



Australian
Human Rights
Commission

BW v
Commonwealth of
Australia (DIBP)

[2017] AusHRC 115

© Australian Human Rights Commission 2017.

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication and endorses the use of the **Australian Governments Open Access and Licensing Framework (AusGOAL)**.



All material presented in this publication is licensed under the **Creative Commons Attribution 4.0 International Licence**, with the exception of:

- the Commission's logo, any branding or trademarks; and
- where otherwise indicated.

To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/legalcode>.

In essence, you are free to copy, communicate and adapt the publication, as long as you attribute the Australian Human Rights Commission and abide by the other licence terms.

Please give attribution to:

© Australian Human Rights Commission 2017.

ISSN 1837-1183

Further information

For further information about the Australian Human Rights Commission or copyright in this publication, please contact:

Communications Unit
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600
Email: communications@humanrights.gov.au.

Design and layout Dancinggirl Designs

Printing Masterprint Pty Limited

**BW v Commonwealth of
Australia (Department of
Immigration and Border
Protection)**

[2017] AusHRC 115

Report into arbitrary detention

Australian Human Rights Commission 2017



Contents

1	Introduction to this inquiry	3
2	Background	4
3	Legislative framework	5
3.1	Functions of the Commission	5
3.2	What is an 'act' or 'practice'?	5
3.3	What is a human right?	5
4	Arbitrary detention	6
4.1	Law on article 9 of the ICCPR	6
4.2	Act or practice of the Commonwealth	7
4.3	Alternatives to detention	7
4.4	Finding	9
5	Failure to process asylum claim	12
5.1	Background to the complaint	12
5.2	Act or practice of the Commonwealth	13
5.3	Finding	14
6	Recommendations	15
6.1	Policy	16
6.2	Compensation	16
	(a) Compensation	16
	(b) Recommendation that compensation be paid	18
6.3	Apology	18
7	Response of the department	19



**Australian
Human Rights
Commission**

April 2017

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint by Mr BW against the Commonwealth of Australia (Department of Immigration and Border Protection) alleging a breach of his human rights under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

I have found that the failure of the department to invite the Minister to consider exercising his discretion under s 197AB and make a residence determination in favour of Mr BW, contributed to his continued detention without consideration of whether that detention was justified in Mr BW's particular circumstances. In light of these circumstances, in particular Mr BW's ongoing health problems, I have found that Mr BW's continued detention is arbitrary contrary to article 9 of the ICCPR.

I have also found that the Commonwealth's interference with Mr BW's right to liberty, through its policy to not assess asylum claims of individuals who arrived in Australia by boat without a visa after 19 July 2013, and to transfer those individuals to a Regional Processing Centre is inconsistent with protections guaranteed by article 9 of the ICCPR.

In light of these findings, I have recommended that the Commonwealth consider making arrangements with the Regional Processing Centres in Nauru and Manus Island to allow asylum seekers who are returned to Australia for medical treatment to continue to have their claim for asylum processed while they are in detained in Australia. I also recommend that the Commonwealth make an apology to Mr BW and pay to him appropriate compensation in relation to his period of arbitrary detention.

By letter dated 3 April 2017 the department provided a response to my findings and recommendations. I have set out the department's response in part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint by Mr BW against the Commonwealth of Australia (Department of Immigration and Border Protection) alleging a breach of his human rights.
2. Mr BW has been detained in an immigration detention centre for over 3 years and continues to be detained. He complains that his detention is arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
3. I consider that the preservation of the anonymity of Mr BW is necessary to protect his privacy. Accordingly, I have given a direction under s 14(2) of the AHRC Act and referred to him by the pseudonym Mr BW in this document.
4. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986 (Cth)* (AHRC Act).
5. As a result of the inquiry, I find that, whether required by a policy decision of the Minister in issuing his guidelines or whether resulting from a failure by the department to refer Mr BW's case to the Minister pursuant to the community detention guidelines, the failure of the department to invite the Minister to consider exercising his discretion under s 197AB contributed to the continued detention of Mr BW without consideration of whether that detention was justified in the particular circumstances of Mr BW's case. As a result, I find that his continued detention is arbitrary for the purposes of article 9(1) of the ICCPR.
6. I also find that the policy of the government not to assess the asylum claims of persons who arrived in Australia after 19 July 2013 without a visa by boat and have been transferred to a Regional Processing Centre (however briefly) is inconsistent with Mr BW's right to liberty protected by article 9 of the ICCPR in the particular circumstances of this case.
7. I have recommended that:
 - The Commonwealth give consideration to making arrangements with the Regional Processing Centres in Nauru and Manus Island to allow asylum seekers who are returned to Australia for medical treatment to continue to have their claim for asylum processed while they are in detained in Australia.
 - The Commonwealth pay to Mr BW appropriate compensation in relation to his period of arbitrary detention.
 - The Commonwealth provide a formal written apology to Mr BW in relation to his period of arbitrary detention.

2 Background

8. Mr BW is a Rohingya person from Burma/Myanmar. Mr BW does not have travel documents or a passport for Burma/Myanmar and is considered by the department to be stateless.
9. Mr BW arrived in Australia by boat at Christmas Island on 19 August 2013. He was immediately detained pursuant to s 189(3) of the *Migration Act 1958* (Cth) in the Phosphate Hill Alternative Place of Detention (APOD).
10. On 28 February 2014, Mr BW was transferred to mainland Australia and detained in the Northern Immigration Detention Centre. On 14 March 2014, he was transferred to Wickham Point APOD. Mr BW states that he was moved to Wickham Point APOD for medical treatment of his back and spine. On 6 June 2014, Mr BW was transferred to North West Point Immigration Detention Centre.
11. On 28 June 2014, Mr BW was transferred to the Nauru Regional Processing Centre (Nauru RPC) pursuant to s 198AD(2) of the Migration Act, which provides that persons meeting the definition of 'unauthorised maritime arrival' who have been detained pursuant to s 189 of the Migration Act must be taken, as soon as reasonably practicable, from Australia to a 'regional processing country'. Mr BW's Pre-Transfer Assessment Form notes that the International Health and Medical Service (a provider of health services to persons detained by the department) was aware that he had 'health issues' relating to a 'disc in his back' and an 'ulcer'. The Form notes that this was 'no barrier to transfer'.
12. Mr BW states that 'upon being transferred to the Nauru RPC I was supposed to be processed and given an interview [for a refugee visa]. But none of this occurred'.
13. Pursuant to s 198B of the Migration Act, on 9 August 2014, Mr BW was transferred back to Australia and taken to the Wickham Point APOD to undertake a series of specialist appointments, including a CT scan, following diagnosis of a lesion on his back.
14. On 11 August 2014, Mr BW was diagnosed as having a Retroperitoneal Cyst in the spine of benign appearance, and degenerative disc disease. Mr BW underwent an epidural injection on 19 February 2015 to assist with pain management, and was later referred to a pain management clinic. On 23 November 2015, a specialist noted an incidental finding of a pre-vertebral abdominal lesion.
15. Mr BW is currently detained at Yongah Hill Immigration Detention Centre. It appears that he is still subject to transfer to a regional processing country, as in correspondence dated 21 September 2016, the department informed the Commission that 'once Mr BW has completed his medical treatment, he will be returned to Nauru where the processing of his asylum claims will continue'. Mr BW's medical treatment in Australia lasted for approximately 21 months.

16. On 11 October 2016, the Commission received the department's response to my preliminary view, dated 2 June 2016. In this response, the department advised that 'there is currently no medical impediment to Mr BW's return to Nauru. However, Mr BW has current litigation before the High Court, the practical effect of which is causing a delay of his return to a regional processing country'.

3 Legislative framework

3.1 Functions of the Commission

17. 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.
18. Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging that an act is inconsistent with or contrary to any human right.
19. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

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

20. 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.
21. 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.
22. 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.¹

3.3 What is a human right?

23. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
24. 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.

4 Arbitrary detention

25. Mr BW complains about his continuing detention in an immigration detention centre. This raises for consideration the question of whether his detention is arbitrary contrary to article 9(1) of the ICCPR.

4.1 Law on article 9 of the ICCPR

26. 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;²
- (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;³
- (c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;⁴ and
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁵

27. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UNHRC) found detention for a period of two months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁶

28. The UNHRC has held 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.⁷

29. Relevant jurisprudence of the UNHRC 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:⁸

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 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.

30. 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 Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.

4.2 Act or practice of the Commonwealth

31. Section 197AB of the Migration Act permits the Minister, where he thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. This is commonly referred to as community detention.
32. The act of the Commonwealth to which I have given consideration is the failure by the department to refer Mr BW's case to the Minister so that he may consider exercising his discretionary powers under section 197AB of the Migration Act to make a residence determination in favour of Mr BW.

4.3 Alternatives to detention

33. When the Commission asked the department the reason for Mr BW's detention in an immigration detention centre, the department responded on 29 April 2015 that:

Mr [BW] is an unlawful non-citizen and is required under section 196 of the Act to be detained until there is no longer reasonable suspicion that he is an unlawful non-citizen, or he is granted a visa or removed from Australia.

34. The department advised that 'during his time onshore, Mr [BW]'s detention has been reviewed on six occasions under case management processes by Case Management and at Detention Review Committee meetings'. The department stated that 'the outcome of these reviews has consistently found that Mr [BW]'s detention remains appropriate'.

35. The Commission asked the department whether alternative, less restrictive detention options had been considered for Mr BW. The department responded on 29 April 2015 that:

In line with Part 10 of the "Minister for Immigration and Border Protection's residence determination power under section 197AB and section 197AD of the Act 1958", less restrictive forms of detention are not considered an option for Mr [BW] as he arrived after 19 July 2013 as an IMA and had no "exceptional reasons" (such as immediate health or welfare concerns) identified for consideration.

36. It is apparent that the department has not referred Mr BW's case to the Minister for him to consider exercising his discretionary power to make a residence determination. The department's response refers to the Minister's published guidelines that explain the circumstances in which he may wish to consider exercising his powers under s 197AB of the Migration Act to make a residence determination. On 18 February 2014, the Hon Scott Morrison MP, then Minister for Immigration and Border Protection made such guidelines (the 2014 guidelines).⁹ These guidelines followed the former Prime Minister Rudd's announcement on 19 July 2013 that asylum seekers arriving after that date would be subject to offshore processing and would not be resettled in Australia. Accordingly, the 2014 guidelines relevantly provided:

10 Cases generally not to be referred for my consideration under section 197AB

I would not expect the department to refer to me for consideration of Residence Determination under section 197AB of the Act a specified person or persons in any of the following circumstances, unless there are exceptional reasons or I have requested it:

- where a person arrived after 19 July 2013, ...

37. That is, the Minister had decided that, in the absence of exceptional reasons, people who were subject to removal to a regional processing country because they arrived after 19 July 2013 would not be eligible for community detention prior to their removal.

38. I note however, that cases could still be referred where there were 'exceptional reasons'. Further, under Part 8 of the 2014 guidelines, the Minister stated that he will 'also consider cases where there are unique or exceptional circumstances'.

39. The phrase 'unique or exceptional circumstances' is not defined in the 2014 guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.¹⁰ In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:

- circumstances that may bring Australia's obligations as a party to the ICCPR into consideration;
- the length of time the person has been present in Australia (including time spent in detention); and
- compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person.

40. On 25 September 2014, the Minister announced that ‘upon passage of the [Asylum Legacy Caseload Bill and another Bill] the Government will agree to process IMAs currently on Christmas Island and the mainland who arrived last year and who **have not been** transferred to Nauru or Manus Island, as part of the legacy caseload. All asylum seekers that had come to Australia by boat already transferred to Nauru or Manus Island would remain subject to the offshore processing policy, regardless of their date of arrival.¹¹
41. In this regard, I note that the department’s Case Review of Mr BW’s detention, dated 7 October 2014, states that Mr BW ‘is considered to have commenced his processing on Nauru, therefore the proposed legislation introduced on 25 September 2014 does not apply to him’.¹²
42. On 29 March 2015, the Hon Peter Dutton MP, Minister for Immigration and Border Protection, issued replacement guidelines (the 2015 guidelines).¹³ These guidelines changed the arrival date of asylum seekers that was relevant for whether they were to be considered for a residence determination from 19 July 2013 to 1 January 2014. The guidelines also stated that, unless there are exceptional reasons, the Minister would not consider cases ‘where a person was transferred from an offshore processing centre to Australia for medical treatment or any other reason’. These guidelines also state that the Minister will consider cases where there are ‘unique or exceptional circumstances’.
43. For the sake of completeness, I also note that the Hon Brendan O’Connor MP, then Minister for Immigration and Citizenship, published guidelines on the exercise of the residence determination power under s 197AB of the Migration Act which were in operation from 30 May 2013 until the 2014 guidelines were issued on 18 February 2014. These guidelines provided that the Minister would consider ‘adults with ongoing illnesses requiring significant and ongoing medical intervention’ and other cases ‘where a person presents unique or exceptional circumstances’.

4.4 Finding

44. Apart from a period of 42 days while he was detained in Nauru, Mr BW has been detained in immigration detention centres in Australia since 19 August 2013. Prior to his removal to Nauru, he was detained in Australia for a period of 10 months (the first period of detention) and after returning from Nauru he has been detained in Australia for over 2 years and continuing (the second period of detention). This means the total time he has been in detention in Australia is a period of approximately 3 years.
45. Having considered the material before me, I am not satisfied that Mr BW’s lengthy and continuing detention in an immigration detention centre is necessary or proportionate to the Commonwealth’s legitimate aim of ensuring the effective operation of its migration system.

46. Apart from a brief initial period in order to document Mr BW's entry, record his claims and determine his identity, his detention in Australian immigration detention centres has not been justified by the department. It has provided no particular reasons for his lengthy detention specific to Mr BW such as an individualised risk of absconding or risk of crimes against others.
47. I note the department's submission that less restrictive alternatives are not considered an option for Mr BW because his case does not meet the Minister's guidelines for the exercise of his public interest powers under s 197AB of the Migration Act. During the first period of Mr BW's detention in Australia from 19 August 2013 – 27 June 2014, the 2013 guidelines and the 2014 guidelines were in operation.
48. The 2013 guidelines permitted cases requiring significant and ongoing medical intervention to be referred to the Minister. As Mr BW required medical treatment for his back and spine, it appears that his case may have been capable of falling within the ambit for referral under the 2013 guidelines. The 2014 guidelines state that the Minister would not expect the department to refer to him a person who had arrived after 19 July 2013 unless there are exceptional reasons.
49. During the second period of detention in Australia from 9 August 2014 and continuing, the 2014 guidelines and the 2015 guidelines were operative. The 2015 guidelines state that 'unless there are exceptional reasons, the Minister would not consider persons transferred from an offshore processing centre to Australia for medical treatment or any other reason'.
50. Both the 2014 and 2015 guidelines permit cases to be referred to the Minister where there are 'unique or exceptional circumstances'. In my preliminary view, I stated that the following factors are relevant to an assessment as to whether Mr BW's case presents 'unique or exceptional circumstances':
- He has been present in Australia for over 2.5 years;
 - He has been detained in an immigration detention centre without individualised justification for over 2.5 years, bringing Australia's obligations as a party to the ICCPR into consideration;
 - The processing of his claim for asylum has not yet commenced, and will not commence until his medical treatment has been completed. Mr BW's medical treatment has been ongoing for 21 months and there is no indication as to when it will be complete;
 - He has been diagnosed as having a Retroperitoneal Cyst in the spine of benign appearance, and degenerative disc disease as well as a pre-vertebral abdominal lesion. Mr BW requires assistance with pain management and has been referred to a pain management clinic.

51. Notwithstanding the presence of these factors, the department has confirmed that it assessed Mr BW's case for residence determination and determined that he did not meet the guidelines for referral due to his transitory status.

52. In response to my preliminary view, the department also stated:

Previous and current Ministerial Guidelines on the referral of cases to the Minister for residence determination provide explicit guidance that cases relating to persons who arrived in Australia unlawfully after 19 July 2013, or have been transferred from a regional processing country to Australia for medical treatment or any other reason should not be referred unless there are exceptional reasons or the Minister has requested it.

Whilst exceptional circumstances are not defined in the Guidelines, Mr [BW]'s case is not the type of case that the Minister has specifically requested to consider (i.e. unaccompanied minors, families with children, elderly detainees, detainees with significant health issues). Taking into consideration advice that Mr [BW]'s health was not a barrier to return, his circumstances were therefore not deemed to warrant referral to the Minister for residence determination consideration.

53. The department has not provided the Commission with a document setting out its formal assessment of Mr BW's case against the guidelines for referral for community detention. Further, it has not informed the Commission of the date on which this assessment occurred. According to the information provided by the department, Mr BW was returned to Australia for the purpose of receiving medical treatment and it appears that for at least 21 months of Mr BW's detention in Australia he was receiving treatment for his health issues.

54. In light of this, I find that whether required by a policy decision of the Minister in issuing his guidelines or whether resulting from a failure by the department to refer Mr BW's case to the Minister pursuant to the community detention guidelines, the failure of the department to invite the Minister to consider exercising his discretion under s 197AB contributed to the continued detention of Mr BW without consideration of whether that detention was justified in the particular circumstances of Mr BW's case. As a result, I find that his continued detention is arbitrary for the purposes of article 9(1) of the ICCPR.

5 Failure to process asylum claim

5.1 Background to the complaint

55. Mr BW also complains about the fact that his claim for asylum has not been processed. He states that during the brief period he was detained in Nauru he was not processed or interviewed.
56. The department has informed the Commission that 'the Government of Nauru is responsible for the processing of Mr BW's application for a refugee visa'. I note that the department has not provided a legislative basis for this position.
57. Section 198AD of the Migration Act requires an officer to, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a 'regional processing country'. On 10 September 2012, Nauru was designated a 'regional processing country'.¹⁴
58. It is on the public record that on 29 August 2012, the Governments of Australia and Nauru signed a Memorandum of Understanding (MOU) 'Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues'.¹⁵ The MOU does not specify which country has responsibility for the processing of the claims of transferred asylum seekers. The 29 August 2012 MOU was replaced with a second MOU on 3 August 2013. Paragraph 19(b) of the current MOU provides that Nauru will 'make an assessment, or permit an assessment to be made, of whether or not a Transferee is a refugee'. It does not appear that this would preclude Australia from making such an assessment itself if an individual is returned to Australia for medical reasons.
59. In my preliminary view, dated 2 June 2016, I noted that the department's response to Mr BW's complaint states that the processing of his asylum claims will continue once his medical treatment is completed and he is returned to Nauru. The department's response suggests that no steps are being taken to process his asylum claim while he is detained in Australia receiving medical treatment. Further, at that time, the department had given no indication of when Mr BW was likely to complete his medical treatment. At that time, Mr BW's medical treatment had been ongoing for 21 months.
60. In the department's response to my preliminary view, it stated that:
- There is currently no medical impediment to Mr [BW]'s return to Nauru. However, Mr [BW] has current litigation before the High Court, the practical effect of which is causing a delay of his return to a regional processing country.

61. Pursuant to s 196 of the Migration Act, an unlawful non-citizen detained under s 189 of the Migration Act must be kept in immigration detention until they are either removed or granted a visa. Accordingly, Mr BW's detention in an Australian immigration detention centre has been prolonged by the fact that his claim for asylum has not been processed while he is in Australia for the purpose of receiving medical treatment and could not be removed to Nauru due to his medical condition.
62. The department has advised there is now no medical impediment to his return to a regional processing country but he remains detained in Australia, awaiting the outcome of certain High Court proceedings.
63. At some point after 2 June 2016 (that the department has not specified), it appears that Mr BW's medical treatment concluded and his medical condition was no longer a barrier to his return to Nauru.

5.2 Act or practice of the Commonwealth

64. Under s 46B(1) of the Migration Act an application for a visa is not a valid application if it is made by a 'transitory person' who is in Australia and is an unlawful non-citizen. A 'transitory person' is defined in s 5 of the Migration Act to mean 'a person who was taken to a regional processing country under s 198AD'. Mr BW meets the definition of 'transitory person'.
65. However, under s 46B(2) of the Migration Act, the Minister has a discretion to determine that these provisions do not apply to a particular application for a visa if the Minister thinks that it is in the public interest to do so. This is commonly referred to as 'lifting the bar' to make a valid visa application. Accordingly, it appears that it is within the Minister's discretion to allow Mr BW to apply for a valid protection visa while he is in Australia receiving medical treatment.
66. In response to questions asked by the Commission, the department confirmed that the Minister had not lifted the bar under s 46B(2) of the Migration Act to allow Mr BW to lodge a valid visa application. When the Commission asked the department whether it had referred Mr BW's case to the Minister for him to consider exercising his discretion under s 46B(2) of the Migration Act, the department replied:

Mr [BW] is a transitory person currently in Australia for medical treatment. He will be returned to Nauru at the conclusion of his medical treatment. He is barred from lodging a valid visa in Australia by virtue of section 46B.
67. It therefore appears that the department has not referred Mr BW's case to the Minister to consider lifting the bar pursuant to s 46B(2) of the Migration Act. The department has not provided an explanation as to why it has not referred Mr BW's case to the Minister.

68. In its response to my preliminary view, the department explained:

The Minister has not issued guidelines in relation to section 46B(2) of the Act. However, in accordance with the Australian Government's border protection framework, any persons that travel to and enter Australia illegally by boat will never settle in Australia and will be subject to regional processing arrangements. As you are aware, the Government's policy is supported by a memorandum of understanding with Nauru and through the legislative framework in relation to unauthorised maritime arrivals.

69. As outlined above, on 19 July 2013, the former Prime Minister Kevin Rudd, former Attorney-General and former Minister for Immigration announced that 'as of today asylum seekers who come here by boat without a visa will *never* be settled in Australia. Under the new arrangement signed with Papua New Guinea today – the Regional Settlement Arrangement – unauthorised arrivals will be sent to Papua New Guinea for assessment and if found to be a refugee will be settled there'.¹⁶ This policy statement was made in the context of agreements made with Papua New Guinea but was later repeated in relation to Nauru.¹⁷ In the context of the arrangements with Nauru, the former Prime Minister and former Minister for Immigration stated:

A cornerstone of this regional approach is to ensure people smugglers do not have a product to sell because people that come by boat without a visa will not be settled in Australia.¹⁸

70. This policy clearly applies to Mr BW, who arrived in Australia by boat without a visa on 19 August 2013.

71. As set out above, the Government subsequently agreed to process IMAs currently on Christmas Island and the mainland who arrived in 2013 and who had not been transferred to Nauru or Manus Island. As Mr BW had been transferred to Nauru (albeit only briefly) he did not fall within this cohort. All asylum seekers that had come to Australia by boat already transferred to Nauru or Manus Island were to remain subject to the offshore processing policy (even if they were subsequently returned to Australia).

72. It appears that this Government policy may be precluding a consideration of the exercise of the Minister's discretion under s 46B(2) of the Migration Act in Mr BW's case. It further appears that owing to this Government policy, the department has not considered itself able to refer Mr BW's case to the Minister to consider lifting the bar under s 46B(2) of the Migration Act.

73. I find that the policy of the Government not to assess the asylum claims of persons who arrived in Australia after 19 July 2013 without a visa by boat and have been transferred to a RPC (however briefly) is a 'practice' for the purposes of the AHRC Act.

5.3 Finding

74. Mr BW was transferred to Nauru for the processing of his asylum claims on 28 June 2014. He returned to Australia on 9 August 2014. He has since been detained in Australia for just over 2 years. It appears he was receiving ongoing medical treatment for at least 21 months. No steps are being taken to process his claim for asylum while he is detained in Australia.

75. As outlined above, I have already found that Mr BW's ongoing detention is arbitrary. I am also of the view that the failure to process Mr BW's claim for asylum has prolonged his detention in an immigration detention centre.
76. The department has stated that Mr BW 'is barred from lodging a valid visa in Australia by virtue of s 46B [of the Migration Act]'. However, it is apparent that the Minister has not considered exercising his discretion to lift the bar pursuant to s 46B(2) of the Migration Act in the exceptional circumstances of this case.
77. Further, as set out above, the Commission asked the department to explain why no consideration had been given to the possibility of lifting the bar pursuant to s 46B(2) of the Migration Act in the particular circumstances of Mr BW's case. The department replied, stating,
- In accordance with the Australian Government's border protection framework, any persons that travel to and enter Australia illegally by boat will never settle in Australia and will be subject to regional processing arrangements.
78. It therefore appears that the Government's policy not to assess the asylum claims of persons who arrived in Australia after 19 July 2013 without a visa by boat is precluding the consideration of lifting the bar pursuant to s 46B(2) of the Migration Act in the particular circumstances of Mr BW's case.
79. I find that the policy of the Government not to assess the asylum claims of persons who arrived in Australia after 19 July 2013 without a visa by boat and have been transferred to a RPC (however briefly) is inconsistent with Mr BW's right to liberty protected by article 9 of the ICCPR in the particular circumstances of this case. This policy of the government is a blanket rule for a broad category of people. It has precluded the individual consideration of Mr BW's particular circumstances including that he was unable to return to Nauru due to the medical treatment he was receiving in Australia, and accordingly could not have his asylum claim considered for this extended period of time.

6 Recommendations

80. 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.¹⁹ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²⁰ The Commission may also recommend:
- The payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - Other action to remedy or reduce the loss or damage suffered by a person.²¹

6.1 Policy

81. The Commonwealth should give consideration to making arrangements with the Regional Processing Centres in Nauru and Manus Island to allow asylum seekers who are returned to Australia for medical treatment to continue to have their claim for asylum processed while they are detained in Australia.

6.2 Compensation

82. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
83. However, in considering the assessment of a recommendation for compensation under s 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.²²
84. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.²³

(a) Compensation

85. I have been asked to consider compensation for Mr BW being arbitrarily detained in contravention of article 9(1) of the ICCPR.
86. The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR. This is because an action for false imprisonment cannot succeed where there is lawful authority for the detention, whereas a breach of article 9(1) of the ICCPR will be made out where it can be established that the detention was arbitrary, irrespective of legality.
87. Notwithstanding this important distinction, the damages awarded in false imprisonment cases provide an appropriate guide for the award of compensation for the breach of article 9(1) of the ICCPR. This is because the damages that are available in false imprisonment matters provide an indication of how the courts have considered it appropriate to compensate for loss of liberty.
88. The principle heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).²⁴

89. In the case of *Fernando v Commonwealth of Australia (No 5)*,²⁵ Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Siopis J referred to the case of *Nye v State of New South Wales*:²⁶

The *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach recognised by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.²⁷

90. Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).²⁸ In that case at first instance,²⁹ the New South Wales District Court awarded the plaintiff, Mr Taylor, the sum of \$116,000 in damages in respect of wrongful imprisonment, consequent upon his detention following the cancellation of his permanent residency visa on character grounds.
91. Mr Taylor was detained for two separate periods. The first was for 161 days and the second was for 155 days. In that case, because Mr Taylor's convictions were in relation to sexual offences against children, Mr Taylor was detained in a state prison under a 'strict protection' regime and not in an immigration detention centre. The detention regime to which Mr Taylor was subjected was described as a 'particularly harsh one'.
92. The Court also took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.³⁰
93. On appeal, in the New South Wales Court of Appeal, Spigelman CJ considered the adequacy of the damages awarded to Mr Taylor and observed that the quantum of damages was low, but not so low as to amount to appellable error.³¹ Spigelman CJ also observed that:

Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as "the initial shock of being arrested". (*Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 at 515). As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.³²

94. Although in *Fernando v Commonwealth of Australia (No 5)*, Siopis J ultimately accepted the Commonwealth's argument that Mr Fernando was only entitled to nominal damages,³³ his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando's claim if his findings in respect of the Commonwealth's argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre. Siopis J accepted Mr Fernando's evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando's evidence did not suggest that in immigration detention he was subjected to the harsh 'strict protection' regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of the inmates in the same way that Mr Nye did whilst he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando in respect of his 1,203 days in detention the sum of \$265,000.³⁴

(b) Recommendation that compensation be paid

95. I have found that, whether required by a policy decision of the Minister in issuing his guidelines or whether resulting from a failure by the department to refer Mr BW's case to the Minister pursuant to the community detention guidelines, the failure of the department to invite the Minister to consider exercising his discretion under s 197AB contributed to the continued detention of Mr BW without consideration of whether that detention was justified in the particular circumstances of Mr BW's case. As a result, I found that his continued detention is arbitrary for the purposes of article 9(1) of the ICCPR.

96. I have also found that the policy of the Government not to assess the asylum claims of persons who arrived in Australia after 19 July 2013 without a visa by boat and have been transferred to a RPC (however briefly) is inconsistent with Mr BW's right to liberty protected by article 9 of the ICCPR in the particular circumstances of this case.

97. There is no material before me that indicated that Mr BW had been previously imprisoned in Australia and therefore it is likely that he would have felt the disgrace and humiliation experienced by a person of good character.

98. I consider that the Commonwealth should pay to Mr BW an appropriate amount of compensation to reflect the loss of liberty caused by his detention in accordance with the principles outlined above.

6.3 Apology

99. I also consider that it is appropriate that the Commonwealth provide a formal written apology to Mr BW. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.³⁵

7 Response of the department

100. On 21 November 2016 I provided a notice under s 29(2)(a) of the AHRC Act setting out my findings and recommendations.

101. By letter dated 3 April 2017 the department provided the following response to my notice:

Recommendation 1 [Policy]

...

The Department notes the findings and recommendations of the AHRC in this case.

Refugee status determination processes are a matter for the governments of Nauru and Papua New Guinea.

Recommendation 2 [Compensation]

...

The Department notes the findings and recommendations of the AHRC in this case.

The Department maintains that Mr [BW]'s immigration detention is lawful and carried out in accordance with applicable statutory procedure prescribed under the *Migration Act 1958*.

Any monetary claim for compensation against the Commonwealth can only be considered where it is consistent with the *Legal Services Direction 2005*. The *Legal Services Directions 2005* provide that a matter may only be settled where there is at least a meaningful prospect of liability being established against the Commonwealth. Furthermore, the amount of compensation that is offered must be in accordance with legal principle and practice.

The Department therefore advises the AHRC that it will not be taking action in relation to this recommendation.

Recommendation 3 [Apology]

...

The Department notes the recommendation of the AHRC in this case.

Given the Department's view that Mr [BW]'s detention is lawful, the Commonwealth is not satisfied of the need for a formal written apology.

Accordingly, the Department advises the AHRC that it will not be taking action in relation to this recommendation.

102. I report accordingly to the Attorney-General.



Gillian Triggs

President

Australian Human Rights Commission

April 2017

- 1 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.
- 2 United Nations Human Rights Committee, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
- 3 United Nations Human Rights Committee, General Comment 31 (2004) [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (Oxford University Press, 2nd ed, 2004) 308 [11.10].
- 4 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42] (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.
- 5 *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.
- 6 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 7 *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* [2007] UNHRC 73, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia* [2003] UNHRC 22, CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, CCPR/C/87/D/1050/2002.
- 8 United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 [18].
- 9 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 18 February 2014. The guidelines are incorporated into the department's Procedures Advice Manual.
- 10 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s345, s 351, s 417 and s 501J)* 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the department's Procedures Advice Manual.
- 11 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Restoring TPVs to resolve labor's legacy caseload' *Media Release*, 25 September 2014 <<http://pandora.nla.gov.au/pan/143035/201410020006/www.minister.immi.gov.au/media/sm/2014/sm218127.htm>>.
- 12 The Minister's announcement on 25 September 2014 refers to the introduction of two Bills: the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 and the Migration Amendment (Protection and Other Measures) Bill 2014. The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 was introduced and read a first time on 25 September 2014. This Bill re-introduced temporary protection visas and introduced safe haven visas. The Migration Amendment (Protection and Other Measures) Bill 2014 was introduced and read a first time on 25 June 2014. This Bill amended the framework in relation to unauthorised maritime arrivals and transitory persons who can make a valid application for a visa.
- 13 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the department's Procedures Advice Manual.
- 14 Instrument of Designation of the Republic of Nauru as A Regional Processing Country under subsection 198AB(1) of the Migration Act 1958, 10 September 2012.
- 15 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, 'Australia signs Memorandum of Understanding with Nauru', (Media Release, 29 August 2012) <<http://www.minister.immi.gov.au/media/cb/2012/cb189579.htm>>.
- 16 Former Prime Minister, former Attorney-General and former Minister for Immigration, 'Australia and Papua new Guinea Regional Settlement Arrangement' (19 July 2013) <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2611769/upload_binary/2611769.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2611769%22>.
- 17 Former Prime Minister and former Immigration Minister, 'New arrangement with Nauru Government', (3 August 2013) <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2643063/upload_binary/2643063.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2643063%22>.
- 18 Former Prime Minister and former Immigration Minister, 'New arrangement with Nauru Government', (3 August 2013) <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2643063/upload_binary/2643063.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2643063%22>.
- 19 AHRC Act s 29(2)(a).
- 20 AHRC Act s 29(2)(b).
- 21 AHRC Act s 29(2)(c).
- 22 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 23 *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).

- 24 *Cassel & Co Ltd v Broome* (1972) AC 1027, 1124; *Spatz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999) [87].
- 25 [2013] FCA 901.
- 26 [2003] NSWSC 1212.
- 27 [2013] FCA 901 [121].
- 28 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 29 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 30 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
- 31 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 32 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 33 The court awarded nominal damages of one dollar for the unlawful detention of Mr Fernando because as a non-citizen, once he committed a serious crime, he was always liable to have his visa cancelled: *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [98]-[99].
- 34 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [139].
- 35 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: www.humanrights.gov.au

For detailed and up to date information about the Australian Human Rights Commission visit our website at: www.humanrights.gov.au

To order more publications from the Australian Human Rights Commission download a Publication Order Form at: www.humanrights.gov.au/publications/index.html
or call: (02) 9284 9600 fax: (02) 9284 9611
or email: publications@humanrights.gov.au

