



Australian
Human Rights
Commission

Mr DH v Commonwealth of Australia

(Department of Home Affairs)

[2026] AusHRC 194

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 DH against the Department of Home Affairs (the Department).

Mr DH was held in detention for almost five years between 28 April 2018 and 20 March 2023, despite repeated findings by the Department that he posed a low risk to the community.

The Minister intervened under s 195A of the *Migration Act 1958* (Cth), resulting in him being released from immigration detention and being granted a Bridging E visa.

As a result of this inquiry, I have found that Mr DH's human rights were breached by the Department's failure to refer Mr DH's case to the Minister for consideration of the exercise of his discretionary powers to grant him a visa or make a residence determination under ss 195A and/or 197AB of the Migration Act.

I have found Mr DH'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 16 April 2026, I provided a notice pursuant to s 29 of the AHRC Act setting out my findings and recommendations in this matter. I received the Department's response by letter dated 24 June 2026. This can be found in part 8 of the report.

I enclose a copy of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Hugh de Kretser', with a long horizontal stroke extending to the right.

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 DH against the Commonwealth of Australia — Department of Home Affairs (Department) alleging a breach of human rights. The inquiry was undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. For almost five years, from 28 April 2018 to 20 March 2023, Mr DH was held in immigration detention, despite repeated findings by the Department that he posed a low risk to the community. He complains that his detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR). He was eventually released from immigration detention as a result of the Minister intervening under s 195A of the *Migration Act 1958* (Cth) (Migration Act), granting Mr DH a Bridging E visa.
 1. The right to liberty and freedom from arbitrary detention is not directly protected in the Australian Constitution or in legislation. As a result, there are limited avenues for an individual to challenge the lawfulness of their detention, outside seeking a writ of *habeas corpus*, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.¹
 3. 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.
 4. In order to avoid 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'.
2. 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 8 below.

5. Given Mr DH has raised 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

6. 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 which prohibits arbitrary detention:
 - (a) the Department's failure to refer Mr DH's case to the Minister for consideration of the exercise of his discretionary powers to grant him a visa or make a residence determination under ss 195A and/or 197AB of the Migration Act prior to 24 February 2023.
7. I make the following recommendations:

Recommendation 1

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 2

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

- all initial requests, whether made by the person or initiated by the Department, are referred to the Minister
- 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

8. Mr DH is a citizen of Bangladesh. On 28 February 2013, Mr DH entered Australia by boat at Darwin as an unauthorised maritime arrival and was immediately detained under s 189(1) of the Migration Act.
9. On 6 May 2013, Mr DH was advised that the Minister had lifted the statutory bar under s 46A to allow him to make an application for a protection visa.
10. On 7 May 2013, Mr DH was released from immigration detention following ministerial intervention under s 195A of the Migration Act, granting him a Bridging E visa.
11. On 5 June 2013, Mr DH lodged an application for a Protection (class XA) visa.
12. On 22 July 2013, the Minister intervened and granted Mr DH a second Bridging E visa.
13. On 19 August 2014, a delegate of the Minister refused to grant Mr DH a Protection visa, on the basis that he did not meet the criteria for being owed protection obligations.
14. Mr DH sought review of the delegate's decision at the then Administrative Appeals Tribunal ('AAT') (now Administrative Review Tribunal).
15. On 16 November 2015, the AAT affirmed the delegate's decision not to grant Mr DH a protection visa.
16. On 10 December 2015, Mr DH sought judicial review of the AAT's decision in the then Federal Circuit Court (now Federal Circuit and Family Court).
17. On 11 December 2015, Mr DH attempted to apply for a new Bridging E visa, but the application was invalid, and his Bridging E visa ceased on 14 December 2015. Mr DH then became classified as an 'unlawful non-citizen' in the community.
18. On 4 April 2016, the Federal Circuit Court dismissed Mr DH's application for judicial review. Mr DH appealed further to the Federal Court, which dismissed his appeal on 11 August 2016.
19. Mr DH requested that the Department consider referring his case to the Minister under s 417 of the Migration Act on 30 August 2016. On 31

August 2016, the Department assessed his case as not meeting the guidelines for referral, as the request only raised claims in relation to Australia's non-refoulement obligations.

20. The Department made numerous failed attempts to contact Mr DH in March, April and September of 2017. As an 'unlawful non-citizen' who had disengaged from the Status Resolution program and could no longer be contacted, Ms DH was referred to Australian Border Force compliance.
21. On 28 April 2018, Mr DH was located and arrested by NSW Police upon suspicion of assault. No charges were laid, nor have been laid since. Mr DH was then transferred to Villawood Immigration Detention Centre.
22. With no further legal proceedings on foot, Mr DH was referred for involuntary removal from Australia on 21 May 2018.
23. On 20 August 2018, Mr DH's case was referred for assessment against the Minister's s 195A guidelines. On 19 September, the Department assessed the case as eligible for referral to the Minister for consideration of issuing him a visa. In reaching their decision, the Department considered that Mr DH's case was finally determined, that there would be a 6 – 12 month period before his travel document was issued, that he did not have a criminal record, and that he had resided in the community for five years with no incidents.
24. That referral decision was reversed on 9 January 2019, after the Department received advice that Mr DH's travel document had been approved, and there was no longer a barrier to his removal.
25. On 18 January 2019, the Bangladesh High Commission (BHC) issued a travel document for Mr DH, valid for three months.
26. The Department attempted to remove Mr DH from Australia on 30 January 2019, 8 February 2019, and 10 April 2019. According to the Department, these attempts were aborted due to Mr DH's disruptive and non-compliant behaviour on the plane. Mr DH's travel document then expired.
27. On 18 April 2019, the Department requested, by way of a letter to the BHC, the re-issuance of a travel document to facilitate Mr DH's removal. The BHC did not accept the letter and requested further information as to why the travel document had not been used. On 2 May 2019, a subsequent letter was provided to the BHC with additional information to support the request. The BHC agreed to reissue a travel document pending an application.

28. On 24 September 2019, an application was made for a travel document.
29. On 9 October 2019, the BHC issued a travel document for Mr DH, valid for three months.
30. On 23 October 2019, a further attempt to remove Mr DH was aborted. According to the Department, this was due to unspecified disruptive behaviour during the removal process.
31. On 17 August 2020, Mr DH lodged a complaint with the Commission.
32. On 4 September 2020, the Department informed the Commonwealth Ombudsman in a report into Mr DH's detention that 'due to COVID-19 restrictions, [his] removal has become protracted as Mr DH will require escorts to return home'.
33. On 10 February 2020, the Department initiated a request for assessment of Mr DH's case against the s 195A and 197AB guidelines. On 10 November 2020, Mr DH was found not to meet the guidelines and was not referred. The assessment noted medical records indicating that Mr DH had a 'history of torture and trauma/adjustment disorder with anxious mood/stress and adjustment reaction/insomnia' in addition to physical health issues. The assessment also noted that Mr DH married an Australian citizen in 2016 and hoped to reconcile with his wife if he was able to live in the community.
34. The Community Protection Assessment Tool (CPAT) is a tool used by the Department to assess risk with respect to detainees, and their suitability for release into the community. The CPAT generates a risk category or 'tier' that corresponds to a recommended placement for a detainee. On 20 October 2020, the CPAT assessed Mr DH as posing a low risk of harm to the community, and recommended *Tier 1- Bridging Visa with conditions*.
35. In the Department's response to my preliminary view, the Department clarified that the CPAT is a decision support tool to assist the Department in assessing the most appropriate placement of an unlawful non-citizen, and that it is not used by the Department's external service providers, such as Serco.
36. On 30 August 2021, the Department initiated a request for assessment of Mr DH's case against the s 195A and 197AB guidelines, and Mr DH was assessed as not meeting the guidelines.

37. On 11 August 2022, the Department initiated another request for assessment of Mr DH's case against s 195A and 197AB guidelines.
38. On 15 November 2022, the CPAT assessed Mr DH as posing a low risk of harm to the community and recommended a placement of *Tier 1- Bridging Visa*.
39. On 24 February 2023, the Department sent a first stage submission to the Minister seeking an indication of whether the Minister would consider intervention in relation to a cohort of five individuals assessed as low risk of harm to the community. Mr DH's case was included in this submission. The Minister indicated on 28 February 2023 that he wished to consider intervention in relation to Mr DH.
40. On 15 March 2023, in relation to the same cohort, the Department sent a second stage submission to the Minister for consideration under s 195A.
41. On 20 March 2023, the Minister intervened under s 195A of the Migration Act, granting Mr DH a Bridging E visa. Mr DH was released from immigration detention that day.

4 Legislative framework

42. On 19 June 2025, I issued a preliminary view on this matter and gave the Department the opportunity to respond to my preliminary findings.
43. On 9 October 2025, the Department responded to my preliminary view.

5 Legislative framework

5.1 Functions of the Commission

44. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with or contrary to any human right.
45. 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.
46. 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’?

47. 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.
48. 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.
49. 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.²

5.3 What is a human right?

50. The phrase ‘human rights’ is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
51. 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.

6 Arbitrary detention

52. Mr DH complains that his detention in immigration detention facilities from 28 April 2018 to 20 March 2023 was ‘arbitrary’, contrary to article 9(1) of the ICCPR.

6.1 Law on article 9

53. 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 detention³
 - (b) lawful detention may become ‘arbitrary’ when a person’s

deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances⁴

- (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 predictability⁵
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁶

- 54. 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.⁷
- 55. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than 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'.⁸
- 56. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention, in particular, based on previous decisions by the 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.⁹

57. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, continuing 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'.¹⁰
58. It is therefore necessary to consider whether the detention of Mr DH 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

59. I find that the following matter constitutes an 'act' for the purposes of the AHRC Act:

The Department's failure to refer Mr DH's case to the Minister for consideration of the exercise of his discretionary powers to grant him a visa or make a residence determination under ss 195A and/or 197AB of the Migration Act prior to 24 February 2023.

6.3 Findings

60. Following the cessation of Mr DH's Bridging E visa on 14 December 2015, he was categorised as an 'unlawful non-citizen', meaning the Migration Act required that he be detained. On 28 April 2018, Mr DH was located by the NSW Police and transferred to the Villawood Immigration Detention Centre. Mr DH had been living in the community for 5 years.
61. As an 'unauthorised maritime arrival', Mr DH was barred from making a visa application by operation of section 46A of the Migration Act.
62. However, there are several discretionary powers that the Minister could have exercised, including to grant Mr DH a visa, or to allow detention in a less restrictive manner than in an immigration detention centre.

63. Under s 195A of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under s 189 of the Migration Act.
64. Under s 197AB of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may make a residence determination to allow a person to reside at a specified place, as opposed to being detained in 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.
65. A ministerial instruction has been issued with respect to each of the discretionary powers available to the Minister. Presently, the relevant instructions or guidelines are as follows:
3. 'Guidelines on Minister's detention intervention power (s 195A of the Migration Act 1958)' as signed in November 2016 (the 195A Guidelines)¹¹
 1. 'Minister for Immigration and Border Protection's residence determination power under section 197AB and section 197AD of the Migration Act 1958' as signed on 10 October 2017 (the 197AB Guidelines)¹²
66. 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.

67. 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; ...

68. The Department considered Mr DH's case against the s 195A and s 197AB Guidelines on four occasions during his detention:

- In September 2018 the Department assessed Mr DH's case as eligible for referral. This decision was later reversed when Mr DH's travel document was approved, meaning there was no barrier to his removal.
- on 10 February 2020, the Department commenced their consideration against both sets of guidelines. On 10 November 2020, Mr DH was assessed as not meeting the guidelines.
- on 30 August 2021, the Department commenced their consideration against both sets of guidelines. On 20 December 2021, Mr DH was assessed as not meeting the guidelines.
- on 11 August 2022, the Department initiated another assessment of Mr DH's case against s 195A and 197AB Guidelines. On 24 February 2023, a first stage submission was sent to the Minister, followed by a second stage submission on 15 March 2023. The Minister intervened in Mr DH's favour on 20 March 2023.

69. The Department has provided the guidelines assessment completed in November 2020, which states that Mr DH's case was considered due to the 'protracted removal and length of time for the issuance of a Bangladeshi Travel Document'.
70. The Department's guidelines assessment from November 2020 stated that, by that stage, Mr DH had spent over 989 accumulated days in detention. The assessment noted that the most recent CPAT had recommended *Tier 1- Bridging Visa with conditions*. The Department further noted that Mr DH had provided a copy of a Commonwealth of Australia marriage certificate reflecting his marriage to an Australian citizen on 19 August 2016. Mr DH had advised that he was still married, working through issues, and hoped to fully reconcile with his wife in the event that he was able to return to the community. Despite this, the Department noted that there was 'no information to indicate Mr DH's continued detention would result in irreparable harm and continuing hardship to an Australian citizen'. The Department further noted that it was open to Mr DH to 'lodge a partner visa application offshore', despite him being unable to do so whilst in detention with no current valid travel documents.
71. The assessment referred to the IHMS Health Summary Report for the Commonwealth Ombudsman, dated 4 August 2020. The report listed a range of Mr DH's physical health issues being managed by IHMS, including a thumb fracture, recurrent atypical chest pain, gastroesophageal reflux disease, abdominal pain, constipation and rectal bleeding, and chronic lower back pain. The IHMS report also noted that Mr DH had a 'history of torture and trauma/adjustment disorder with anxious mood/stress and adjustment reaction/insomnia'. He had been prescribed anti-depressants and routine mental health screening assessments. IHMS also advised that Mr DH reported ongoing stress and anxiety from being placed in immigration detention. Despite these listed factors, the Department concluded that Mr DH had 'no health conditions that cannot be properly cared for in a secured immigration detention facility'.
72. The Department concluded that whilst Mr DH had no criminal convictions or outstanding charges and had raised circumstances which may impact an Australian citizen, this was 'not considered exceptional' and is 'outweighed by his finally determined status and demonstrated refusal to depart voluntarily from the community or cooperate with removal from detention'.
73. In its response to my preliminary view, the Department provided further information and context, as well as clarification, regarding the November

2020 guidelines assessment summarised above. The Department described a CPAT assessment as follows:

The recommended placement provided by the CPAT is defined through a set of parameters underpinned by the CPAT's four harm indicators (National Security, Identity, Criminality and Behaviour Impacting Others). When completing a CPAT assessment, Status Resolution Officers may consider additional factors as part of the placement assessment, including potential vulnerabilities and strength-based factors, such as community support and employable skills that might support a community placement, notwithstanding an individual's criminal history.

74. The Department said that in the October 2020 CPAT, which was the relevant CPAT considered in the November 2020 guidelines assessment, Mr DH's family in Australia was noted as a strength. The Department also clarified that its comment regarding Mr DH's ability to lodge a partner visa application offshore was that it was open for Mr DH to apply for a partner visa offshore provided he took the necessary steps while in immigration detention to apply for a travel document to enable him to travel outside of Australia. Once offshore, he could lodge a partner visa application and would need to satisfy the relevant criteria for the visa grant, including the necessary exclusion periods.
75. The Department maintained that the November 2020 guidelines assessment was undertaken in a holistic manner and that the officer actively engaged with, and balanced, relevant factors, of which Mr DH's Australian family unity was just one factor. Relevant to the Department's conclusion that Mr DH's continued detention would not result in irreparable harm and continuing hardship to an Australian citizen was the Department's understanding that Mr DH's wife was an Australian citizen, though this was not confirmed, that as an Australian citizen she would have access to mainstream social support services, that Detention Visit records show his wife only visited on two occasions while he was in Villawood IDC, and that Mr DH had not provided any evidence his relationship was ongoing.
76. The Department also clarified with respect to Mr DH's health conditions that it concluded in the November 2020 guidelines assessment that 'there is no evidence Mr DH's individual needs cannot be properly cared for in a secured immigration detention facility'. The Department referred to the IHMS Health Summary Report, which advised that Mr DH's listed health

issues 'can be managed by IHMS or GP review as required'. The Department reported that Mr DH received 'ongoing medical treatment for his health concerns while in immigration detention' and that health concerns were 'escalated to hospital when necessary'.

77. The Department highlighted that 'unique or exceptional' circumstances are not the only or underlying factors for which a case could meet the guidelines for referral and reiterated that Mr DH's November 2020 guidelines assessment was undertaken 'in a holistic manner'.
78. The Department has also provided the next guidelines assessment, completed in December 2021. This assessment also listed Mr DH's mental and physical health conditions, concluding that they could be appropriately managed in detention.
79. One of the questions on the assessment form is whether the person has any adverse character information, including criminal history, criminal charges and convictions. The officer who completed the form noted that Mr DH had been involved in a 'number of incidents'. The officer then listed a range of incidents that had occurred in detention, including incidents of actual self-harm or threats of self-harm and suicide, and incidents during which Mr DH was the victim of violence, or a witness to an incident of sexual assault. In my preliminary view, I expressed concern that these incidents were listed and considered as 'adverse character information', rather than indications of Mr DH's struggles in detention and clear mental health concerns. In its response, the Department made the correction that the entry in the assessment form against the question about adverse character information referred only to Mr DH's arrest on 28 April 2018 following which no charges were laid. The incidents in detention were not listed as adverse character information, but as separate information that clearly noted his involvement whether as a victim or witness.
80. The December 2021 assessment noted that Mr DH was married to an Australian citizen, but again concluded that since she would have 'access to services available to Australian citizens', there was no indication that she would be experiencing continuing hardship while Mr DH was in detention. The Department's response to my preliminary view reiterated that it was not confirmed if Mr DH's wife was an Australian citizen and that there was no evidence provided that the relationship was ongoing. It also referred to its response to the November 2020 guidelines assessment summarised above.

81. The assessment placed weight on the fact that Mr DH's 'own behaviour has contributed to his continued detention', referring to the attempted involuntary removals that took place between January and October 2019.
82. The Department has stated that between October 2019 and 20 March 2023, no further attempts were made to remove Mr DH because he had ongoing matters before the Department, which were barriers to his removal process. However, Ministerial Intervention assessments are not a barrier to removal, and it does not appear that he had any matters before a court or tribunal. The Department has also stated that in February 2021, the BHC advised that it would only issue a travel document if Mr DH was willing to travel. The fact that he refused to sign any documentation to facilitate his removal is more likely to have been the main reason no further attempts were made to remove him.
83. An initial period of immigration detention may have been justified in 2018 and 2019 given Mr DH did not have a visa, had disengaged from the Status Resolution program and there were reasonable prospects of his removal to Bangladesh.
84. However, since at least 2020, with the onset of the COVID-19 pandemic, it was clear to the Department that his removal would not be timely. The Department acknowledged in September 2020, 'due to COVID-19 restrictions, [his] removal has become protracted as Mr DH will require escorts to return home'. Further, from at least October 2020, the Department's own CPAT assessed Mr DH as posing a low risk of harm to the community, and recommended *Tier 1- Bridging Visa with conditions*.
85. Mr DH was detained for more than two years after this.
86. I said in my preliminary view that the Department's failure to refer Mr DH's case to the Minister to consider exercising his discretion under s 195A or s 197AB of the Migration Act, prior to 24 February 2023, contributed to Mr DH's continued and prolonged detention. There was inadequate consideration of whether that detention was justified in the particular circumstances of his case. Mr DH suffered from a range of physical and mental health conditions while in detention, some of which were linked to his placement in detention. Mr DH was married to an Australian citizen and hoped to reside in the community and fully reconcile with his wife. In my preliminary view, these factors weighed in favour of referral of Mr DH's case for the Minister's consideration.

87. Accordingly, the Department's failure to refer his case contributed to Mr DH's detention becoming arbitrary contrary to article 9(1) of the ICCPR.
88. The Department, in its response, submitted that Mr DH was lawfully detained as an unlawful non-citizen under s 189 of the Migration Act, and that his detention was regularly reviewed to ensure it remained reasonable, appropriate and justified in relation to his individual circumstances.
89. However, as set out above, detention that is lawful can still become 'arbitrary' if it becomes unjust, unreasonable or disproportionate. That Mr DH's detention was regularly reviewed is not sufficient to prevent it becoming arbitrary, particularly as the review parameters are not to ensure immigration detention is reasonable, appropriate or necessary. For example, the CPAT is underpinned by four harm indicators. While additional factors may be relevant, the purpose of the CPAT is to assess an individual's risk of harm to the community in order to determine appropriate placement arrangements. Even the Minister's power under s 195A or s 197AB of the Migration Act are conditioned on whether the grant of a visa is in the 'public interest'. The Department does not appear to be asking itself whether ongoing detention of an individual such as Mr DH is reasonable, proportionate or necessary when it reviews ongoing immigration detention.
90. My preliminary view remains unchanged.
91. The Department's decision not to refer the case under s 195 or s 197AB, must also 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').¹³ In that case, the Court considered that the Ministerial Instructions used by the Department allowed departmental officers to assess public interest – a task solely imparted upon the Minister. In line with this decision, I consider that the Department's decisions not to refer the case may have exceeded the statutory limit on executive power imposed by section 351 of the Migration Act.¹⁴
92. The Department has accepted that because of *Davis*, each of the Department's decisions not to refer Mr DH's case to the Minister was made in excess of the executive power of the Commonwealth.

7 Recommendations

93. 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.¹⁵ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.¹⁶ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.¹⁷

7.1 Alternatives to held detention

94. Mr DH was detained for almost 5 years, even though he had no criminal convictions or charges and had been assessed as a low risk of harm to the community, with *Tier 1 – Bridging Visa with conditions* as the recommended placements in most of his CPATs since 2018. The Department assessed Mr DH against the s 195A and s 197AB guidelines on 4 occasions in those 5 years. Though Mr DH was released following the Minister’s intervention in relation to the last guidelines assessment, it took 7 months from when the Department initiated the guidelines assessment for Mr DH to be released.
95. The process that allowed Mr DH’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,¹⁸ and considers that alternatives to held detention should be made a priority.
96. 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,¹⁹ 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).²⁰ 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.²¹ The Department has informed the Commission that this program was placed ‘on hold’ following the decision of the High Court

of Australia in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor.*²²

97. 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.
98. 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.

Recommendation 1

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.

7.2 Guidelines for referrals to the Minister

99. 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 ss 195A and 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,²³ and the Commission considers that this is likely to apply equally to referrals under s 197AB.

100. Any revised guidelines issued by the Minister should contain clear, objective criteria for referral.²⁴ As noted above, the Minister has recently issued new 'Ministerial Instructions – requests for use of the Minister's intervention powers under ss 351 and 501J of the *Migration Act 1958*'.²⁵ The Department is still developing instructions for the Minister's intervention powers under ss 195A and 197AB.
101. The Commission reiterates previous recommendations it has made for amendment of the ss 195A and 197AB guidelines for referral to the Minister.²⁶ The Commission also reiterates recommendations made in its submission to the Department regarding the ss 351 and 501J guidelines.²⁷

Recommendation 2

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

- all initial requests, whether made by the person or initiated by the Department, are referred to the Minister
- 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.

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

102. On 16 April 2026, I provided the Department with a notice of my findings and recommendations.
103. On 24 June 2026, the Department provided the following response to my findings and recommendations:

Recommendation 1 – 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** with Recommendation 1.

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. The 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 unlawful non-citizens (UNCs) 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 (BE) or a substantive visa.

Where necessary, UNCs 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 2 – Agrees

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

- *all initial requests, whether made by the person or initiated by the Department, are referred to the Minister*
- *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.*

The Department **agrees** with Recommendation 2.

The Department and Minister accept that, because of the resulting High Court judgment in *Davis v Minister for Immigration; DCM20 v Secretary of Department 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 of 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 1.

104. I report accordingly to the Attorney-General.



Hugh de Kretser
President
Australian Human Rights Commission
August 2026

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- ¹ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.
- ² See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212-3 and 214-5.
- ³ UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, *Communication No. 560/1993*, 59th Sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*'); UN Human Rights Committee, *Communication No. 900/1999*, 67th Sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('*C v Australia*'); UN Human Rights Committee, *Communication No. 1014/2001*, 78th Sess, CCPR/C/78/D/1014/2001 (2003) ('*Baban v Australia*').
- ⁴ UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (2014) [18]; UN Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6].
- ⁵ *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee in *Communication No. 305/1988*, 39th Sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('*Van Alphen v The Netherlands*'); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Communication No. 631/1995*, 67th Sess, UN Doc CCPR/C/67/D/631/1995 (1999) ('*Spakmo v Norway*').
- ⁶ UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (2014); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- ⁷ *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- ⁸ *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90th Sess, UN Doc CCPR/C/90/D/1255/2004 (2007) ('*Shams & Ors v Australia*'); *Babhan v Australia*, CCPR/C/78/D/1014/2001; UN Human Rights Committee, *Communication No. 1050/2002*, 87th Sess, CCPR/C/87/D/1050/2002 (2006) ('*D and E and their two children v Australia*').
- ⁹ UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (2014) [18], footnotes omitted.
- ¹⁰ UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- ¹¹ Accessed on LEGENDcom
- ¹² Accessed on LEGENDcom
- ¹³ [2023] HCA 10.
- ¹⁴ *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs* [2023] HCA 10, [38].
- ¹⁵ AHRC Act, s 29(2)(a).
- ¹⁶ AHRC Act, s 29(2)(b).
- ¹⁷ AHRC Act, s 29(2)(c).
- ¹⁸ Australian Human Rights Commission, *Ms RC v Commonwealth (Department of Home Affairs)* [2022] AusHRC 144, at [104].

¹⁹ 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.

²⁰ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC141

²¹ 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>.

²² [2023] HCA 37.

²³ *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [13] and [46].

²⁴ *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).

²⁵ 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.

²⁶ *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>.

²⁷ Australian Human Rights Commission, *Ministerial Guidelines on intervention under sections 351, 417 and 501J of the Migration Act*, 8 September 2023.