



Australian
Human Rights
Commission

DR & DS v

The Commonwealth

(Department of

Home Affairs)

[2018] AusHRC 120

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DR & DS v The Commonwealth (Department of Home Affairs)

[2018] AusHRC 120

Report into complaints of arbitrary detention

Australian Human Rights Commission 2018

The Hon. Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

Pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), I attach a report of the inquiry by the former President of the Australian Human Rights Commission, Professor Gillian Triggs, into complaints made by Mr DR and Mr DS against the Commonwealth of Australia — specifically, against the former Department of Immigration and Border Protection and now the Department of Home Affairs (department).

Professor Triggs found that the Commonwealth had breached the human rights of the complainants pursuant to article 9(1) of the *International Covenant on Civil and Political Rights*.

In the time between the issuing of the notice inquiring into this matter, and the preparation of this report, I assumed the role of President at the Australian Human Rights Commission. As a result, I received the department's response to Professor Triggs' findings and recommendations in this matter by letter dated 27 October 2017. I have set out the response of the department in its entirety in part 6 of the report.

Mr DR and Mr DS have requested that their names not be published in connection with this inquiry. I consider that the preservation of their anonymity is necessary to protect their human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and refer to them by the pseudonyms 'DR' and 'DS'.

Yours sincerely

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

March 2018

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by two individuals who are brothers, Mr DR and Mr DS, against the Commonwealth of Australia — (Department of Home Affairs — formerly the Department of Immigration and Border Protection) (department) alleging a breach of their human rights.
2. Mr DR and Mr DS complain that the length of time that they were each held in closed immigration detention, being 46 and 44 months respectively, despite twice being found by the Refugee Review Tribunal (RRT) to be refugees to whom Australia owes protection obligations, was ‘arbitrary’ and so contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).
3. This inquiry was undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
4. On the basis of this inquiry, the previous President of the Commission, Professor Gillian Triggs made the following findings:
 - a) the failure of the department to consider less restrictive alternatives to detention prior to April 2014, resulted in the detention of Mr DR and Mr DS for a period of 2 years, where the detention was not justified and not properly considered in light of their particular circumstances. The detention of Mr DR and Mr DS from soon after they arrived until April 2014 was ‘arbitrary’ for the purposes of article 9(1) of the ICCPR, and
 - b) the failure of the Hon. Scott Morrison MP, the then Minister for Immigration and Border Protection (Minister), to consider exercising his powers under s 195A and s 197AB of the *Migration Act 1958* (Cth) (Migration Act), to allow Mr DR and Mr DS to reside outside a closed immigration detention centre, when their cases were referred to him by the department in April 2014, is an act that is inconsistent with or contrary to article 9(1) of the ICCPR.
5. Based on those findings, Professor Triggs made the following recommendations:
 - a) that the Commonwealth pay to Mr DR an appropriate amount of compensation to reflect the loss of liberty caused by his detention, and
 - b) that the Commonwealth pay to Mr DS an appropriate amount of compensation to reflect the loss of liberty caused by his detention.

2 Background

6. Mr DR and Mr DS are nationals of Sri Lanka. Mr DR arrived in Australia by boat at Christmas Island on 17 February 2012. Mr DS arrived in Australia by boat at Christmas Island on 10 April 2012. Upon arrival in Australia, each was detained on Christmas Island pursuant to s 189(3) of the Migration Act.
7. On 7 March 2012, Mr DR was transferred to the mainland and detained under s 189(1) of the Migration Act at Scherger Immigration Detention Centre. On 20 April 2012, Mr DS was also transferred to Scherger Immigration Detention Centre. On 24 May 2012, they were transferred to Villawood Immigration Detention Centre.
8. On 2 October 2012, the then Minister for Immigration and Citizenship exercised his discretion under s 46A(2) of the Migration Act to allow Mr DR and Mr DS to each apply for a protection visa. Mr DR and Mr DS made their applications on 2 November 2012 and 15 November 2012 respectively. On 4 January 2013, the department refused to grant both a protection visa.
9. In mid-April 2013, the RRT determined that they were refugees for the purposes of the Migration Act, and their applications were remitted back to the department.
10. On 9 September 2013, the brothers were separately interviewed by department officers in an interview room at Villawood Immigration Detention Centre. They were each told that the department had information regarding their alleged involvement in a murder in Sri Lanka and were asked questions in relation to this allegation. Both denied any knowledge or involvement in this matter.
11. On 4 and 5 February 2014, Mr DR and Mr DS's protection visa applications were again refused by the department, this time for not meeting requirements of clause 866.222 of the *Migration Regulations 1944* (Cth) (Migration Regulations). On 12 December 2013, the Migration Regulations were amended to include clause 866.222, which disallows persons who arrive in Australia without a visa to be granted permanent protection.
12. On 3 April 2014, Mr DR and Mr DS were transferred to Curtin Immigration Detention Centre in Western Australia.
13. On 22 April 2014/23 April 2014, submissions in the form of Ministerial Intervention requests were made by the department to the Hon Scott Morrison MP, the then Minister. The requests asked the Minister to consider exercising his discretion to either grant a temporary visa under s 195A of the Migration Act or make a residence determination under s 197AB of the Migration Act to allow Mr DR and Mr DS to reside in the community. On 30 May 2014, the Minister declined to consider intervening in both cases.

14. The brothers went back to the RRT to have the department's decisions reviewed. On 11 July 2014, the RRT again found that Mr DS was owed protection obligations and remitted his matter to the department for reconsideration. On 18 July 2014, the RRT found the same in relation to Mr DR.
15. On 6 August 2014, the department initiated security and health checks for the purpose of granting each a Temporary Protection Visa (TPV).
16. On 28 August 2014, they were transferred to Yongah Hill Immigration Detention Centre in Western Australia.
17. Mr DR and Mr DS were held in closed immigration detention until they were granted TPVs on 16 December 2015 and were then released into the community.

3 Legislative framework

3.1 Functions of the Commission

18. 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.
19. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint is made to it in writing alleging that an act is inconsistent with or contrary to any human right.
20. 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'?

21. 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.
22. 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.
23. 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?

24. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR, or recognised or declared by any relevant international instrument.
25. Article 9(1) of the ICCPR is relevant to this inquiry. That article 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

26. Mr DR and Mr DS complain about the duration of their detention in immigration detention facilities since their arrival in Australia until 16 December 2015, when they were released into the community.
27. Professor Triggs considered that Mr DR and Mr DS's complaints raised for consideration the question of whether their detention until 16 December 2015 was 'arbitrary' within the meaning of article 9(1) of the ICCPR, and therefore whether it was inconsistent with or contrary to that right.

4.1 Law

28. 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 detention²
 - (b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances³
 - (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 predictability⁴
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁵
29. 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 being remanded in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁶ Similarly, the UNHRC considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was 'considerably in excess of what is necessary'.⁷

30. The UNHRC has said 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
31. 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:

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

4.2 Act or practice of the Commonwealth

32. Mr DR was detained by the Commonwealth for 46 months, from 17 February 2012 until 16 December 2015.
33. Mr DS was detained for 44 months, from 10 April 2012 until 16 December 2015.
34. Although the Migration Act required that Mr DR and Mr DS be detained because they arrived in Australia by boat without a valid visa and are therefore 'unlawful non-citizens', there are a number of powers that the Minister could have exercised either to grant them a visa, or to allow them to be detained in a less restrictive manner than in a closed immigration detention centre.
35. 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.
36. Alternatively, the Minister can make a 'residence determination' under s 197AB of the Migration Act which provides:

If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a **residence determination**) to the effect that one or more specified persons to whom this subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1).

37. The making of a 'residence determination' may allow a person to reside in the community, in 'community detention'.
38. Further, the definition of 'immigration detention' includes 'being held by, or on behalf of, an officer in another place approved by the Minister in writing'.¹⁰
39. Accordingly, the Minister could have granted a visa to Mr DR and Mr DS, made a 'residence determination' in relation to each of them under s 197AB of the Migration Act, or could have approved each of them to reside in a place other than an immigration detention centre.
40. The first and only time that the department referred the brothers' cases to the Minister for him to consider exercising his powers under s 195A and s 197AB was in April 2014, two years after they were first detained. In those two years, it appears that the department did not consider less restrictive alternatives to immigration detention for the brothers, despite the RRT's decision in April 2013 that they were refugees and were owed protection obligations. The failure or omission of the department to consider less restrictive alternatives to detention prior to April 2014 was not mandated by law. Professor Triggs considered that this was an 'act' for the purposes of the AHRC Act.
41. In response to the submissions made to the Minister in April 2014 asking him to intervene, the Minister indicated on 30 May 2014 that he did not wish to consider exercising his powers under s 195A and s 197AB. The Minister's decision was not a decision not to exercise his power under s 195A and s 197AB. It was, expressly, a decision *not to consider* exercising his power. The Minister's decision not to consider intervening resulted in the continued detention of Mr DR and Mr DS for a further 18 months. Mr DR and Mr DS were only released from closed immigration detention once they were granted TPVs on 16 December 2015 after a lengthy period involving two reviews by the RRT and waiting for over 16 months to obtain security clearances. The failure of the Minister to consider exercising his powers under s 195A and s 197A was not mandated by law. Professor Triggs considered that this was an 'act' for the purposes of the AHRC Act.

4.3 Assessment

42. In the information provided to the Commission by the department, there is no clear explanation as to why the Minister was not asked to exercise his powers to allow Mr DR and Mr DS to reside in a less restrictive alternative to immigration detention prior to April 2014. This is particularly concerning given the RRT's finding in April 2013 that Mr DR and Mr DS were refugees for the purposes of the Migration Act, and were therefore owed protection obligations by Australia.
43. In mid-September 2012, the department issued criminal justice stay certificates (CJSCs) to both Mr DR and Mr DS due to allegations they were involved in people smuggling. While this could have been the department's reason for continuing to detain the brothers in immigration detention centres for a part of 2012, on 20 November 2012, about 6 weeks after the CSJCs were issued, they were cancelled and the Australian Federal Police (AFP) advised that it would not be prosecuting either of the brothers. There is no explanation as to why, at this point, the brothers were not considered for less restrictive alternatives to detention.
44. In a review dated 3 May 2013 on the progression of Mr DS's case, a senior department officer considered whether Mr DS's current detention placement was appropriate and stated the following:

On 8 April 2013, [Mr DS] was assessed as meeting the guideline under sections 195A and 197AB of the *Migration Act* 1958, for referral to the Minister for consideration of the grant of a Bridging Visa E (BVE) or a community detention placement. A submission is being prepared.

It does not appear that a submission was ultimately given to the Minister.
45. Similarly, on 23 May 2013, according to departmental records, Mr DR was being considered for referral to the Minister under s 195A to consider the grant of a BVE, and under s 197AB for consideration of a community detention placement. Subsequently, a senior officer review dated 18 September 2013 stated that progression in relation to Mr DR's case being considered by the Minister was 'unlikely since it is contrary to state Government policy'.
46. Around August 2013, the department began investigating character concerns in relation to the brothers' alleged involvement in criminal activity in their home country. However, these concerns did not come to light until the brothers had been detained for over 12 months. Further, the department does not appear to have undertaken a consideration of whether the character concerns were such that precluded Mr DR and Mr DS from residing in the community while the department undertook its investigations, and while the brothers waited for an outcome on their applications for protection.

47. Professor Triggs considered that the failure of the department to consider less restrictive alternatives to detention prior to April 2014, resulted in the detention of Mr DR and Mr DS for a period of 2 years, where the detention was not justified and not properly considered in light of their particular circumstances. Professor Triggs found that the detention of Mr DR and Mr DS from when they arrived until April 2014 was 'arbitrary' for the purposes of article 9(1) of the ICCPR.
48. In a response to the Commission dated 15 September 2014, the department gave the following reason for the continued detention of Mr DR and Mr DS:

Detention remains appropriate under section 189(1) of the Act, as reasonable suspicion exists that Mr DS and Mr DR are UNCs who arrived offshore in Australia without a valid visa...the Minister has declined to intervene...as such, placement at an IDC [immigration detention centre] remains appropriate.
49. The Commission asked the department to provide a copy of the submissions made to the Minister to consider intervening, however the department has not done so. The department has stated that it is unable to provide a copy of the submissions as they are 'classified at a protected level due to information provided by another agency'.
50. Department reports to the Ombudsman under s 486N of the Migration Act indicate that the Minister's refusal to consider exercising his power under s 195A and s 197AB may have been due to concerns about the character of Mr DR and Mr DS. As mentioned above, these character concerns arose in or around August 2013 when the brothers were identified as persons of interest to the department in relation to alleged criminal matters while offshore. The allegations related to a murder committed in Sri Lanka. It appears that this may also have precluded them being further considered for BVEs and community detention from that time onward.
51. These allegations were reported by the department to the department's National Security and Serious Crimes Section (NSSCS), which is responsible for maintaining a central register of allegations on the department's system. The NSSCS in turn referred the allegations to the AFP for investigation.
52. On 9 September 2013, the department interviewed Mr DR and Mr DS separately at Villawood Detention Centre in relation to the allegations.

53. The department has provided no information indicating the exact nature of the character concerns and whether Mr DR and Mr DS posed any specific credible security risk in the event of their release from closed immigration detention. They were able to receive full security clearances at the time their TPVs were granted in December 2015. It is unclear whether the department's character concerns were such that precluded Mr DR and Mr DS from residing in the community while their protection visa applications were being progressed during and after their appeals at the RRT.
54. Also of note is that at the time of the RRT's first decision in April 2013, concluding that Mr DR and Mr DS were owed protection by Australia, they were eligible for permanent protection, and had each applied for a permanent protection visa. However, in the period of time taken by the department to investigate character concerns and subsequently to continue processing the brothers protection visas (approximately from August 2013 to early February 2014), the Migration Regulations were amended to include clause 866.222, and the brothers were no longer eligible for permanent protection but only for temporary protection.
55. It is unclear how long the department and the AFP took to investigate character concerns in relation to the brothers. In response to a question asked in the Commission's preliminary view, the department has said that it has not been able to locate records confirming when the AFP's investigation concluded.
56. Further, the department only initiated obtaining security clearances from the Australian Security Intelligence Organisation (ASIO) for the brothers on 6 August 2014, after the RRT's second decision, and these checks took more than 16 months to obtain.
57. In Professor Triggs' preliminary view, she asked the department to provide an explanation as to why it did not initiate security checks for the brothers prior to 6 August 2017. In response, the department provided the following information:
- Mr DR's security check was initially sent to ASIO on 12 August 2013. The security check reverted to draft on 5 February 2014 when his visa application was refused by the Department. Following the remittal of Mr DR's visa application by Refugee Review Tribunal on 18 July 2014, the security check was resent to the ASIO on 6 August 2014.
- Mr DS' security check was initially sent to the ASIO on 18 July 2013. The security check reverted to draft on 4 February 2014 when his visa application was refused by the Department. Following the remittal of Mr DS' visa application by Refugee Review Tribunal on 11 July 2014, the security check was resent to ASIO on 6 August 2014.
58. In its response to Professor Triggs' preliminary view, the department also stated that it escalated the security checks with ASIO on 15 June 2015, and was provided with clear security checks for both brothers on 21 July 2015.

59. The department has indicated that it did not ask ASIO, at any point, to assess whether Mr DR and Mr DS were suitable for community based-detention while awaiting their full security clearances. In response to a question asked in Professor Triggs' preliminary view, the department has stated that it 'does not routinely seek advice from ASIO regarding community placements'.
60. The satisfaction of 'public interest criterion 4002' was prescribed by the *Migration Regulations 1994* as a precondition for the grant of a protection visa. The relevant regulation was found to be invalid in 2012.¹¹ An equivalent requirement was subsequently introduced into the body of the Migration Act.¹² However, the fact that a person's security clearance for the purposes of the grant of a protection visa is outstanding is not a reason they should not be placed in community detention or granted another category of visa under s 195A. Separate advice can be sought by the department from ASIO about the security implications of the exercise of those powers. This matter has been discussed in detail by previous Presidents of the Commission in reports resulting from previous human rights inquiries.¹³
61. The only factor identified by the department that might be seen to weigh against the exercise of the Minister's discretion to grant the brothers visas to reside in the community, was the concerns in relation to their character. However, as noted above, it is not the case that the Minister considered whether to exercise his powers, and having considered the matter in its entirety, refused to do so. Rather, the Minister indicated that he did not wish to consider exercising his power at all.
62. Professor Triggs found that the failure of the Minister to consider exercising his discretionary power under s 195A and s 197AB resulted in the continued detention of Mr DR and Mr DS, in circumstances where the justification for detention was not considered in light of the particular circumstances of each of their cases. Professor Triggs found that this failure resulted in the detention of Mr DR and Mr DS becoming 'arbitrary' for the purposes of article 9(1) of the ICCPR.

5 Findings and Recommendations

63. On the basis of this inquiry, Professor Triggs made the following findings:
 - a) the failure of the department to consider less restrictive alternatives to detention prior to April 2014 resulted in the detention of Mr DR and Mr DS for a period of 2 years, where the detention was not justified and not properly considered in light of their particular circumstances. The detention of Mr DR and Mr DS from soon after they arrived until April 2014 was 'arbitrary' for the purposes of article 9(1) of the ICCPR, and

- b) the Minister's failure to consider exercising his powers under s 195A and s 197AB of the Migration Act 1958 (Cth) (Migration Act), to allow Mr DR and Mr DS to reside outside a closed immigration detention centre, when their cases were referred to him by the department in April 2014, is an act that is inconsistent with or contrary to article 9(1) of the ICCPR.

5.1 Power to make recommendations

- 64. 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.¹⁴ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice, or for the taking of action to remedy or reduce loss or damage suffered by a person because of the act or practice.¹⁵
- 65. The Commission may also recommend:¹⁶
 - (a) the payment of compensation to, or in respect of, a person who has suffered loss or damage as a result of the act or practice, and
 - (b) the taking of other action to remedy or reduce the loss or damage suffered by a person as a result of the act or practice.

5.2 Compensation

- 66. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
- 67. However, in considering the assessment of a recommendation for compensation under section 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.
- 68. Professor Triggs was 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.
- 69. Professor Triggs considered whether to recommend compensation for Mr DR and Mr DS being arbitrarily detained in contravention of article 9(1) of the ICCPR.

70. 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 a lawful justification 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.
71. Notwithstanding this important distinction, the damages awarded in false imprisonment cases provide an appropriate guide for the award of compensation for a 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.
72. In *Fernando v Commonwealth of Australia (No 5)*,¹⁷ Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Justice Siopis referred to the case of *Nye v State of New South Wales*:¹⁸
- ...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 recognized 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.¹⁹
73. Justice Siopis 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)*.²⁰ In that case, at first instance,²¹ 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.
74. 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'.
75. 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.²²

76. On appeal, the New South Wales Court of Appeal considered that the award was low but in the acceptable range. The Court noted that ‘as the term of imprisonment extends, the effect upon the person falsely imprisoned does progressively diminish’.²³
77. 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,²⁴ 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. Justice Siopis 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 inmates in the same way that Mr Nye did while he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando the sum of \$265,000 in respect of his 1,203 days in detention.²⁵ On appeal, the Full Federal Court noted that although ‘the primary judge’s assessment seems to us to be low’, it was not so low as to indicate error.²⁶
78. Mr DR was held in closed immigration detention for 46 months, from 17 February 2012 until 16 December 2015.
79. Mr DS was held in closed immigration detention for 44 months, from 10 April 2012 until 16 December 2015.
80. Professor Triggs found that the department’s failure to consider less restrictive alternatives to detention prior to April 2014, and the Minister’s failure to consider exercising his personal powers to allow Mr DR and Mr DS to reside outside of closed immigration detention when their matters were referred to him in April 2014, resulted in their arbitrary detention.
81. Professor Triggs was of the view that the Commonwealth should pay to Mr DR and Mr DS an appropriate amount of compensation to reflect the loss of liberty caused by their detention in accordance with the principles outlined above.

Recommendation 1

82. Professor Triggs recommended that the Commonwealth pay to Mr DR an appropriate amount of compensation to reflect the loss of liberty caused by his detention.

Recommendation 2

83. Professor Triggs recommended that the Commonwealth pay to Mr DS an appropriate amount of compensation to reflect the loss of liberty caused by his detention.

6 Department's response to the recommendations

84. On 28 July 2017, Professor Triggs provided a notice of her findings and recommendations to the department, and sought a response from the department.
85. By letter dated 27 October 2017, the department provided the following response to Professor Triggs' notice:

The Department of Immigration and Border Protection's response to the Australian Human Rights Commission's final view – Mr DR and Mr DS

Professor Gillian Triggs, former President of the Australian Human Rights Commission (AHRC), issued a notice in accordance with section 29(2) of the *Australian Human Rights Commission Act 1986* (Cth) on 28 July 2017. Professor Triggs made the following findings:

- 1. That the failure of the Department to consider less restrictive alternatives to detention prior to April 2014, resulted in the detention of Mr DR and Mr DS for a period of 2 years, where the detention was not justified and not properly considered in light of their particular circumstances. In her view, the detention of Mr DR and Mr DS from soon after they arrived until April 2014 was arbitrary for the purposes of article 9(1) of the International Convention of Civil and Political Rights (ICCPR).*

Response to finding

The Department considers less restrictive detention placements for illegal maritime arrivals (IMAs) in line with Government policy. Government policy in effect at the time of Mr DS and Mr DR's arrival in Australia in 2012 was for priority consideration for community detention placements be given to families with children and single adult IMAs identified as having vulnerabilities were to be referred for assessment against the section 197AB guidelines, neither of which applied to Mr DS or Mr DR.

After Mr DS and Mr DR arrived in Australia as IMAs in February and April 2012 respectively, their cases were reviewed monthly by a departmental case manager. These reviews considered a number of factors including whether detention continues to be appropriate, whether the right level of case management intervention is being applied and re-consideration of the detainee's detention placement (taking into account health and wellbeing, family structure, community support, availability of accommodation and any security factors). As part of this ongoing review, if it is determined that a detainee's circumstances fall within the section 195A or section 197AB guidelines, their case will be referred to the Minister for consideration of alternate management options. Monthly reviews from their arrival until December 2012 concluded that Mr DS and Mr DR's placement in held immigration detention was appropriate, given there were no vulnerabilities in their case that warranted referral to the Minister for consideration under sections 195A of the Act for a visa grant and 197AB of the Act for community detention.

Assessments against the guidelines are initiated through internal departmental processes (for example, referral by a departmental case manager) or following a request from a detainee or on behalf of a detainee.

Following the AFP finalising their investigations regarding Mr DS and Mr DR's alleged involvement in people smuggling activities and deciding charges would not be pursued, their departmental case manager referred their case for an assessment against the section 197AB guidelines in December 2012.

In April 2013 and July 2013, respectively, Mr DS and Mr DR were assessed as meeting the section 197AB guidelines. These assessments took time to complete given the prioritisation of detention cases based on vulnerabilities and length of time in detention. At that time, Mr DS and Mr DR were not considered high priority cases based on their vulnerabilities and length of time in detention.

Following these assessments, the Department commenced preparation of a submission for the former Minister in July 2013. At this time, the team preparing the submission was made aware of allegations that Mr DR and Mr DS had left Sri Lanka to escape from a murder charge. The officer drafting the submission requested further information from the AFP and other areas of the Department to include in the submission for the former Minister, including details of the allegation and progress on investigating the veracity of the allegation.

During this time the Department pursued inquiries through offshore partners to obtain the required information regarding the allegations, in a manner that would not compromise the protection status of Mr DR and Mr DS.

Following the provision of this information, the Department provided the submission and all relevant information to the former Minister for his consideration of possible release of Mr DR and Mr DS from held immigration detention. At the time of the submission being referred to the Minister for consideration, AFP investigations indicated that these allegations were likely to be credible. On 30 May 2014, the former Minister considered the submissions and declined to consider releasing Mr DR and Mr DS from held immigration detention.

After examining the Department's records of this period, the Department is satisfied that it was actively considering and pursuing options for less restrictive detention for the complainants, balanced with obtaining the required information for the former Minister to make an informed assessment of the potential risks posed to the Australian community.

For the reasons above, the Department does not accept the AHRC's finding and asserts that, given the seriousness of the allegation raised in their case, a full investigation was required as part of presenting their case for the former Minister's consideration of possible release from held immigration detention.

2. *That the Minister's failure to consider exercising his powers under section 195A and 197AB of the Migration Act 1958, to allow Mr DR and Mr DS to reside outside a closed immigration detention centre, when their cases were referred to him by the Department in April 2014, is an act that is inconsistent with or contrary to article 9(1) of the ICCPR.*

Response to finding

The Minister's powers under sections 195A and 197AB of the Migration Act are non-delegable and non-compellable and require the consideration of many factors, including a detainee's immigration pathway, behaviour in detention, risk to the Australian community and connection to the Australian community.

Ultimately, decisions are made at the discretion of the Minister, and are a reflection of what is deemed to be in the public interest at that time.

On the basis of the above, the Department does not accept the AHRC's finding.

Response to the recommendations

Recommendation 1 – That the Commonwealth pay to Mr DR an appropriate amount of compensation to reflect the loss of liberty caused by his detention.

The Department notes the AHRC recommendation however as noted above does not accept the AHRC findings and will not be taking any action in relation to this recommendation.

The Department maintains that Mr DR's placement in a detention centre was appropriate, reasonable and justified in the individual circumstances.

Any monetary claim for compensation against the Commonwealth can only be considered where it is consistent with the *Legal Services Directions 2017*. The *Legal Service Directions 2017* 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 considers that Mr DR's detention was lawful and that the decisions and processes followed were appropriate having regard to their circumstances. On this basis, with there being no meaningful prospect of liability being established, the Department is respectfully of the view that payment of compensation to Mr DR would not be appropriate in this case.

Although there are limited circumstances in which the Commonwealth may pay compensation on a discretionary basis, Resource Management Guide No. 409 generally limits such payments to situation where a person has suffered some form of financial detriment or injury arising out of defective administration on the part of the Commonwealth, or otherwise experienced an anomalous, inequitable or unintended outcome as a result of the application of the Commonwealth legislation or policy. On the basis of the current information, the Department is not satisfied that there is a proper basis for the payment of discretionary compensation at this time.

Recommendation 2 – That the Commonwealth pay to Mr DS an appropriate amount of compensation to reflect the loss of liberty caused by his detention

The Department notes the AHRC recommendation however as noted above does not accept the AHRC findings and will not be taking any action in relation to this recommendation.

The Department maintains that Mr DS's placement in a detention centre was appropriate, reasonable and justified in the individual circumstances.

Any monetary claim for compensation against the Commonwealth can only be considered where it is consistent with the *Legal Services Directions 2017*. The *Legal Services Directions 2017* 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 principles and practice.

The Department considers that Mr DS's detention was lawful and that the decisions and processes followed were appropriate having regard to their circumstances. On this basis, the Department is respectfully of the view that payment of compensation to Mr DS would not be appropriate in this case.

Although there are limited circumstances in which the Commonwealth may pay compensation on a discretionary basis, Resource Management Guide No. 409 generally limits such payments to situations where a person has suffered some form of financial detriment or injury arising out of defective administration on the part of the Commonwealth, or otherwise experienced an anomalous, inequitable or unintended outcome as a result of application of the Commonwealth legislation or policy. On the basis of the current information, the Department is not satisfied that there is a proper basis for the payment of discretionary compensation at this time.

86. I report Professor Triggs' decision accordingly to the Attorney-General.

Emeritus Professor Rosalind Croucher AM

President

Australian Human Rights Commission

March 2018

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- 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 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*').
 - 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) [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].
 - ⁴ *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*'); 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. 631/1995*, 67th Sess, UN Doc CCPR/C/67/D/631/1995 (1999) ('*Spakmo v Norway*').
 - ⁵ 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); UN Human Rights Committee, *Communication No. 560/1993*, 59th Sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*') (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); UN Human Rights Committee, *Communication No. 900/1999*, 67th Sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('*C v Australia*').
 - ⁶ UN Human Rights Committee, *Communication No. 305/1988*, 39th Sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('*Van Alphen v The Netherlands*').
 - ⁷ UN Human Rights Committee, *Concluding Observations on Switzerland*, UN Doc CCPR/C/79/Add.70 (1997) [100].
 - ⁸ 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, *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*'); UN Human Rights Committee, *Communication No 1014/2001*, 78th Sess, CCPR/C/78/D/1014/2001 (2003) ('*Baban v Australia*'); 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].
 - ¹⁰ *Migration Act 1958* (Cth) s 5.
 - ¹¹ *Plaintiff M47 v Director-General of Security* (2012) 251 CLR 1.
 - ¹² *Migration Act 1958* (43) s 36(1B).
 - ¹³ See the following reports of the Commission: [2012] AusHRC 56 at [48]–[70]; [2013] AusHRC 64 at [33]ff.
 - ¹⁴ AHRC Act s 29(2)(a).
 - ¹⁵ AHRC Act s 29(2)(b) and (c).
 - ¹⁶ AHRC Act s 29(2)(c).
 - ¹⁷ [2013] FCA 901.
 - ¹⁸ [2003] NSWSC 1212.

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- ¹⁹ [2013] FCA 901 [121].
- ²⁰ *Ruddock v Taylor* (2003) 58 NSWLR 269.
- ²¹ *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- ²² *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
- ²³ *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- ²⁴ *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [99].
- ²⁵ 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].
- ²⁶ *Fernando v Commonwealth of Australia* [2014] FCAFC 181 [113].