs/responsivity assessment process in assessing level of service and risk of recidivism, integration and rehabilitation needs and appropriate interventions.

Following the High Court's judgment in NZYQ, the department has continued to consider how ATHD initiatives may be applied to individuals who fall outside the scope of that decision. Potential ATHD options that remain under consideration may require changes to legislative and policy settings, and will be subject to policy authority from Government.

### **Recommendation 2 - Note**

*I recommend that the Department require Serco to develop an operational plan to facilitate the physical separation of female detainees into different accommodation areas, which may involve transfers between centres, where this is necessary to prevent a real risk to their safety.*

The Department **notes** Recommendation 2 and considers that existing operational policy instructions and associated guidelines appropriately meet the intent of this recommendation as it relates to placement decisions for female detainees in the Immigration Detention Network (IDN).

Since Ms BH's period of immigration detention, there is greater operational capacity to accommodate female detainees across the IDN. This includes a second 'female compound' at the Villawood Immigration Detention Centre which became operational in February 2024.

As with all detainees, the placement of a female detainee in an IDF is determined on a case-by-case basis, assessed on the basis of health, safety and security risks posed to and by the detainee. Placement decisions are reviewed at least monthly.

335. I report accordingly to the Attorney-General.

A handwritten signature in black ink, appearing to read 'J. King', with a stylized flourish at the end.

James King

**Delegate of the President**

Australian Human Rights Commission

August 2025

## Endnotes

- 1 *CPJ16 v Minister for Home Affairs* [2020] FCA 1408 at [91], [104]-[106] (Mortimer J).
- 2 *Administrative Appeals Tribunal Act 1975* (Cth), s 43(6).
- 3 *CRI026 v The Republic of Nauru* [2018] HCA 19 at [24] (Kiefel CJ, Gageler and Nettle JJ).
- 4 Subclause 050.223 provides: 'The Minister is satisfied that, if a bridging visa is granted to the applicant, the applicant will abide by the conditions (if any) imposed on it.'
- 5 *AQM18 v Minister for Immigration and Border Protection* [2019] FCAFC 27.
- 6 *BBFD and Minister for Home Affairs (Migration)* [2019] AATA 3907.
- 7 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* [2019] FCA 2033 at [47] (Rares J).
- 8 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* [2019] FCA 1702 at [22] (Stewart J).
- 9 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* [2019] FCA 2033.
- 10 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* [2020] FCAFC 87.
- 11 *CPJ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 980.
- 12 *CPJ16 v Minister for Home Affairs* [2020] FCA 1408.
- 13 *CPJ16 v Minister for Home Affairs* [2020] FCAFC 212.
- 14 *CPJ16 v Minister for Home Affairs* [2021] HCASL 149.
- 15 *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth).
- 16 *CRI026 v The Republic of Nauru* [2018] HCA 19 at [22] (Kiefel CJ, Gageler and Nettle JJ), citing *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639 at 664 [66].
- 17 *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208 at 214-216, where Branson J held that it was not open to the Commission, in conducting its inquiry, to disregard the legal obligations of the Secretary in deciding whether to exercise a statutory power.
- 18 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1), 10(1).
- 19 Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014) [9].
- 20 Human Rights Committee, *General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [2].
- 21 Human Rights Committee, *Views: Communication No. 1020/2001*, 78<sup>th</sup> sess, UN Doc CCPR/C/78/D/1020/2001 (7 August 2003) 15 [7.2] ('*Cabal and Bertran v Australia*').
- 22 Human Rights Committee, *General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [3].
- 23 Human Rights Committee, *General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44<sup>th</sup> sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [3].
- 24 Human Rights Committee, *General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44<sup>th</sup> sess, UN Doc HRI/GEN/1/ Rev.1 at 33 (10 April 1992) [3].
- 25 Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel, 2<sup>nd</sup> ed, 2005) 250.
- 26 Human Rights Committee, *Views: Communication No. 639/1995*, 60<sup>th</sup> sess, UN Doc CCPR/C/60/D/639/1995 (28 July 1997) ('*Walker and Richards v Jamaica*'); Human Rights Committee, *Views: Communication No. 845/1998*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/845/1998 (26 March 2002) ('*Kennedy v Trinidad and Tobago*'); Human Rights Committee, *Views: Communication No. 684/1996*, 74<sup>th</sup> sess, UN Doc CCPR/C/74/D/684/1996 (2 April 2002) ('*R.S. v Trinidad and Tobago*').
- 27 Melissa Castan, Jennifer Schultz and Sarah Joseph, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2013) 318.
- 28 UN Human Rights Committee: Concluding Observations: Croatia, 71<sup>st</sup> sess, UN Doc CCPR/CO/71/HRV (30 April 2001) [14].

- 29 Human Rights Committee, *General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44<sup>th</sup> sess, UN Doc HRI/GEN/1/ Rev.1 at 33 (10 April 1992) [5].
- 30 UN General Assembly, Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, United Nations Publication, UN Doc. A/CONF/611 (30 August 1955), as amended by 'the Nelson Mandela Rules', 70<sup>th</sup> sess, UN Doc A/RES/70/175 (17 December 2015).
- 31 The Body of Principles were adopted by the UN General Assembly in *Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 6<sup>th</sup> Comm, 43<sup>rd</sup> sess, 76<sup>th</sup> plen mtg, Agenda Item 138, UN Doc A/43/49 (9 December 1988) Annex.
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- 53 Condition 8401 is: 'The holder must report: (a) at the time or times; and (b) at a place or in a manner; specified by the Minister from time to time.' Condition 8505 is: 'The holder must continue to live at the address specified by the holder before grant of the visa.' Condition 8564 is: 'The holder must not engage in criminal conduct.'
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