



Australian
Human Rights
Commission

Mr CH v Commonwealth of Australia

(Department of Home Affairs)

[2026] AusHRC 193

August 2026

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

Dear Attorney-General

Pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), I enclose a report of my inquiry into a complaint made by Mr CH against the Department of Home Affairs (the Department).

Mr CH arrived in Australia in 2007 and was granted a Protection visa in 2009. Following a series of criminal convictions between 2010 and 2018, Mr CH was taken into criminal custody in July 2018 and his Protection visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) in September 2018.

After his release from criminal custody in January 2019, Mr CH was transferred to immigration detention. He was detained at various facilities between January 2019 and November 2023, including Brisbane Immigration Transit Accommodation, Yongah Hill Immigration Detention Centre and the North West Point Immigration Detention Centre on Christmas Island. On 11 November 2023, following the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*, Mr CH was released from immigration detention and granted a Bridging (Removal Pending) (subclass 070) Visa. In total, he spent almost five years in immigration detention.

While still in immigration detention, Mr CH complained that his detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights*.

As a result of this inquiry, I have found that Mr CH's human rights were breached by the Department's failure to refer his case to the Minister for consideration of his discretionary intervention powers under s 195A and/or s 197AB of the *Migration Act 1958* (Cth). I have found Mr CH's detention to be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system. As a result, his detention was arbitrary, contrary to article 9(1) of the ICCPR.

On 12 March 2026, I provided a notice issued under s 29 of the AHRC Act setting out my findings and recommendations in this matter. The Department provided

its response to my findings and recommendations on 24 June 2026. That response can be found in Part 9 of this report.

I enclose a copy of my report.

Yours sincerely

A handwritten signature in black ink, consisting of a stylized 'H' followed by a series of loops and a long horizontal stroke.

Hugh de Kretser

President

Australian Human Rights Commission

August 2026

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1 Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint by Mr CH against the Commonwealth of Australia, Department of Home Affairs (Department), alleging a breach of his human rights. This inquiry was undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr CH was detained in an immigration detention centre for almost five years. He complains that his detention is arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
3. Mr CH had also complained that his detention has resulted in arbitrary interference with his family contrary to articles 17(1) and 23(1) of the ICCPR. He has since, however, withdrawn that aspect of his complaint. The Commission has therefore not considered this further.
4. The right to liberty and freedom from arbitrary detention is not directly protected in the Australian Constitution or in federal legislation. As a result, there are limited avenues for an individual to challenge the lawfulness of their detention by the Australian Government, outside seeking a writ of *habeas corpus*, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.¹
5. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights. Detention may be lawful under domestic law but still arbitrary and contrary to international human rights law.
6. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary, and proportionate on the basis of the individual's particular circumstances. There is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the immigration policy, for example the imposition of reporting obligations, sureties or other conditions, in order to avoid the conclusion that detention was 'arbitrary'.
7. Mr CH arrived in Australia on a Tourist (subclass 676) visa in December 2007. He applied for and was granted a Protection (subclass 866) Visa in February 2009. His Protection Visa was mandatorily cancelled under s

501(3A) of the *Migration Act 1958* (Cth) (Migration Act) in September 2018, following convictions for a number of offences. Mr CH served the sentence imposed for his crimes. Upon his release from criminal custody on 16 January 2019, he was taken into immigration detention. Mr CH was detained for 4 years and 10 months until 11 November 2023. This period of immigration detention was more than twice the period of his sentence for his most serious criminal offence.

8. This report sets out my findings in relation to this complaint and my recommendations to the Commonwealth. The Department's response to those recommendations is in Part 9 below.
9. Given that Mr CH has previously been granted a protection visa and continues to raise protection claims against his home country, I have made a direction under s 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

2 Summary of findings and recommendations

10. As a result of this inquiry, I find that the following acts of the Commonwealth are inconsistent with, or contrary to, article 9(1) of the ICCPR:
 - (a) the failure of the Department to refer Mr CH to the Minister for the Minister to consider the exercise of one of their discretionary powers to release him.
11. I make the following recommendations:

Recommendation 1

The Commission recommends that the Department provide clarity about the Community Protection Board, in particular its functions and scope, its final Terms of Reference, the independence of the Board members, and the role of its members from the Australian Border Force and other senior public servants. The Department should also indicate whether there are plans to extend the role of the Community Protection Board to consider the release from immigration detention of people beyond those affected by *NZYQ*.

Recommendation 2

The Commission recommends that the Department prioritise development of the Alternatives to Held Detention program, including:

- revised risk assessment tools
- an independent board of experts
- increased community-based placements through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

The Department should adopt an approach to eligibility for the program such that all unlawful non-citizens are to be considered for an alternative to held detention, unless their removal is imminent, or their individual circumstances indicate that only held detention is appropriate. Regular and updated assessment against the Alternatives to Held Detention program should be conducted on a systematic basis.

Recommendation 3

The Commission recommends that a criminal record or character cancellation should not automatically result in presumed high risk assessments, and that the Department should engage in regular fresh assessments of a person's risk to the community informed by the following:

- the person's contemporaneous circumstances
- advice provided by an independent panel of experts
- whether any risks to the community identified can be mitigated by appropriate visa conditions
- whether identified risks can be mitigated by appropriate support services.

Recommendation 4

The Commission recommends that the updated Ministerial Instructions relating to ss 195A and 197AB in development should include the following:

- all people in closed immigration detention are to be referred to the Minister for consideration under ss 195A and 197AB when they have been in detention for 12 months or more, and/or where it appears likely that their detention will continue for any significant period
- all people in immigration detention are eligible for referral under ss 195A and 197AB whether or not they have had a visa cancelled or refused under s 501 of the Migration Act, or it appears they may fail the character test in s 501
- 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, the Department include in any submission to the Minister:
 - 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, and a description of the inquiries undertaken by the Department in forming its assessment
 - an assessment of whether an 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, and a description of the inquiries undertaken by the Department in forming its assessment
- where the Minister has previously decided not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every 6 months and re-refer the case to the Minister to ensure that detention does not become protracted
- in the event that there has been a material change in a person's circumstances including deterioration in their mental health, the Department can re-refer a case to the Minister at any time after the Minister last considered a person's case
- repeat requests to the Minister are permitted when there has been a change of Minister.

3 Background

12. Mr CH arrived in Australia from Zimbabwe on 4 December 2007 on a Tourist (subclass 676) visa. On 16 January 2008, he lodged an application for a Protection (subclass 866) visa and was granted an associated Bridging A visa (BVA). His protection visa application was initially refused, but he applied for merits review in the then Refugee Review Tribunal (RRT) and was found to be owed protection in Australia. On 4 February 2009, he was granted a protection visa.
13. Mr CH is the father of two children, both of whom are reportedly Australian citizens, from two different partners. His eldest daughter was born in 2012 but he has not been part of her life since she was 7 months old. His second daughter was born in 2014 and he has had no involvement in her upbringing.
14. Between 2010 and 2018, Mr CH was convicted of a range of offences, such as public nuisance offences, drunk and disorderly offences, drug related offences, assault offences, wilful damage, and breach offences. He received sentences that ranged from fines, community service, community based orders, probation, suspended sentences and imprisonment. In July 2018, Mr CH was taken into criminal custody and convicted of grievous bodily harm, assault occasioning bodily harm, and wilful damage to property. He was sentenced to two years imprisonment and required to pay compensation.
15. On 27 September 2018, Mr CH's protection visa was cancelled under s 501(3A) of the Migration Act. Mr CH sought revocation of the mandatory cancellation on 24 October 2018.
16. On 16 January 2019, Mr CH was released from criminal custody and detained under s 189(1) of the Migration Act. He was transferred to Brisbane Immigration Transit Accommodation (BITA). On 2 May 2019, he was transferred to Yongah Hill Immigration Detention Centre (Yongah Hill IDC) near Perth.
17. On 31 July 2019, the Department commenced an International Treaties Obligations Assessment (ITOA).
18. On 22 May 2020, a delegate of the Minister decided not to revoke the cancellation of Mr CH's protection visa (non-revocation decision). Mr CH sought merits review of the non-revocation decision in the then Administrative Appeals Tribunal (AAT) on 28 May 2020.

19. On 31 July 2020, the Department finalised the ITOA and determined that Mr CH did not engage Australia's non-refoulement obligations. Following this decision, the AAT affirmed the non-revocation decision on 17 August 2020.
20. The next day, on 18 August 2020, the Department initiated the first Ministerial Intervention process to assess Mr CH's case against the s 195A Ministerial Intervention Guidelines (s 195A Guidelines) and s 197AB Ministerial Intervention Guidelines (s 197AB Guidelines) to determine if his case should be referred to the Minister for consideration of the exercise of the Minister's discretionary powers under ss 195A or 197AB of the Migration Act.
21. On 20 August 2020, Mr CH was transferred to Northwest Point Immigration Detention Centre on Christmas Island and detained under s 189(3) of the Migration Act. Christmas Island is a small Australian island around 1,500 kilometres off the Western Australian coast.
22. On 9 September 2020, Mr CH sought judicial review of the AAT decision in the then Federal Court of Australia (FCA). The FCA dismissed his application on 24 February 2021.
23. On 10 March 2021, a delegate of the Minister assessed that Mr CH did not meet either the s 195A or the s 197AB Guidelines and his case was not referred to the Minister for consideration of the exercise of their discretion.
24. On 12 March 2021, Mr CH commenced an appeal of the FCA judgment in the Full Court of the Federal Court of Australia (Full Court). The Full Court dismissed his appeal on 22 November 2021.
25. On 23 November 2021, Mr CH made this complaint with the Commission.
26. On 20 December 2021, Mr CH made a special leave application with the High Court of Australia, which was dismissed on 20 April 2022.
27. Around July 2022, Mr CH submitted a request for Ministerial Intervention under s 48B of the Migration Act requesting that the s 48A bar preventing him lodging a new protection visa application be lifted. On 27 July 2022 the Department informed Mr CH that it would not be undertaking an assessment of his claims under s 48B. Instead, the Department would commence a s 197D assessment with respect to his protection finding to consider if Mr CH no longer engages Australia's protection obligations.

28. On 4 January 2023, the Department initiated a second Ministerial Intervention process to assess Mr CH's case against the s 195A Guidelines and s 197AB Guidelines. The Department informed the Commission in its response to my preliminary view that this Ministerial Intervention process was actively progressing when Mr CH was granted a Bridging (Removal Pending) (subclass 070) visa (BVR) on 11 November 2023. The Department therefore finalised this Ministerial Intervention process as it was no longer required or appropriate.
29. On 23 March 2023, Mr CH was transferred from immigration detention on Christmas Island to the Yongah Hill IDC.
30. On 29 May 2023, the Department emailed to Mr CH a 'Notice of intention to consider making a decision under s197D(2) of the *Migration Act 1958*' (Notice). He was invited to comment on the information provided in the Notice and provide information that he considered relevant to whether he still engaged Australia's protection obligations. On 26 June 2023, Mr CH's legal representative provided a detailed legal submission together with a statement by Mr CH. The Commission does not have any information as to the outcome of s 197D assessment.
31. On 11 November 2023, Mr CH was released into the community following the decision of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor*² (*NZYQ*), and was granted a BVR. Mr CH continues to live in the community on a BVR.
32. Mr CH has an Australian partner who has a daughter who is an Australian citizen. He has close relationship with his partner and her daughter and considers them his family. They reside in Perth, Western Australia, and he was separated from them while detained. He made multiple requests to be transferred to a detention centre closer to his family in Perth.

4 Procedural history of this inquiry

33. On 1 May 2025, I issued a preliminary view on this matter and gave the Department the opportunity to respond to my preliminary findings.
34. On 28 August 2025, the Department responded to my preliminary view.

5 Legislative framework

5.1 Functions of the Commission

35. Section 11(1)(f) of the AHRC Act provides that one of the Commission's functions is to inquire into any act or practice that may be inconsistent with, or contrary to, any human right.
36. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.
37. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

5.2 What is an 'act' or 'practice'

38. 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.
39. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
40. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.³

5.3 What is a human right?

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

6 Arbitrary detention

42. Mr CH complains that his detention in immigration detention facilities in Australia from 16 January 2019 until 11 November 2023 for a total of 4 years and 10 months was 'arbitrary', contrary to article 9(1) of the ICCPR.

6.1 Law on article 9 of the ICCPR

43. Article 9(1) of the ICCPR relevantly provides:

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

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

- (a) 'detention' includes immigration detention.⁴
- (b) lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.⁵
- (c) 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability⁶
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁷

45. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two months to be 'arbitrary' because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁸

46. 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'.⁹

47. Relevant jurisprudence of the UN HR Committee on the right to liberty is set out 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.¹⁰

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

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

49. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.¹³
50. A short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, closed detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.¹⁴
51. 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'.¹⁵

52. Accordingly, where alternative places or modes of detention that impose a lesser restriction on a person's liberty are reasonably available, and in the absence of particular reasons specific to the individual, prolonged detention in an immigration detention centre may be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.
53. It is therefore necessary to consider whether the detention of Mr CH in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

6.2 Act or practice of the Commonwealth

54. Mr CH's protection visa was mandatorily cancelled while he was in criminal custody. He was therefore an 'unlawful non-citizen' within the meaning of the Migration Act, which required him to be detained.
55. Mr CH was unable to make a visa application due to the legislative bar imposed by s 501E of the Migration Act.
56. While the Migration Act requires the detention of unlawful non-citizens, there are a number of powers that the Minister could have exercised either to grant a visa, or to allow the detention in a less restrictive manner than in a closed immigration detention centre.
57. Under s 197AB of the Migration Act, the Minister may, where the Minister thinks it is in the public interest to do so, make a residence determination to allow a person to reside at a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. The residence determination may be made subject to other conditions such as reporting requirements.
58. Under s 195A of the Migration Act, the Minister also has a discretionary non-compellable power to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.

59. A referral to the Minister for consideration of either of these powers is generally made by the Department.
60. I find the act or practice of the Commonwealth relevant to this inquiry is the failure of the Department to refer Mr CH to the Minister, for the Minister to consider the exercise of one of their discretionary powers to release him.

7 Findings

7.1 Discretion of the Minister to grant a visa or hold someone in less restrictive forms of detention

61. As noted above, lawful immigration detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system. Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, and where detention in an immigration detention centre is not demonstrably necessary, prolonged detention in an immigration detention centre may be disproportionate to the goals said to justify the detention.
62. The Minister has discretionary powers under ss 195A and 197AB of the Migration Act that would have allowed Mr CH to be granted a visa or be held in a less restrictive form of detention.
63. A ministerial instruction has been issued with respect to each of the discretionary powers available to the Minister. The relevant instructions or guidelines are as follows:

Guidelines on Minister's detention intervention power (s195A of the Migration Act 1958) reissued by the Hon Peter Dutton MP, Minister for Immigration and Border Protection, on 18 August 2017 (the 195A Guidelines)

Minister for Immigration and Border Protection's residence determination power under section 197AB and section 197AD of the Migration Act 1958 reissued by Minister Dutton on 10 October 2017 (the 197AB Guidelines).

64. The 195A Guidelines include as criteria for referral to the Minister:

- the person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department
- there are strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or permanent resident), or there is an impact on the best interests of a child in Australia
- the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable ...
- there are other compelling or compassionate circumstances which justify the consideration of the use of my public interest powers and there is no other intervention power available to grant a visa to the person.

65. The 197AB Guidelines state:

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

- unaccompanied minors

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

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

I will also consider cases where:

- there are unique or exceptional circumstances; ...

66. The phrase 'unique or exceptional circumstances' is not defined in any of the guidelines, however it is defined in similar guidelines relating to the

Minister's power to grant visas in the public interest.¹⁶ 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
- compassionate circumstances regarding the age and/or health and/or psychological state of the person that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to the person
- 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.

67. These powers in the context of detainees who had visas cancelled or refused, and the legislative framework within the Migration Act regarding the character test, were outlined in the Commission's 2021 report, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*.¹⁷

68. Specifically, that report highlighted that both sets of guidelines exclude referral of cases where the person does not meet the character test, unless there are exceptional circumstances.¹⁸ The recommendation was made to amend the guidelines to allow for all people in immigration detention to be referred to the Minister, regardless of whether they have had a visa refused or cancelled under section 501.¹⁹

7.2 Failure by the Department to refer Mr CH case to the Minister

69. Mr CH was taken into immigration detention on 16 January 2019 and remained in immigration detention for 4 years and 10 months until 11 November 2023. He was detained following his release from criminal custody because of the mandatory cancellation of his protection visa while he was in prison.
70. While in criminal custody, Mr CH had sought revocation of the mandatory cancellation of his visa and was still awaiting an outcome at the time of his transfer to immigration detention. The Department did not make a decision on his revocation application until 22 May 2020, by which time he had been in immigration detention for 16 months. Mr CH then sought merits review of the non-revocation decision in the AAT. The AAT affirmed the Department's non-revocation decision on 17 August 2020, shortly after an ITOA determined that Mr CH did not engage Australia's non-refoulement obligations.
71. On 18 August 2020, 19 months after Mr CH was first detained, the Department initiated the first Ministerial Intervention process to assess Mr CH's case against the s 195A Guidelines and s 197AB Guidelines. According to the first Commonwealth Ombudsman report, the Ministerial Intervention process was initiated at the request of Mr CH's legal representative at the time.
72. The s 195A Guidelines state that the Minister would not expect anyone whose visa has been cancelled under s 501 of the Migration Act to be referred to them for consideration of their intervention power. The s 197AB Guidelines similarly provide that the Minister would not expect anyone who presents character issues and may fail the s 501 character test to be referred to them. However, both provide for referral where there are compelling or compassionate, or unique or exception circumstances, and where there are health, including mental health, concerns.
73. The guidelines must now be viewed in light of the High Court's assessment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs (Davis)*,²⁰ that the Ministerial Instructions used by the Department exceeded the statutory limitation of the power invested in the Minister by inviting Departmental officers to evaluate what is in the public interest.²¹ The criticisms levelled by the Court on the section 351 guidelines may

equally apply to the section 195A and section 197AB guidelines. In September 2025, the Minister for Home Affairs issued new instructions to the Department in relation to the exercise of the discretion in section 351 of the Migration Act. Those new instructions make significant changes to the instructions that applied in Mr CH's case, with the intent of making them consistent with *Davis*. The Commission understands that work is underway to also revise the instructions that apply in relation to sections 195A and 197AB to bring them into compliance with *Davis*.

74. On 10 March 2021, the Department found that Mr CH did not meet either the ss 195A or 197AB Guidelines, and he was therefore not referred to the Minister for consideration of the exercise of their ss 195A or 197AB discretionary powers.
75. I expressed in my preliminary view that the following factors were relevant to an assessment of whether Mr CH's case presented 'unique or exceptional circumstances' and that the case should have been referred to the Minister:
 - the prolonged period of Mr CH's detention – at the time of the Department's initial assessment of Mr CH against the relevant guidelines he had been detained for over one and a half years
 - that he was a resident in Australia for almost ten years prior to his detention
 - his ongoing mental health concerns including history of torture and trauma, depression and alcohol abuse, as well as a serious suicide attempt in 2016 that resulted in ongoing chronic pain
 - the separation from his partner and her daughter.
76. In its response to my preliminary view, the Department accepted that because of the High Court's judgment in *Davis*, the 10 March 2021 decision not to refer Mr CH's case to the Minister was made in excess of the executive power of the Commonwealth. In other words, the Department accepted that the decision not to refer his case to the Minister was likely unlawful. The Department submitted, however, that 'unique or exceptional' circumstances are not the only or underlying factors when assessing the guidelines for referral to the Minister, and that Mr CH's case was assessed in a holistic manner with the officer actively engaged with, and balancing, relevant factors. The Department informed that the assessment considered the following factors:

- Mr CH's 501 cancellation
 - his period of detention
 - the Community Protection Assessment Tool (CPAT) recommendation
 - that no health issues could not be managed in detention
 - his significant criminal record
 - that he had been prohibited from contacting his two Australian citizen daughters for years due to a protection/domestic violence order in place
 - that he was an unlawful non-citizen required to remain to immigration detention until he departed Australia or was granted a visa.
77. The Department further noted that it was actively progressing Mr CH's voluntary removal from Australia until he withdrew his consent.
78. In January 2023, the Department initiated a second Ministerial Intervention process, which the Commission understands was finalised when Mr CH was released from detention on a BVR following the decision in *NZYQ*. I note that there was still a period of 10 months between when the second Ministerial Intervention process was initiated and Mr CH's release in November 2023.
79. I expressed in my preliminary view that, in addition to the above stated factors, the following factors were relevant and should have weighed in favour of Mr CH's case being assessed and referred to the Minister for 'unique or exceptional circumstances':
- the prospects of indefinite detention faced by Mr CH at the time in light of amendments to the Migration Act that introduced a legal barrier to removing Mr CH under s 197C(3) of the Migration Act
 - the commencement of the process under s 197D of the Migration Act through which Mr CH was notified that the Department is considering making a decision under s 197D(2) that he is no longer a person in respect of whom any protection finding would be made
 - the significant deterioration of Mr CH's mental health after four and half years in immigration detention.

80. According to the material before me and confirmed in the Department's response to my preliminary view, it was the Department's position that Mr CH had no physical or mental health needs that could not be met by service providers within immigration detention, and that his placement in immigration detention was appropriate. This is despite his history of torture and trauma, depression and alcohol abuse.
81. It is apparent, however that Mr CH's prolonged detention significantly impacted his mental health, particularly after his transfer to Christmas Island in August 2020. While the IHMS health induction assessment when Mr CH was first detained shows that he was generally in good health, IHMS clinical records following the Christmas Island riots in January 2021 report Mr CH feeling highly distressed and like he was in a war zone. He was described as 'highly traumatised by the riots which triggered traumatic symptoms from childhood' and that 'he is at danger of further decline of mental health, physical health and his ability to respond appropriately to ongoing disturbances'.
82. With his prolonged detention, IHMS records describe symptoms of anxiety and insomnia, low mood, detention fatigue, and increased alcohol and illicit substance abuse. The records reveal that Mr CH has chronic neuropathic pain in his upper left limb from an injury that occurred in 2016 when he attempted suicide. According to the IHMS External Referral Form dated 29 September 2022, Mr CH's use of illicit suboxone started in immigration detention, he was on a high dose of Lyrica for his chronic neuropathic pain, and his chronic pain complicated his chronic alcohol and suboxone abuse.
83. In February 2022, IHMS records describe Mr CH as engaging in 'unusual behaviours such as covering himself in mud or wrapping himself in paper towels'. In 2022 and 2023, he was moved to Keepsafe in High Care Accommodation due to incidents of self harm and suicidal ideation. Though he was recommended for the opioid substitute treatment program, he could not access it on Christmas Island. According to the 'DASS21 Assessment' dated 27 February 2023, Mr CH's assessment of his mental health revealed 'Extremely Severe' scores for depression, anxiety and stress. His 'K10: Kessler Psychological Distress Scale' dated 16 June 2023 showed a similarly severe score for distress.
84. An IHMS psychologist noted in his clinical record dated 15 February 2023 that Mr CH's substance abuse was 'having a detrimental impact and causing stressors both with relationships with other detainees/service

providers as well as financially'. This could explain the escalation in Mr CH's involvement in incidents in detention, including an increase in abusive / aggressive behaviour and the three minor assault incidents in which Mr CH was an alleged offender. In January 2023, Mr CH was an alleged victim in an assault in which he was physical assaulted by another detainee.

85. Mr CH's deteriorating mental health could also explain the multiple times that he requested voluntary removal from Australia under s 198(1) of the Migration Act, only to withdraw the request for fear of what would happen should he be returned to Zimbabwe. His first request for removal was in January 2020, and he made approximately five requests that he then withdrew during his period of detention.
86. Following his transfer to Christmas Island in August 2020, Mr CH made numerous requests to be transferred back to Yongah Hill IDC so that he could be close to his partner and her daughter, who he considered his family. Between September 2020 and May 2023, he submitted 27 transfer requests to be closer to his family and support network, so that he could have visits from his family, and for his mental health.
87. The Department was aware of Mr CH's deteriorating mental health, particularly following the riots on Christmas Island in January 2021. Over the next two years, as outlined above, there were numerous reports from medical professionals regarding his mental health, detention fatigue and the detrimental effect of prolonged detention on his mental and physical health. Mr CH would have met the criteria in the relevant guidelines of a person with an ongoing illness and individual needs that cannot properly be cared for in an immigration detention facility. These matters would have meant that Mr CH's case met the criteria of 'unique or exceptional' and 'compelling or compassionate' circumstances warranting referral to the Minister.
88. It appears, however, that Mr CH's character cancellation was a barrier that prevented any consideration by the Minister of his case under either ss 195A or 197AB of the Migration Act. The Department, in its response to my preliminary view, did not agree with this position and maintained that the March 2021 assessment of Mr CH's case was undertaken in a holistic manner with the officer actively engaging with, and balancing, relevant factors.
89. I find, however, that the Department failed to properly consider Mr CH's deteriorating mental health. According to the Department's response to

my preliminary view, the Department considered that Mr CH had no health issues that could not be managed in a detention facility when assessing his case against the ss 195A and 197AB Guidelines. This was despite the evidence of the significant effect prolonged detention was having on Mr CH's physical and mental health. This position was likely reinforced by the Department's monthly Case Reviews, which failed to properly engage with the medical information available from IHMS when assessing whether Mr CH's health could be adequately managed in immigration detention.

90. The fact that Mr CH had at times requested and then withdrawn requests for voluntary removal does not justify his prolonged detention.
91. Mr CH's detention was reviewed through Case Reviews conducted by the Department. In the Case Reviews provided to the Commission, his ongoing detention was justified on the basis that his protection visa was cancelled on character grounds and his ongoing detention was lawful and appropriate. His placement in immigration detention and accommodation arrangements were also justified because of the CPAT recommendation of 'Tier 3 – Held Detention'.
92. According to the Department's response to my preliminary view, the Department reviewed detention cases through monthly Case Reviews, monthly Detention Review Committees (DRCs) and regular CPATS. The Department said further that:
 - These reviews ensure that: Detention remains lawful and reasonable.
 - The location of the individual in held detention is appropriate to their individual circumstances and that consideration is undertaken as to whether the person is able to effectively resolve their immigration status from the community.
 - Their case is progressing towards a timely and appropriate status resolution outcome and addressing barriers (noting that these barriers may include lack of cooperation by a detainee with regard to removal processes).

Through these reviews, if it is identified that detention is no longer appropriate... their case may be referred for Ministerial Intervention consideration.

It is not a legal requirement that a case be referred for Ministerial Intervention consideration, however, the review mechanisms above (note - these form part of the Status Resolution System Control Framework) ensure that the option for a Ministerial Intervention referral is considered by the allocated Status Resolution Officer.

93. In the CPAT reports prepared for Mr CH, the assessment of Mr CH's risk of harm to the community was consistently high and his placement recommendation remained 'Tier 3 – Held Detention'. This is likely because under the harm indicators in the CPAT reports, 'Criminality' was assessed as 'Red' due to the mandatory cancellation of his protection visa for his past criminal offending. There was nothing in the material before me to suggest that in either the Case Reviews or the CPAT assessments, the Department had carried out a fresh assessment of Mr CH's risk of the community, whether his detention was 'appropriate' or justified, and whether his individual circumstances indicate that he could be placed in less restrictive forms of detention.
94. The Department stated in its response to my preliminary view that it does not accept that it failed to conduct a fresh assessment. The Department reiterated that it undertakes formal monthly review of each detention case and that CPATs are completed every 6 months for detainees who have had a character cancellation. The Department explained that the CPAT is a decision support tool to assist in assessing the most appropriate placement of an unlawful non-citizen, whether in the community or in immigration detention. The CPAT does this 'through a set of defined parameters underpinned by the CPAT's four harm indicators (National Security, Identity, Criminality and Behaviour Impacting Others)'. Additional factors such as potential vulnerabilities and strength-based factors like community support and employable skills are also considered, notwithstanding criminal history. The Department said that all CPATs conducted for Mr CH assessed him as high risk to the community.
95. My concern is that as Mr CH had a criminal history and character cancellation, the default position in the CPAT was to assign a 'red' to 'Criminality', being one of the harm indicators. This led to an assessment in each CPAT of Mr CH as a high risk to the community and therefore the placement recommendation of 'Tier 3 – Held Detention'. This placement recommendation then informed all of Mr CH's Case Reviews. I understand that the Department has the discretion to override a harm indicator and give it a lower colour rating, which could lead to a different recommendation. However, there is no indication in the material to

suggest that the Department gave separate consideration to whether the harm indicator for 'Criminality' in the each CPAT should remain 'red'.

96. Mr CH has an extensive criminal history of offences including domestic violence and serious assault offences. He has served the sentences imposed for these crimes by Australian courts. The issue before me is whether his detention for almost five years in an immigration detention facility was arbitrary. This period of administrative detention was more than twice the period of his sentence for his most serious criminal offence. I note that in Mr CH's CPAT assessments, there had been no behaviour concerns until 2023. Under the 'Harm Indicators', 'Behaviour Impacting Others', Mr CH had consistently been assessed as having 'Nil issues identified'. It was only since his mental health and substance abuse had deteriorated further that there were some concerns due to an increase in incidents in detention. Mr CH's 2023 Security Risk Assessment (SRAT) assesses his risk of aggression/violence and criminal profile as high. Review of the incident history outlined in the SRAT shows that, apart from two self-harm incidents, all the detention incidents recorded were categorised as 'minor' incidents, even those involving assault, and the majority occurred in 2022 and related to contraband and intoxication. On the other hand, throughout his clinical records, all mental health reports have assessed his risk of harm to others as 'low'.
97. On 17 August 2020 the Tribunal, in affirming the non-revocation decision, concluded that Mr CH's risk of reoffending if returned to the Australian community was no different than it was when he was initially detained in mid-2018, and that he had repeatedly failed to overcome his serious abuse of alcohol and subsequent offending (see [191]). The Tribunal said further that given that recidivism, if it did occur, would likely cause great harm, any risk of offending in the future was unacceptable (at [201]). These findings were in the context of reviewing a decision not to revoke the mandatory cancellation of Mr CH's protection visa. The Tribunal was not considering the necessity of Mr CH's ongoing detention in an immigration detention centre or whether any risks he posed to the community could be mitigated.
98. Furthermore, at the time of the Tribunal decision, the law in Australia was such that under ss 197C and 198 of the Migration Act, as it was then, unlawful non-citizens in Australia must be removed as soon as reasonably practicable irrespective of whether the unlawful non-citizen was owed non-refoulement obligations by Australia. This meant that Mr CH's previous protection visa was no barrier to his removal. The non-

refoulment obligations owed to him had also just been reassessed through an ITOA process and it was found that he no longer engaged Australia's non-refoulement obligations. The Tribunal, in its discussion about the prospect of indefinite detention, found at [306] that a decision not to revoke the mandatory cancellation decision would not result in indefinite detention.

99. The law changed after the Tribunal decision. Under s 197C of the Migration Act, an unlawful non-citizen is no longer required to be removed from Australia as soon as reasonably practicable if they have had a protection finding unless the Minister has decided under s 197D that they are no longer a person in respect of whom a protection finding would be made. This means that while Mr CH has a protection finding, he cannot be returned to Zimbabwe. It was a clear legal consequence of the decision not to revoke the cancellation of Mr CH's visa that he faced the prospect of 'indefinite detention' in Australia in the sense described by the Full Court of the Federal Court in *WKMZ*.²² The prolonged nature of Mr CH's detention with no end date (prior to *NZYQ*) was a clear factor that should have weighed in favour of his case being referred to the Minister.
100. In May 2023, the Department notified Mr CH of an intention to consider a s 197D decision and invited him to comment on whether he still engaged Australia's protection obligations. It was likely that this process would have taken a protracted length of time, particularly if the Minister decided against Mr CH and he sought merits review. This was also a relevant factor to Mr CH's individual circumstances that should have been considered by the Department, and weighed in favour of his case being assessed and referred to the Minister.
101. Mr CH was eventually released on 11 November 2023 but only because he was affected by the decision in *NZYQ*.
102. The Department maintained, in its response to my preliminary view, that Mr CH was lawfully detained and that his detention did not at any point become arbitrary. The Department reiterated that the Minister's personal intervention powers under the Migration Act are non-compellable and there is no legislative requirement that a case must be referred to the Minister for Ministerial Intervention consideration. The Department also did not accept that it failed to conduct a regular review of Mr CH's risk of harm to the Australian community.
103. As outlined above, lawful detention may become arbitrary when it becomes unjust, unreasonable or disproportionate in the circumstances. I

find that Mr CH's detention until 11 November 2023 was not justified by the Department as reasonable, necessary or proportionate in the context of his particular circumstances and as a result, his detention was 'arbitrary' and in breach of article 9(1) of the ICCPR. The reasons for this finding are:

- the length of Mr CH's immigration detention
- the significant impact of the detention on his health, particularly his mental health, which resulted in a clinical rating of 'extremely severe' with respect to depression, anxiety and stress
- the failure by the Department to adequately consider Mr CH's deteriorating mental health when assessing whether his health could be adequately managed in immigration detention, particularly in its Case Reviews
- Mr CH's connections to the Australian community
- the prospect of Mr CH being detained with no end
- the failure by the Department to refer Mr CH to the Minister for the Minister to consider exercising their discretionary power to release him and consider whether any risks to the Australian community could be appropriately managed by imposing reporting obligations and other conditions. This failure was likely unlawful given the High Court's decision in *Davis*
- the apparent failure to conduct adequate updated assessments of the harm indicator for 'Criminality' in Mr CH's CPATs and therefore his risk of harm to the Australian community.

104. This detention, without referral by the Department of Mr CH's case to the Minister for consideration of their discretionary powers, is particularly concerning in light of the indefinite nature of Mr CH's detention at the time and the significant deteriorating of his physical and mental health on Christmas Island.

8 Recommendations

105. 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.²³ The

Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.²⁴ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.²⁵

8.1 Alternatives to held detention

106. During the 4 years and 10 months that Mr CH was detained, the Department initiated two Ministerial Intervention processes to assess Mr CH's case against the ss 195A and 197AB Guidelines. The first was finalised without referral, and the second was finalised because Mr CH was released from immigration detention as a result of the *NZYQ* decision.
107. Mr CH, along with many long-term detainees, was released on a BVR only because the Department was required to release him following the *NZYQ* decision. However, the process that allowed Mr CH's release did not consider whether his detention was reasonable, necessary or proportionate on the basis of his particular circumstances, and in light of the available alternatives to closed detention. The Commission has expressed concern in the past that existing processes do not adequately safeguard against arbitrary detention,²⁶ and considers that alternatives to held detention should be made a priority.
108. The Department was previously progressing an Alternatives to Held Detention program following the Independent Detention Case Review conducted for the Department in March 2020 by Robert Cornall AO,²⁷ and the Commission's report to the Attorney-General, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958* (Cth).²⁸ The program was exploring initiatives relating to risk assessment tools, an independent panel (including an Independent Assessment Capability pilot), increasing community-based placements and a step-down model.²⁹ The Department has informed the Commission that this program was placed 'on hold' following the *NZYQ* decision and the establishment of the Community Protection Board (CPB).
109. The Commission understands that in response to the *NZYQ* decision, the Department established the CPB to provide informed, impartial and evidence-based recommendations regarding *NZYQ*-affected individuals released into the community on a BVR. The CPB members have expertise in law enforcement, corrections, academia, mental health, clinical psychology and the community and multicultural sector.

110. The establishment of a board with appropriate expertise to make recommendations on community placements is positive. The board should form part of an alternatives to held detention model. However, there should be transparency about the board's functions and its accountability mechanisms, and assurance that due process is built into its functionality. The interim Terms of Reference for the CPB were released through FOI, and some information about payments made to the CPB, its role and members has been provided in the course of Senate Estimates. However, information available is limited. The Department should provide further clarity on its functions and scope, its final Terms of Reference, the independence of the expert members of the Board and the role of the members from the Australian Border Force and other senior public servants. The Department should also indicate whether there are plans to extend the role of the CPB to consider the release from immigration detention of groups of people beyond those affected by *NZYQ*.
111. The Commission encourages the Department to prioritise the Alternatives to Held Detention program. This program should increase the likelihood that people will only be detained in closed immigration detention where it is reasonable, necessary and proportionate based on reasons specific to the individual and considering available alternatives to closed detention.
112. The Commission recommends that an Alternatives to Held Detention program apply to all people held in closed immigration detention from the start of their detention and include regular and systematic assessments, including by an independent board. The Commission considers that an appropriate Alternatives to Held Detention program would likely anticipate when an individual may become affected by *NZYQ* (i.e. once there is no real prospect of their removal becoming practicable in the reasonably foreseeable future) and ensure that the individual's detention has not become arbitrary by the time *NZYQ* becomes relevant.

Recommendation 1

The Commission recommends that the Department provide clarity about the Community Protection Board, in particular its functions and scope, its final Terms of Reference, the independence of the Board members, and the role of its members from the Australian Border Force and other senior public servants. The Department should also indicate whether there are plans to extend the role of the Community Protection Board to consider the release from immigration detention of people beyond those affected by *NZYQ*.

Recommendation 2

The Commission recommends that the Department prioritise development of the Alternatives to Held Detention program, including:

- revised risk assessment tools
- an independent board of experts
- increased community-based placements through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

The Department should adopt an approach to eligibility for the program such that all unlawful non-citizens are to be considered for an alternative to held detention, unless their removal is imminent, or their individual circumstances indicate that only held detention is appropriate. Regular and updated assessment against the Alternatives to Held Detention program should be conducted on a systematic basis.

8.2 Risk assessments

113. The Commission has previously made recommendations to the Department for improvement of its risk assessment tools in its report *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*.³⁰
114. Mr CH's case demonstrates why it is inappropriate that a detainee's individual circumstances are not thoroughly considered when assigning a high risk rating for past criminal offending. Mr CH's past criminal offending clearly affected the risk assessments carried out by the Department, so that the default position when a person has a criminal history and character cancellation is a high risk assessment.
115. The Commission does not consider that the mere fact of having a criminal record or character cancellation should mean that a person is presumed to be a high risk to the community. Fresh assessments should occur on a regular basis with a focus on whether ongoing detention is reasonable, necessary and proportionate. These assessments should also form part of the Alternatives to Held Detention program referred to above.
116. Furthermore, fresh assessments should be informed by independent advice provided by an independent panel of experts to assess the person's

risk to the community, how such risk can be mitigated in community-based placement and the appropriate support needs for the individual. The recommendations made previously by the Commission remain relevant.

Recommendation 3

The Commission recommends that a criminal record or character cancellation should not automatically result in presumed high risk assessments, and that the Department should engage in regular fresh assessments of a person's risk to the community informed by the following:

- the person's contemporaneous circumstances
- advice provided by an independent panel of experts
- whether any risks to the community identified can be mitigated by appropriate visa conditions
- whether identified risks can be mitigated by appropriate support services.

8.3 Guidelines for referrals to the Minister

117. Following the High Court's judgment in *Davis*, there will need to be amendments to the guidelines issued by the Minister to the Department about the exercise of ministerial intervention powers under s 195A and s 197AB. It is no longer open to the Department *not* to refer cases to the Minister on the basis that the Department has formed the view that the cases do not have 'unique or exceptional circumstances' or that it is otherwise not in the public interest for the Minister to exercise these powers. While *Davis* was about referrals made under s 351 of the Migration Act, the Federal Court has indicated that it is reasonably arguable that similar principles will apply to referrals under s 195A,³¹ and the Commission considers that this is likely to apply equally to referrals under s 197AB.
118. Any revised guidelines issued by the Minister should contain clear, objective criteria for referral.³² As noted above, the Minister has recently issued new 'Ministerial Instructions – requests for use of the Minister's intervention powers under sections 351 and 501J of the *Migration Act*

1958'.³³ The Department is still developing instructions for the Minister's intervention powers under ss 195A and 197AB.

119. The Commission reiterates previous recommendations it has made for amendment of the ss 195A and 197AB guidelines for referral to the Minister.³⁴ The Commission also reiterates recommendations made in its submission to the Department regarding the ss 351 and 501J guidelines.³⁵

Recommendation 4

The Commission recommends that the updated Ministerial Instructions relating to ss 195A and 197AB in development should include the following:

- all people in closed immigration detention are to be referred to the Minister for consideration under ss 195A and 197AB when they have been in detention for 12 months or more, and/or where it appears likely that their detention will continue for any significant period
- all people in immigration detention are eligible for referral under ss 195A and 197AB whether or not they have had a visa cancelled or refused under s 501 of the Migration Act, or it appears they may fail the character test in s 501
- 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, the Department include in any submission to the Minister:
 - 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, and a description of the inquiries undertaken by the Department in forming its assessment
 - an assessment of whether an 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, and a description of the inquiries undertaken by the Department in forming its assessment
- where the Minister has previously decided not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every 6 months and re-refer the case

to the Minister to ensure that detention does not become protracted

- in the event that there has been a material change in a person's circumstances including deterioration in their mental health, the Department can re-refer a case to the Minister at any time after the Minister last considered a person's case
- repeat requests to the Minister are permitted when there has been a change of Minister.

9 Department's response to Commission's findings and recommendations

120. On 12 March 2026, I provided the Department with a notice of my findings and recommendations.
121. On 24 June 2026, the Department provided the following response to my findings and recommendations:

Recommendation 1 – Agree

The Commission recommends that the Department provide clarity about the Community Protection Board, in particular its functions and scope, its final Terms of Reference, the independence of Board members, and the role of its members from the Australian Border Force and other senior public servants. The Department should also indicate whether there are plans to extend the role of the Community Protection Board to consider the release from immigration detention of people beyond those affected by NZYQ.

The Department **agrees** to Recommendation 1.

The Community Protection Board (the Board) was established as an expert advisory body to support the implementation of the decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (NZYQ) and the government's response and is no longer in operation. Its purpose was to provide informed, impartial and evidence-based recommendations to support the Minister's delegates in determining whether specific Bridging Visa Removal (BVR) conditions were reasonably necessary, appropriate and adapted to protect the Australian community from serious harm.

The Board operated under Terms of Reference that clearly set out its:

- advisory and decision-support role
- evidence-based approach to assessment
- independence of external members
- lack of statutory decision-making authority.

The Board's membership included both external experts and senior public sector officials. External members were contracted independently to bring specialist expertise in areas such as criminology, psychology, youth justice and forensic psychiatry. Senior public sector members contributed operational and risk-management expertise, including knowledge of compliance, detention and status-resolution frameworks. All members participated on an equal footing; none exercised statutory powers or direct visa decision-making.

Given its clearly defined remit and targeted advisory role, the Department does not plan to extend the scope of the Board beyond the NZYQ affected cohort.

Following the High Court's judgment in *EGH19 v Commonwealth of Australia* [2026] HCA 7, which found that electronic monitoring and curfew conditions cannot lawfully be imposed on BVRs, the Board convened for a final time in April 2026.

Recommendation 2 – Disagree

The Commission recommends that the Department prioritise development of the Alternatives to Held Detention program, including:

- *revised risk assessment tools*
- *an independent board of experts*
- *increased community-based placements through necessary conditions and support services*
- *utilising residence determinations as part of a step-down model of reintegration into the community*

The Department should adopt an approach to eligibility for the program such that all unlawful non-citizens are to be considered for an

alternative to held detention, unless their removal is imminent, or their individual circumstances indicate that only held detention is appropriate. Regular and updated assessment against the Alternatives to Held Detention program should be conducted on a systematic basis.

The Department **disagrees** to Recommendation 2.

The *Migration Act 1958* requires unlawful non-citizens in Australia to be placed in detention - the Department of Home Affairs acts in accordance with this legal duty. Following the High Court's 2023 decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (NZYQ), no further design or development work has been undertaken on the Alternatives to Held Detention (ATHD) program.

The ATHD program was proposed to reduce the number of people in detention by moving them into the community earlier in the status resolution process. After the High Court's NZYQ decision—which found that detention is unlawful when there is no real prospect of removal in the immediate future—a group of 'NZYQ-affected' detainees had to be immediately released into the community on Bridging (Removal Pending) (BVR) visas. This decision negated the need for the ATHD program, as it applied to the same group of people and required their release into the community.

In response to the NZYQ decision, the Department has adopted a risk-proportionate, community-based management model for NZYQ-affected non-citizens. In addition, the Department has in place a range of alternative management pathways for UNC's whose removal is not practicable in the reasonably foreseeable future. These measures include resolving barriers to their removal and consideration of the following visas to enable the person to lawfully reside in the community:

- Bridging (Removal Pending) (Subclass 070) visa (BVR)
- an alternative visa, such as a Bridging (General) (Subclass 050) visa (BVE) or a substantive visa.

Where necessary, UNC's are detained until their immigration status is resolved - either through the grant of a valid visa or their departure from Australia. While detained, necessary identity, health

and external checks are carried out. Where appropriate, the Department supports non-citizens with no right to remain in Australia to depart from the community, therefore avoiding detention.

Recommendation 3 – Partially agrees

The Commission recommends that a criminal record or character cancellation should not automatically result in presumed high risk assessments, and that the Department should engage in regular fresh assessments of a person's risk to the community informed by the following:

- *the person's contemporaneous circumstances –*
- *advice provided by an independent panel of experts –*
- *whether any risks to the community identified can be mitigated by appropriate visa conditions –*
- *whether identified risks can be mitigated by appropriate support services*

The Department **partially agrees** with Recommendation 3.

Engaging in regular fresh assessments of a person's risk to the community informed by the person's contemporaneous circumstances and whether identified risks can be mitigated by appropriate support services.

In September 2025, the Department undertook a thorough review of the Community Protection Assessment Tool (CPAT) and made significant enhancements. The CPAT and the monthly Case Review is now referred to the Mandatory Control Point 17 (MCP17).

As part of MCP17, the Department undertakes regular fresh assessments of a person's risk to the community informed by their contemporaneous circumstances and whether risks can be mitigated by appropriate support services.

The MCP17 provides a holistic overview of a detainee's circumstances and immigration pathway, as well as a nationally consistent tool to consider the most appropriate placement while status resolution is progressed. It identifies risks, tasks and objectives to progress a case to resolution, with the emphasis on

the resolution of barriers hindering an individual's immigration status. The MCP17 is a decision support tool to assist officers to assess the most appropriate placement for an unlawful non-citizen (whether in held immigration detention or in the community) while status resolution processes are being undertaken.

When completing the MCP17, it is at the Status Resolution Officer's discretion to consider a substituted placement based on the detainee's circumstances, which includes consideration of relevant support services to support an alternative to the recommended placement. For example, where the MCP17 recommends a held detention placement, the Status Resolution Officer considers additional factors, which might support a community placement, notwithstanding whether an individual's visa was cancelled or refused under section 501 of the *Migration Act 1958* (the Act).

In accordance with detention assurance measures, all detainees must have an MCP17 conducted monthly and each case is reviewed to ensure case progression and placement is appropriate and to review and consider any other possible alternative placements while their immigration status is being progressed.

Engaging in regular fresh assessments of a person's risk to the community informed by whether any risks to the community identified can be mitigated by appropriate visa conditions.

While Status Resolution Officers can make alternative placement recommendations to held detention in an MCP 17 assessment (for example, recommending a Bridging Visa with conditions) as per the process outlined above, they cannot specify conditions to impose on a Bridging Visa. Conditions can only be legally imposed at the time a visa decision is made by the relevant delegate.

Engaging in regular fresh assessments of a person's risk to the community informed by advice provided by an independent panel of experts.

As noted in our response to Recommendation 2, the Department progressed the Alternatives to Held Detention (ATHD) program, including the establishment of an independent panel of experts,

until the High Court's 2023 decision in NZYQ, after which no further design or development work has been pursued.

Recommendation 4 – Agrees

The Commission recommends that the updated Ministerial Instructions relating to ss 195A and 197AB in development should include the following:

- *all people in closed immigration detention are to be referred to the Minister for consideration under ss 195A and 197AB when they have been in detention for 12 months or more, and/or where it appears likely that their detention will continue for any significant period*
- *all people in immigration detention are eligible for referral under ss 195A and 197AB whether or not they have had a visa cancelled or refused under s 501 of the Migration Act, or it appears they may fail the character test in s 501*
- *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, the Department include in any submission to the Minister:*
 - 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, and a description of inquiries undertaken by the Department in forming its assessment*
 - ii. *an assessment of whether an 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, and a description of the inquiries undertaken by the Department in forming its assessment*
- *where the Minister has previously decided not to exercise their discretionary powers, the Department conduct further assessments of risk and mitigation options every 6 months and re-refer the case to the Minister to ensure that detention does not become protracted*
- *in the event that there has been a material change in a person's circumstances including deterioration in their mental health, the*

Department can re-refer a case to the Minister at any time after the Minister last considered a person's case

- *repeat requests to the Minister are permitted when there has been a change of Minister.*

The Department **agrees** to Recommendation 4. The Department and Minister accept that, because of the resulting High Court judgement in *Davis v Minister for Immigration; DCM20 v Secretary of Home Affairs* [2023] HCA 10 (Davis) handed down on 12 April 2023, the 10 March 2021 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 will provide the Commission's recommendations for the Minister's consideration when briefing the Minister on options to review the sections 195A and 197AB Ministerial Intervention guidelines. The final decision on how much of the Commission's recommendation is incorporated will rest with the Minister.

The Department notes sub points i) and ii), relate also to risk assessment processes (see response to Recommendation 3).

122. I report accordingly to the Attorney-General.



Hugh de Kretser
President
Australian Human Rights Commission

¹ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37, [72].

² [2023] HCA 37.

³ See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212–3 and 214–5.

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- ⁴ UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014). See also UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*'); UN Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) ('*C v Australia*'); UN Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*').
- ⁵ UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 5–6 [18]; UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 1 [6]
- ⁶ *Manga v Attorney-General* [2000] 2 NZLR 65, [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee in *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) ('*Van Alphen v The Netherlands*'); UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*'); UN Human Rights Committee, *Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (11 November 1999) ('*Spakmo v Norway*').
- ⁷ UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 1 [6]; UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014); UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*') (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); UN Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) ('*C v Australia*').
- ⁸ UN Human Rights Committee, *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) ('*Van Alphen v The Netherlands*').
- ⁹ UN Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) ('*C v Australia*'); UN Human Rights Committee, *Views: Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (20 July 2007) ('*Shams & Ors v Australia*'); UN Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*'); UN Human Rights Committee, *Views: Communication No. 1050/2002*, 87th sess, CCPR/C/87/D/1050/2002 (9 August 2006) ('*D and E and their two children v Australia*').
- ¹⁰ UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 5–6 [18], footnotes omitted.
- ¹¹ Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].
- ¹² UN Human Rights Committee, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons)*, 60th sess, UN Doc HRI/GEN/1/Rev.1 (1982) [4]. See also UN Commission on Human Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc E/CN.4/826/Rev.1 (1962) [783]–[787].
- ¹³ UN Human Rights Committee, *Communication No 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (2004) ('*Mansour Ahani v Canada*') [10.2].

- ¹⁴ UN Human Rights Committee, *Communication No 794/1998*, 74th sess, UN Doc CCPR/C/74/D/794/1998 (2002) (*Jalloh v the Netherlands*); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001.
- ¹⁵ UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 1 [6]; UN Human Rights Committee, *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*); UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); UN Human Rights Committee, *Views Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*).
- ¹⁶ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister's guidelines on ministerial powers (s351, s417 and s501)*, 11 March 2016. The guidelines are incorporated into the Department's Procedures Advice Manual.
- ¹⁷ [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, 21-24
- ¹⁸ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, 38
- ¹⁹ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, 100.
- ²⁰ (2023) 279 CLR 1.
- ²¹ *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs* (2023) 279 CLR 1, [38].
- ²² *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55; 285 FCR 463 [132].
- ²³ AHRC Act, s 29(2)(a).
- ²⁴ AHRC Act, s 29(2)(b).
- ²⁵ AHRC Act, s 29(2)(c).
- ²⁶ Australian Human Rights Commission, *Ms RC v Commonwealth (Department of Home Affairs)* [2022] AusHRC 144, at [104].
- ²⁷ A redacted copy of this report was provided to the Commission by the Department. It has not become publicly available to the Commission's knowledge.
- ²⁸ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC141.
- ²⁹ See for example *Immigration detainees in prolonged or indefinite detention v Commonwealth of Australia (Department of Home Affairs and Minister for Immigration and Multicultural Affairs)* [2024] AusHRC 174, 160 at <https://humanrights.gov.au/resource-hub/by-resource-type/publications/immigration-detainees-prolonged-or-indefinite-detention>.
- ³⁰ [2021] AusHRC 141, 94-98.
- ³¹ *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [13] and [46].
- ³² *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [17] (Kiefel CJ, Gageler and Gleeson JJ) and [99] (Gordon J), cf [219] (Steward J).

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- ³³ The Hon Tony Burke MP, Minister for Immigration and Citizenship, *Ministerial Instructions – requests for use of the Minister’s intervention powers under sections 351 and 501J of the Migration Act 1958*, 17 September 2025.
- ³⁴ *AZ v Commonwealth (Department of Home Affairs)* [2018] AusHRC 122, [58] at <https://humanrights.gov.au/our-work/legal/publications/az-v-commonwealth-department-home-affairs-2018>; *QA v Commonwealth (Department of Home Affairs)* [2021] AusHRC 140, [189] at <https://humanrights.gov.au/resource-hub/by-resource-type/publications/reports-to-the-minister/qa-v-commonwealth-department-home-affairs-2021>; *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, [576]–[578] at <https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>.
- ³⁵ Australian Human Rights Commission, *Ministerial Guidelines on intervention under sections 351, 417 and 501J of the Migration Act*, 8 September 2023.