



Australian  
Human Rights  
Commission

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Mr Nauroze Anees

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v Commonwealth of

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Australia (Department

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of Home Affairs)

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[2019] AusHRC 133

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Mr Nauroze Anees  
v Commonwealth of  
Australia (Department  
of Home Affairs)

[2019] AusHRC 133

*Report into complaint of arbitrary detention  
and arbitrary interference with family*

**Australian Human Rights Commission 2019**



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**Australian  
Human Rights  
Commission**

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

Dear Attorney,

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint of Mr Nauroze Anees alleging a breach of his human rights.

Mr Anees complains that the actions of the Department of Home Affairs (department) amounted to a breach of articles 9(1), 17(1), 23(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

Mr Anees also alleges that he was sexually assaulted by a Serco officer, inconsistent with or contrary to article 10(1) of the ICCPR.

As a result of this inquiry, I have found that the Department's omission to refer Mr Anees' case to the Minister for consideration of his discretionary intervention powers until 19 October 2018, and the Minister's failure to consider exercising his power to make a residence determination under s 197AB or grant Mr Anees a visa under s 195A of the Migration Act, were acts that were, taken together, inconsistent with or contrary to article 9(1) of the ICCPR.

I have also found that the detention of Mr Anees interfered with his family and family life contrary to articles 17(1) and 23(1) of the ICCPR.

With respect to article 10 of the ICCPR, I have found that the act of sexual assault as alleged by Mr Anees has not been established.

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The Department provided a response to my findings and recommendations on 25 September 2019. That response can be found in Part 11 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM  
**President**  
Australian Human Rights Commission

November 2019

# 1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mr Nauroze Anees against the Commonwealth of Australia, Department of Home Affairs (Department) alleging a breach of his human rights.
2. Mr Anees arrived in Australia on a Student visa in 2007. His application for a Partner visa was refused in 2016 under s 501(1) of the *Migration Act 1958* (Cth) (Migration Act). Since October 2016, he has been held in closed detention in various immigration detention facilities. He complains that his detention has been arbitrary, and therefore inconsistent with or contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup> Mr Anees also complains that his detention has resulted in arbitrary interference with his family contrary to articles 17(1) and 23(1) of the ICCPR.
3. Mr Anees alleges that he was sexually assaulted by a Serco officer, inconsistent with or contrary to article 10(1) of the ICCPR.
4. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

# 2 Summary of findings and recommendations

5. As a result of this inquiry, I find the following:
  - The Department's omission to refer Mr Anees' case to the Minister for consideration of his discretionary intervention powers until 19 October 2018, and the Minister's failure to consider exercising his power to make a residence determination under s 197AB or grant Mr Anees a visa under s 195A of the Migration Act, were acts that were, taken together, inconsistent with or contrary to article 9(1) of the ICCPR.
  - The detention of Mr Anees interfered with his family and family life contrary to articles 17(1) and 23(1) of the ICCPR.
  - The act of sexual assault as alleged by Mr Anees has not been established.

6. In its response to the Commission's preliminary view in this matter, the Department noted that it mistakenly advised the Minister that Mr Anees was subject to an Intervention Violence Order, which had been struck out. As a result, the Department advised that it will refer Mr Anees' case to the Minister under ss 195A and 197AB of the Act.
7. I recommend that the Minister consider exercising his powers in a manner consistent with the findings set out in this notice.
8. In the event that the Minister is concerned that Mr Anees may pose some real risk if allowed to reside in the community (such as a risk of re-offending), I recommend he direct the Department to prepare a detailed submission including the following:
  - a) a personalised assessment of the existence and/or extent of any such risk, including a detailed description of the nature of the risk and of the evidence and reasons leading to the assessment
  - b) a description of what measures might be implemented to ameliorate any risk in the event Mr Anees were allowed to reside in the community, for example the imposition of conditions such as a requirement to reside at a specified location, curfews, travel restrictions, reporting requirements or a surety
  - c) an assessment of whether any risk, if present, could be satisfactorily addressed by the identified measures.

### 3 Background

9. Mr Anees is a national of Pakistan. He arrived in Australia on 20 May 2007 on a Student (Temporary) (Class TU) visa.
10. Mr Anees completed a Diploma of Commerce at Melbourne Institute of Business and Technology Pty Ltd and commenced a Bachelor of Commerce at Deakin University in 2009.
11. In August 2008, Mr Anees met his partner Ms ND. Ms ND is an Australian citizen. She has serious mental health conditions. Mr Anees chose to stop studying to provide care for her.
12. On 15 April 2011, his Student visa was cancelled for non-compliance because he was no longer enrolled as a student.
13. Between January 2011 and October 2013, Mr Anees was convicted of a number of offences outlined in the table below.



14. In August 2011, he served a 3-month prison sentence. On 25 October 2011, he was released from prison and detained under s 189(1) of the Migration Act because he was an unlawful non-citizen.
15. On 20 January 2012, Mr Anees lodged an application for a Partner visa. On 30 January 2012, he was granted a Bridging Visa E and released into the community.
16. His Partner visa application was initially refused on 20 November 2012 on the basis that he was not in a spousal or defacto relationship with the sponsor.
17. On 6 November 2013, the former Migration Review Tribunal remitted the decision on the basis that at the time of the visa application Mr Anees and Ms ND were in a de facto relationship.
18. On 21 September 2016, Mr Anees' Partner visa application was refused under s 501(1) of the Migration Act. His associated Bridging Visa E was cancelled under s 501F(3) of the Migration Act.
19. Due to the cancellation of his Bridging Visa, on 5 October 2016, Mr Anees was detained at Maribyrnong Immigration Detention Centre (MIDC). He still remains in immigration detention.
20. Mr Anees appealed the decision to refuse a Partner visa in the Administrative Appeals Tribunal (AAT). The AAT affirmed the Partner visa refusal on 23 December 2016.
21. Mr Anees appealed the decision of the AAT in the Federal Court. On 28 August 2017, the Federal Court, by consent, remitted the matter to the AAT.
22. On 20 June 2018, the AAT again affirmed the decision to refuse Mr Anees a Partner visa. Mr Anees appealed this decision in the Federal Court.
23. On 8 February 2019, the Federal Court dismissed Mr Anees' appeal.<sup>2</sup> Mr Anees filed an application for judicial review of this decision, which remains ongoing.

24. Mr Anees' criminal offences are outlined in the table below.

<b>Date of conviction</b>	<b>Offence</b>	<b>Sentence</b>
17/01/2011	<ul style="list-style-type: none"> <li>• Various traffic offences including, driving without authorisation, driving an unregistered vehicle, running a red light</li> </ul>	Two months imprisonment, suspended
25/07/2011	<ul style="list-style-type: none"> <li>• Theft (clothing, perfume, sunglasses from department store)</li> <li>• Fail to answer bail</li> <li>• Possess controlled weapon (small knife) without excuse</li> <li>• Possession of property being suspected of being proceeds of crime</li> </ul>	Community based order, 75 hours community service
17/08/2011	<ul style="list-style-type: none"> <li>• Recklessly cause injury</li> <li>• 13 charges obtain property by deception (credit card fraud to purchase goods primarily food and basic items from grocery store)</li> </ul>	Three months imprisonment
17/10/2013	<ul style="list-style-type: none"> <li>• Theft (bed sheets, food, drinks from grocery store, medications from chemist)</li> <li>• Threat to inflict serious injury</li> <li>• Assault with weapon</li> </ul>	12 months community corrections order

## 4 Conciliation

25. The Commonwealth indicated that it did not want to participate in conciliation of the matter.

## 5 Procedural history of this inquiry

26. On 15 April 2019, I issued a preliminary view in this matter and gave both Mr Anees and the Department the opportunity to respond to my preliminary findings.
27. On 8 May 2019, Mr Anees responded to my preliminary view.
28. On 26 June 2019, the Department responded to my preliminary view and provided additional information regarding Mr Anees' circumstances.

## 6 Legislative framework

### 6.1 Functions of the Commission

29. 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.
30. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.
31. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

### 6.2 What is an 'act' or 'practice'?

32. 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.
33. 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.

34. 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.<sup>3</sup>

### 6.3 What is a 'human right'?

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

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

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

37. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

38. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

39. Article 10(1) of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

## 7 Arbitrary detention

40. Mr Anees complains about his continuing detention in an immigration detention centre. This requires consideration to be given to whether his detention is 'arbitrary' contrary to article 9(1) of the ICCPR.

### 7.1 Law on article 9 of the ICCPR

41. 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<sup>4</sup>

- (b) lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances<sup>5</sup>
  - (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<sup>6</sup>
  - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>7</sup>
42. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two months to be 'arbitrary' because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.<sup>8</sup>
43. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'.<sup>9</sup>
44. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:
- Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.<sup>10</sup>
45. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, continuing immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth of Australia) in order to avoid being 'arbitrary'.<sup>11</sup>

46. It is therefore necessary to consider whether the detention of Mr Anees in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

## 7.2 Act or practice of the Commonwealth

47. Mr Anees is an unlawful non-citizen, meaning the Migration Act required that he be detained.
48. However, there are a number of powers that the Minister could have exercised either to grant a visa, or to allow detention in a less restrictive manner than in a closed immigration detention centre.
49. 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. The residence determination may be made subject to other conditions such as reporting requirements.
50. In addition to the power to make a residence determination under s 197AB, the Minister also has a discretionary non-compellable power under s 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
51. I consider two acts of the Commonwealth as relevant to this inquiry:
- (a) The failure of the Department to refer the case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under ss 195A or 197AB until 19 October 2018.
  - (b) The failure of the Minister to consider exercising his discretionary powers under ss 195A and 197AB of the Migration Act.

## 7.3 Findings

52. Mr Anees was taken into immigration detention on 5 October 2016. At the time of writing, he had been detained for 33 months. He is currently detained at Brisbane Immigration Transit Accommodation.
53. On 27 April 2017 and 17 May 2017, the Department found Mr Anees not to meet the Ministerial Intervention Guidelines under s 195A, and he was therefore not referred to the Minister.
54. On 29 March 2015, the Hon Peter Dutton MP, Minister for Home Affairs, published guidelines to explain the circumstances in which he may wish to consider exercising his residence determination power under s 197AB of the Migration Act.<sup>12</sup>
55. These guidelines provide that the Minister would not expect referral of cases where a person does not meet the character test under s 501 of the Migration Act, unless there were exceptional circumstances.
56. The guidelines also state that the Minister will consider cases where there are 'unique or exceptional circumstances'.
57. The phrase 'unique or exceptional circumstances' is not defined in any of the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.<sup>13</sup> 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 their level of integration into the Australian community
  - 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.
58. Similarly, guidelines have been published in relation to the exercise of the Minister's power under s 195A of the Migration Act to grant a visa to a person in immigration detention.

59. In April 2016, Minister Dutton re-issued s 195A guidelines, which are the current guidelines in use by the Department. These guidelines provide that the Minister would not expect referral of cases where a person does not meet the character test under s 501 of the Migration Act. Although there is no exception for unique or exceptional circumstances—unlike the other ministerial intervention guidelines referred to above—under these guidelines the Minister will consider cases where there are compelling or compassionate circumstances.
60. The Department did not refer Mr Anees to the Minister for consideration of his Ministerial Intervention powers until 19 October 2018. I consider that Mr Anees' case should have been referred to the Minister earlier. In my view, the existence of the following factors are relevant to an assessment as to whether Mr Anees' case presented 'unique or exceptional circumstances':
- at the time of the Department's initial assessment of Mr Anees against the relevant guidelines he had been detained for over six months
  - he was resident in Australia for almost ten years prior to his detention
  - IHMS recommended community detention due to his mental health issues
  - he has an Australian citizen partner with serious mental health issues.
61. The Department's delay in referring Mr Anees' case to the Minister until October 2018 is particularly concerning given the mental health concerns raised by IHMS in 2017. An IHMS psychiatrist report, dated 25 May 2017, diagnosed Mr Anees with anxiety and stated he 'is at greater risk of worsening anxiety in detention, which is likely to contribute at some point to interpersonal conflict or depression'. The psychiatrist recommended
- speedy resolution of immigration pathway, and CD [community detention] if immigration status allows, to both prevent worsening of anxiety, and also provide MH [mental health] support for partner. If [he] was in CD [he] needs to be in the same city as his partner, and able to have her live in with him.
62. In its response to my preliminary view, dated 26 June 2019, the Department stated:
- The Department's assessment of Mr Anees' case against the s 195A Guidelines, finalised on 27 April 2017 as 'guidelines not met', considered that:
- International Health and Medical Services (IHMS) had advised the Department that Mr Anees did not have any health conditions that were unable to be cared for within a held detention environment;
  - There was no information before the Department to suggest that Mr Anees' continued detention would cause irreparable harm or continued hardship to an Australian Citizen, as Mr Anees had failed to provide evidence of Ms ND's dependence on Mr Anees or her disability requiring his support;
  - His removal was not reasonably practicable due to the judicial review of his refused Partner visa application;



- There were no other compelling and compassionate circumstances identified to warrant referral to the Minister.

The Department's assessment of Mr Anees' case against the 195A Guidelines, finalised on 6 June 2017 as 'guidelines not met', considered that since the previous guidelines assessment in April 2017, the supporting material he had provided with his request for Ministerial Intervention was not new information, and was inconsistent with previous advice from Mr Anees. The assessment was finalised without referral to the Minister.

63. The Department advised that Mr Anees was assessed using the Community Protection Assessment Tool (CPAT) on seven occasions. The CPAT provides a recommendation of placement based on the level of risk a person poses to the community. The Department provided the following information about CPAT:

A CPAT is a point in time assessment. It is possible for a detainee's CPAT recommendation to change over time depending on their circumstances. In addition, the CPAT parameters are regularly reviewed, and may be adjusted depending on government and departmental policy and other operational requirements. For example, it is noted that in September 2017, the CPAT parameters were updated to reflect government policy in relation to persons who have had a visa refused under section 501 of the Act. This change means that where a detainee has had a visa refused under section 501 of the Act, their CPAT will make a recommendation of *Tier 3 – Held Detention*.

It is possible for the Department to substitute a CPAT recommendation. Where a departmental officer disagrees with the CPAT's placement recommendation, they can provide a 'Substituted Assessment'. This option is provided as an acknowledgement that a detainee's circumstances may present a degree of complexity and multifaceted factors that transcend the standard assessment categories of the CPAT.

64. On 22 February 2017, Mr Anees' CPAT outcome was Tier 1 Bridging Visa E. On 17 May 2017, Mr Anees' CPAT assessment was substituted with Tier 3 – held detention. The Department stated that this occurred because some of Mr Anees' offences were serious and involved violence and the decision of the AAT to affirm his partner visa refusal.
65. In relation to the Department's assessment on 27 April 2017, it is unclear what, if any, consideration was given to the fact that Mr Anees' CPAT outcome was that he be granted a Bridging Visa E.
66. The Department stated that, between 27 April 2017 and 6 June 2017, when the second assessment was finalised, no new information had been provided by Mr Anees. However, the Department would have been aware of the IHMS psychiatrist's report discussed above, dated 25 May 2017, outlining Mr Anees' mental health concerns and recommending community detention.

67. In response to the Department's claim that there was no information regarding Ms ND's disability, Mr Anees submits that in 2017 he provided the Department with evidence of the deterioration of Ms ND's mental health condition from her psychiatrist. Mr Anees provided a letter from Dr John Cocks, dated 12 May 2017, noting that Mr Anees provided Ms ND with assistance when he was in the community. The letter also reported that Ms ND felt that Mr Anees' support 'is an essential aspect of her life that has kept her well'.
68. On 19 October 2018, the Department referred Mr Anees to the Minister for consideration of his Ministerial Intervention powers. In its submission to the Minister, the Department identified the following factors as potentially relevant to the Minister's decision about whether to consider the exercise of his powers under ss 195A and 197AB:
- Mr Anees has been held in immigration detention for over two years
  - Mr Anees has a criminal history and served three months in prison
  - Mr Anees has been in a relationship with an Australian citizen since 2008, and states that she needs his support due to her serious mental health condition
  - Mr Anees has been assessed through the Community Protection Assessment Tool (CPAT) as Tier 1 – bridging visa with conditions
  - ASIO has not issued an assessment that they consider Mr Anees to be directly or indirectly a risk to security
  - an IHMS psychiatrist recommended community detention due to his mental health issues; which include adjustment disorder, mixed anxiety and depressive symptoms and a history of PTSD
  - it is likely that Mr Anees' continued detention would be protracted if he is not released into the community.
69. The only factors identified by the Department that might be seen to weigh against the exercise of the discretion to grant Mr Anees a visa were:
- Mr Anees' criminal history
  - an Intervention Violence Order against Mr Anees due to expire on 31 December 2019.
70. The Department's submission to the Minister outlined Mr Anees' criminal offences, however, it provides no context to inform the circumstances surrounding his offending.

71. Between 2010 and 2013, Mr Anees committed a significant number of offences. His crimes, however, were generally on the lower side of offending and occurred during a period where he said he was without income and homeless. Mr Anees said he stopped studying and did not work in order to care for his partner who suffered from mental health issues. Sometime in 2010, Mr Anees said he found himself homeless and began living in his car. Mr Anees said the local council towed his car and he started to live on the streets.
72. Many of the offences Mr Anees committed appear to be directed to obtaining food, drink and medication and attracted community based orders.
73. I note that the following convictions can be viewed more seriously:
  - Possess controlled weapon without excuse
  - Recklessly causing injury, for which he was sentenced to three months' imprisonment
  - Assault with a weapon, for which he was sentenced to a 12 months' community corrections order.
74. Mr Anees says the weapon conviction was in relation to a knife he had in his backpack to cut food because he was homeless. Mr Anees says his conviction for recklessly causing injury was in relation to an altercation with a group of youths at a cinema. Mr Anees states the group attacked his girlfriend and he intervened to protect her. Mr Anees says the assault with a weapon offence arose because Mr Anees pulled out a pocketknife and threatened a supermarket's security officer with it.
75. Mr Anees has not offended since January 2013 until he was taken into immigration detention on 5 October 2016. During this almost four-year period, Mr Anees had stable employment and accommodation.
76. I acknowledge that on 20 June 2018 the AAT, in affirming the delegate's decision to refuse a Partner visa, concluded that there was a real risk of Mr Anees re-offending.
77. However, it is significant to note that these findings were in the context of reviewing a decision to refuse Mr Anees a substantive visa under s 501 of the Migration Act. The AAT was not considering the necessity of Mr Anees' ongoing detention in an immigration detention centre or whether any risks he posed to the community could be mitigated.

78. For the purposes of this inquiry, what is relevant is a recent assessment on 5 September 2018 by the Department of Mr Anees' risk of harm to the community. In the Department's submission to the Minister, a CPAT assessment recommended Mr Anees be granted a bridging visa with conditions:

Mr Anees' case has been assessed through the CPAT. The CPAT considers removal readiness, risk to the community and engagement with status resolution processes. Based on this assessment, on 5 September 2018, a recommendation of Tier 3 – Held detention was substituted with a Tier 1 – Bridging visa with conditions. The case manager substituted this recommendation due to their assessment of Mr Anees risk of harm to the community and psychological reports indicating a low risk of criminal reoffending.

79. Mr Anees contests the validity of the Intervention Violence Order mentioned in the Department's submission to the Minister. In response, the Department says Victoria Police advised that Mr Anees was served with an Interim Intervention Order, dated 7 February 2013, which was still in effect. Mr Anees was provided a copy of the Interim Intervention Order taken out by Ms HT.
80. Mr Anees submitted a document from the Werribee Magistrates Court, dated 1 March 2019. The document certifies that on 5 March 2013 the Intervention Order against Mr Anees was struck out. I accept this information and find that Mr Anees is not subject to an Intervention Violence Order, contrary to the Department's submission to the Minister.
81. I consider this inaccuracy of information a serious matter in light of the implication that Mr Anees posed a threat to a woman in the Australian community. As a result, I appreciate the Minister may have viewed the existence of an Intervention Violence Order very seriously.
82. In response to my preliminary view about the Intervention Violence Order, the Department stated:

The Department was not aware that the IVO had been struck out (in March 2013) until 1 March 2019.

The IVO was located by a departmental officer on Mr Anees' case file. The officer did not verify that the IVO was still valid, rather relying on the end date of the IVO as per the document on file. The Department will verify the validity of such document with the issuing body in future.

The Department notes it mistakenly advised the Minister that Mr Anees was subject to an Intervention Violence Order, which had been struck out. As a result, the Department will refer Mr Anees' case to the Minister under section 195A and 197AB of the Act. The submission will correct the advice previously given regarding the IVO which has not been in place since March 2013. Mr Anees will be advised of the outcome of this process in due course.

As at 24 June 2019, the Ministerial Intervention submission is in draft. The submission has been delayed due to the Federal Election and confirmation of Ministerial responsibilities. The Department expects the submission to be referred to the Minister by 28 June 2019.

83. The Minister's decision, dated 4 January 2019, was recorded by his endorsement of the Departmental submission by circling the words 'not consider'. There is no evidence the Minister had other grounds to believe Mr Anees would have posed a risk to the community if released from closed immigration detention.
84. In any event, as noted above, it is not the case that the Minister considered whether to exercise his power under ss 195A and 197AB, and, having considered that matter, refused to do so. Rather, the Minister indicated that he did not wish to consider exercising his power at all.
85. In response to my preliminary view that the Minister failed to consider exercising his discretionary powers, the Department stated:

The Minister's Intervention powers are non-compellable. The Minister is not required to consider exercising, or to exercise their power in any case. The Department refutes the AHRC's view that the Minister 'failed to consider exercising' his power, as deciding not to exercise or consider exercising a non-delegable power cannot be construed as a failure.
86. In response to a submission from his Department, the Minister made a decision not to consider exercising his discretionary powers under ss 195A or 197AB of the Migration Act. Whether this amounts to a 'decision' not to consider the exercise of the powers, or a 'failure' to make a substantive decision about whether to exercise those powers is immaterial to the Commission's jurisdiction to inquire. The Commission may inquire into both discretionary acts and failures to act.
87. Similarly, the fact that the powers are 'non-compellable' (ie, that the Minister has no legal duty under the Migration Act to consider whether to exercise his discretion) does not mean that a failure to exercise the powers in the complainant's favour, when this was open to the Minister, cannot be inconsistent with human rights.
88. I find that the decision of the Minister not to consider exercising his discretionary powers under ss 195A and 197AB resulted in the continued detention of Mr Anees, in circumstances where the justification for detention was not considered in light of the particular circumstances of Mr Anees' case. In my preliminary view, that resulted in his detention being arbitrary for the purposes of article 9(1) of the ICCPR.

89. As discussed above, the Department did not refer Mr Anees' case to the Minister for consideration of his intervention powers until 19 October 2018. I find that the omission of the Department to invite the Minister to consider exercising his discretion under ss 195A and 197AB contributed to the continued detention of Mr Anees without consideration of whether that detention was justified in the particular circumstances of Mr Anees' case. I find that has the result that his continued detention is arbitrary for the purposes of article 9(1) of the ICCPR.

## 8 Arbitrary interference with family

90. Mr Anees claims that his detention interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR.

### 8.1 Articles 17(1) and 23(1)

91. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

92. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

93. Professor Manfred Nowak has noted that:

[T]he significance of Art. 23(1) lies in the protected existence of the institution "family", whereas the right to non-interference with family life is primarily guaranteed by article 17. However, this distinction is difficult to maintain in practice.<sup>10</sup>

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

(a) 'Family'

95. The UN HR Committee has confirmed on a number of occasions that 'family' is to be interpreted broadly.<sup>14</sup> Where a nation's laws and practice recognise a group of persons as a family, they are entitled to the protections in articles 17 and 23.<sup>15</sup> However, more than a formal familial relationship is required to demonstrate a family for the purposes of article 17(1). Some degree of effective family life or family connection must also be shown to exist.<sup>16</sup> For example, in *Balaguer Santacana v Spain*,<sup>17</sup> after acknowledging that the term 'family' must be interpreted broadly, the UN HR Committee went on to say:

Some minimal requirements for the existence of a family are, however, necessary, such as life together, economic ties, a regular and intense relationship, etc.<sup>18</sup>

96. Mr Anees met his partner Ms ND in 2008 and says they have been in a relationship since that time. Mr Anees and Ms ND were living together prior to his detention in October 2016.
97. Ms ND sponsored Mr Anees for a Partner visa in 2012. The Partner visa application was initially refused in 2012 and has been subject to numerous reviews over the years. Mr Anees continues to appeal the decision to refuse him a Partner visa in the Federal Court.
98. In his complaint before the Commission, Mr Anees has on many occasions raised concern about the welfare of Ms ND, who has serious mental health conditions, and expressed his grief about their ongoing separation. These feelings are also reflected consistently in Mr Anees' mental health reports produced during his detention.
99. Mr Anees was detained at MIDC on 5 October 2016. On 24 January 2017, he was transferred from MIDC to Christmas Island Immigration Detention Centre. Since that time, he has spent prolonged periods at Christmas Island IDC, Yongah Hill IDC and Perth IDC.
100. The Commission asked the Department to advise why Mr Anees could not be transferred to MIDC to be closer to his partner. In response, the Department said it had no information to suggest that family members visited Mr Anees when he was detained at MIDC. However, Mr Anees says he wrote to the Department several times requesting a visit from his partner and asked for the visitation process to be made easier for her because of her disability.
101. In June 2018, the AAT affirmed the decision of the Minister refusing to grant Mr Anees a Partner visa under s 501 of the Migration Act because he failed the character test. In that decision, I note that the AAT accepted Mr Anees' evidence that he was still in a relationship with Ms ND even though he has been in detention.<sup>19</sup>

102. I am satisfied on the basis of all of the above that Mr Anees and Ms ND have a relationship that is sufficient to constitute a 'family' for the purpose of article 17(1) of the ICCPR.

(b) 'Interference'

103. There is no clear guidance in the jurisprudence of the UN HR Committee as to whether a particular threshold is required in establishing that an act or practice constitutes an 'interference' with a person's family. However, in relation to one communication, the UN HR Committee appeared to accept that a 'considerable inconvenience' could suffice.<sup>20</sup>

104. Interpreting the word 'interference' using its ordinary meaning, as explained in the Commission report, [2008] AusHRC 39,<sup>21</sup> I am satisfied that interference with the family is demonstrated by the simple fact that Mr Anees and Ms ND were physically separated by the placement of Mr Anees in closed immigration detention.

(c) 'Arbitrary'

105. In its General Comment on article 17, the UN HR Committee confirmed that a lawful interference with a person's family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the Covenant and is reasonable in the particular circumstances.<sup>22</sup>

106. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness.<sup>23</sup> In relation to the meaning of reasonableness, the UN HR Committee stated in *Toonen v Australia*:

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.<sup>24</sup>

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

108. In its response to my preliminary view, the Department did not accept that interference with Mr Anees' family and family life could be considered as arbitrary:

There was no evidence before the Department that Ms ND visited Mr Anees while he was detained at MIDC. The Department acknowledges that in January 2017, Mr Anees requested Ms ND be allowed to visit without providing photo identification, which she had allegedly lost. Mr Anees was advised entry conditions to the detention centre required photo identification and that Ms ND would need to hold photo identification to visit.



The Department notes while Mr Anees' continued to state he is in a relationship with Ms ND, the Department has not received any supporting evidence or any confirmation from Ms ND.

The Department notes the ICCPR does not provide a person with absolute rights to enter or remain in a country of which they are not a national. Interference with family unity is permissible where it is not arbitrary and where it is lawful at domestic law.

Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Non-citizens who may pose a risk to the health and safety of the Australian community, can expect to have their visas considered for cancellation or their applications considered for refusal.

Mr Anees' Partner visa application has been refused under s 501 of the Act. The decision to refuse his visa has been upheld by the Administrative Appeals Tribunal (AAT) and the Federal Court. The AAT noted they did not have 'up to date information' regarding Ms ND's circumstances, and the interests of the Australian community outweighed the impacts upon their relationship.

109. For the reasons outlined earlier, I accept that Mr Anees and Ms ND are in a relationship. Notwithstanding the absence of evidence directly from Ms ND, Mr Anees has provided sufficient evidence, including a psychologist report for Ms ND dated 19 June 2019, demonstrating their on-going relationship. Furthermore, as noted above, in the AAT's most recent decision in 2018 it accepted Mr Anees' evidence that he was still in a relationship with Ms ND even though he has been in detention.<sup>25</sup>
110. In Mr Anees' case, the interference with his family and family life was the direct consequence of his being put into closed detention. For the reasons I have given above, I find that his detention may be considered arbitrary for the purposes of article 9(1) of the ICCPR. It follows that I find that that the significant interference with family and family life has also not been shown to be necessary, and is consequently arbitrary for the purposes of article 17(1).
111. For these reasons, I find that the detention of Mr Anees may be considered as interfering with his family and family life contrary to articles 17(1) and 23(1) of the ICCPR.

## 9 Right of detainees to be treated with humanity and dignity

112. Article 10(1) of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

113. General Comment 21 on article 10(1) of the ICCPR by the UN HR Committee states:

Article 10, paragraph 1, imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7 ... but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons.<sup>26</sup>

114. The above comment supports the conclusions that:

- article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons
- the threshold for establishing a breach of article 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of art 7 of the ICCPR
- the article may be breached if the detainees' rights, protected by one of the other articles in the ICCPR, are breached unless that breach is necessitated by the deprivation of liberty.

115. The above conclusions about the application of article 10(1) are also supported by the jurisprudence of the UN HR Committee<sup>27</sup>, which emphasises that there is a difference between the obligation imposed by article 7(1) not to engage in 'inhuman' treatment and the obligation imposed by article 10(1) to treat detainees with humanity and respect for their dignity. In *Christopher Hapimana Ben Mark Taunoa v The Attorney General*,<sup>28</sup> the Supreme Court of New Zealand explained the difference between these two concepts as follows:

A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment ... the words 'with humanity' are I think properly to be contrasted with the concept of 'inhuman treatment' ... The concepts are not the same, although they overlap because inhuman treatment will always be inhumane. Inhuman treatment is however different in quality. It amounts to denial of humanity. That is I think consistent with modern usage which contrasts 'inhuman' with 'inhumane'.<sup>29</sup>

116. The decision considered provisions of the New Zealand Bill of Rights, which are worded in identical terms to articles 10(1) and 7(1) of the ICCPR.

## 9.1 Alleged sexual assault

117. Mr Anees alleges that on 16 September 2018 a Serco Emergency Response Team (ERT) officer sexually assaulted him at Yongah Hill IDC.

118. In a written complaint Mr Anees lodged with Serco on 16 September 2018, he described the incident in the following way:

When I was exiting the medical dispensary, this Serco-ERT guy, followed me from the backside and pressed his genitals against my back, and then used his right hand to touch my buttocks area from the back. This caused me extreme emotional distress, fear and panic. And when I asked him why he did it, the ERT officials ganged up on me and I felt I was going to get physically assaulted.

119. The Department referred the matter to the Australian Federal Police (AFP) two days later on 18 September 2018. On 26 September 2018, the AFP advised the Department that the referral was rejected. The AFP stated that as it is a complaint about alleged misconduct regarding a Serco officer it should be referred to the ABF Integrity and Professional Standards Branch in the first instance.
120. On 19 February 2019, the Integrity and Professional Standards Branch advised Mr Anees that its assessment was that his allegations were unsubstantiated and the matter was closed.

## 9.2 Finding

121. I have considered the information in the complaint, written responses and documents provided by the Department. These materials include CCTV footage from cameras in the medical pharmacy, 'incident reports' completed by Serco officers and witness statements.
122. The ERT Officer accused of sexual assault completed an incident report dated 16 September 2018. In the report, he provides a different version of events from Mr Anees. The Officer says that Mr Anees was speaking aggressively to an IHMS nurse dispensing medication and called her a 'dumb bitch'. He says that after Mr Anees took his medication he followed him towards the exit. At the exit, Mr Anees stopped abruptly causing him to accidentally bump into Mr Anees. He then states he told Mr Anees he could not block the doorway and to please move aside. Mr Anees is said to have responded in an aggressive tone, 'you just touched me inappropriately, you can't touch me'. The Officer says he replied, 'I did not touch you inappropriately, I did accidentally lightly bump into you though because you stopped suddenly in the exit way'.

123. An Incident Detail Report by the Facility Operations Manager dated 16 September 2018 provides a similar account of events:

Earlier in the day of Sunday 16<sup>th</sup> of September at approximately 0925hrs detainee ANEES was in the medical pharmacy area when he became involved in an argument with the International Health and Medical Services (IHMS) staff member [redacted] and the ERT's Officer's [redacted] and [redacted] in relation to his medication, in which Mr ANEES became verbally abusive. ERT Officer [redacted] also witnessed the conversation between ERT officers [redacted] and detainee ANEES once they had departed the medical pharmacy area.

CCTV footage of camera 117 commencing at 0925hrs on 16/09/18 was reviewed shortly after these two incidents by the Facility Operations Manager in which it was observed that detainee ANEES was viewed conversing with ERT officer [redacted] and IHMS [redacted] before starting to depart the pharmacy area followed by ERT [redacted]. As detainee ANEES departed the room he appeared to stop in the open doorframe momentarily at which point ERT [redacted] who was walking a short distance behind ANEES appears to step into him due to the sudden stoppage of detainee ANEES.

No purposeful touching of detainee ANEES was observed by the Facility Operation Manager on this CCTV footage and a copy of the footage has been recorded and will be handed to the Serco intelligence manager [redacted] for referral to the AFP.

124. I have viewed relevant footage from two separate CCTV cameras that were located in the medical dispensary room. The CCTV footage shows Mr Anees in the medical dispensary collecting his medication. An ERT officer is stationed at the back of the room. After consuming his medication, Mr Anees walks towards the door and the ERT officer follows him.
125. From the CCTV footage, it is not apparent to me that Mr Anees suddenly stopped in the doorway as described in the incident reports. He seems to slow down for a brief moment outside the door, however, and continues walking. When walking through the door, the ERT officer is in close proximity to Mr Anees. It is not clear from the footage that there was physical contact.
126. However, once outside Mr Anees appears to move sharply and turns around towards the officer supporting a conclusion that there may have been unexpected physical contact. The footage is not of sufficient quality to give any indication of what occurred at the point of contact between both men.
127. From the CCTV footage, it is not apparent that the ERT officer used his right-hand to grab Mr Anees' buttocks or that he intentionally touched Mr Anees in any other way as alleged by Mr Anees.
128. Mr Anees provided two witness statements from Mr [redacted] who accompanied him to the medical dispensary. Mr [redacted] provides a similar account of events as Mr Anees. In his witness statement dated 17 September 2018, Mr [redacted] states:

When Mr Anees was leaving the medication area, I observed the tall, white bulky – ERT (Serco) officer with an aggressive body language approach and come really close towards the back side of Mr Anees in the door way of the dispensary. I observed the ERT officer make physical body contact with his body to the backside of Mr Anees' body, and then he touched Mr Anees' bottom. I observed Mr Anees to be very distressed after that.

129. On 26 September 2018, Mr [REDACTED] made another witness statement regarding the incident. He said he previously witnessed the ERT officer accused of sexual assault stalk and intimidate Mr Anees. He also described what he observed immediately prior to the alleged assault:

On the morning of 16/09/18 I accompanied Mr Anees to the medication area for the morning medication. I observed that there were about approximately 3 ERT officers in the 'medical yard' but when Mr Anees entered the dispensary, the 'Caucasian ERT officer' alone, with an aggressive body language followed Mr Anees into the medical dispensary. During Mr Anees' time in the medical dispensary, I observed him [Mr Anees] to be very courteous as he normally is.

130. The Department submitted a witness statement dated 20 September 2018 from an IHMS staff member that is consistent with the incident reports. The witness states:

Detainee Anees Nauroze's medications were being dispensed by [redacted] (Mental Health Nurse) when the detainee stated that he always had his Diazepam Dry. [redacted] then asked me if he had his medications undiluted to which I had responded that I had never given them dry due to our policy.

[redacted] then apologised and attempted to explain to Anees the reason why the medication had to be diluted. The detainee then aggressively said 'fucken bitch', to which [redacted] said, 'excuse me'.

...

Anees then took his medications and went to walk out of the room. Due to his hostile behaviour ERT that were present in the room escorted Anees out to ensure that no further aggressive behaviour could be displayed to the nursing staff. The ERT officer had an appropriate amount of space between himself and the detainee. The detainee had then for no apparent reason suddenly stopped in the doorway, knowing the ERT officer was behind him. The ERT officers vest had gently tapped Anees on the back due to him stopping without warning. Anees then became aggressive toward the ERT officer and saying that he had assaulted him and continued his hostile behaviour outside with ERT officers.

131. I have considered the contemporaneous witness statements. Mr Anees' witness statements provide a different account of events from those provided by the Department. I note that Mr Anees has raised concerns about the credibility about one of the accounts because the witness was allegedly subject to a number of complaints from detainees. I have also carefully considered the CCTV footage.
132. All parties agree that there was some physical contact between the ERT officer and Mr Anees. The factual dispute is as to nature of the contact. It is my view that, on balance, I cannot reasonably conclude that the ERT officer intentionally or inappropriately touched Mr Anees.
133. For the above reasons, I find that there is insufficient information to support a finding that the act of sexual assault as alleged by Mr Anees has been established.

## 10 Recommendations

134. As a result of this inquiry, I find the following:
- The Department's omission to refer Mr Anees' case to the Minister for consideration of his discretionary intervention powers until 19 October 2018, and the Minister's failure to consider exercising his power to make a residence determination under s 197AB or grant Mr Anees a visa under s 195A of the Migration Act, were acts that were, taken together, inconsistent with or contrary to article 9(1) of the ICCPR.
  - The detention of Mr Anees interfered with his family and family life contrary to articles 17(1) and 23(1) of the ICCPR.
  - The act of sexual assault as alleged by Mr Anees has not been established.
135. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with, or contrary to, any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.<sup>30</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>31</sup> The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.<sup>32</sup>
136. As noted above, the Department has stated that it will prepare a submission in respect of Mr Anees for consideration by the Minister. I recommend that the Minister consider exercising his powers in a manner consistent with the findings set out in this notice.
137. In the event that the Minister is concerned that Mr Anees may pose some real risk if allowed to reside in the community (such as a risk of re-offending), he direct the Department to prepare a detailed submission including the following:

- a) a personalised assessment of the existence and/or extent of any such risk, including a detailed description of the nature of the risk and of the evidence and reasons leading to the assessment
- b) a description of what measures might be implemented to ameliorate any risk in the event Mr Anees were allowed to reside in the community, for example the imposition of conditions such as a requirement to reside at a specified location, curfews, travel restrictions, reporting requirements or a surety
- c) an assessment of whether any risk, if present, could be satisfactorily addressed by the identified measures.

## 11 The department's response to my findings and recommendations

138. On 8 August 2019, I provided the department with a notice of my findings and recommendations.
139. On 30 September 2019, the department provided the following response to my findings and recommendations:

For the reasons set out below, the Department does not accept the findings of the Australian Human Rights Commission (AHRC) as set out in the notice issued under section 29 of the *Australian Human Rights Commission Act 1986*.

### **AHRC's finding:**

The AHRC's findings are that:

- The Department's failure to refer Mr Anees' case to the Minister for consideration of his intervention powers until 19 October 2018, and the decision of the Minister not to consider exercising his discretionary powers under section 195A and section 197 AB, resulted in the continued detention of Mr Anees, in circumstances where the justification for detention was not considered in light of the particular circumstances of Mr Anees' case. This resulted in his detention being inconsistent with or contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).
- Mr Anees' detention amounts to an interference with his family and family life contrary to articles 17(1) and 23(1) of the ICCPR.

### **Department's response to finding**

As per the Department's response to the section 27 notice of the AHRC regarding this case, the Department maintains that prior to 19 October 2018 it was appropriate not to refer Mr Anees' case for Ministerial consideration.

Mr Anees' case had been reviewed 24 times since he was detained in October 2015, and each review determined that his health and welfare needs had been provided for. Mr Anees' case was referred for assessment against the Minister's guidelines in April and June 2017, and on both occasions was found not to meet.

As noted in the response to the section 27 notice, the Minister's Intervention powers are non-compellable.

The Minister is not required to consider exercising, or to exercise their power in any case. The Department continues to refute the AHRC's view that the Minister 'failed to consider exercising' his power, as deciding not to exercise or consider exercising a non-delegable power cannot be construed a failure.

The Department does not accept the AHRC's view that the interference with Mr Anees' family and family life, as a consequence of his detention, is arbitrary for the purposes of article 17(1) and 23(1) of the ICCPR. The Department maintains that the decision to refuse Mr Anees' visa application under section 501 of the Act indicates that he is considered a risk to community safety and that this risk outweighed the impact such a decision would have on his family. The Administrative Appeals Tribunal and the Federal Court upheld this decision. The Department has not received correspondence from Mr Anees' alleged de-facto partner, Ms ND, to support his claims that their relationship is still ongoing.

The Department does not accept the AHRC's view that Mr Anees' detention is contrary to Articles 9, 17 or 23 of the ICCPR. The Department views its actions, and the actions of the Minister, with the available evidence, demonstrate Mr Anees' detention was appropriate, reasonable and justified based on his personal circumstances. The Department considers that Mr Anees' detention is the lawful and predictable outcome of Australian law.

### **AHRC's recommendation**

That the Department prepare a submission and the Minister consider exercising his powers in a manner consistent with the findings set out in the AHRC section 29 notice.

### **Response to recommendation**

The Department gave an undertaking in the section 27 response to refer Mr Anees' case to the Minister under sections 195A and 197 AB of the Act, to correct the advice previously given to the Minister regarding the Intervention Violence Order (IVO).

Mr Anees' case was referred to the Minister for consideration under sections 195A and 197 AB of the Act. The submission advised the Minister of the incorrect advice provided regarding the IVO and confirmed it had been struck out in March 2013. The submission also noted that AHRC's preliminary views regarding Mr Anees' case; Mr Anees' criminal and immigration histories; and the information provided by Mr Anees regarding his relationship with Ms ND and her mental health issues. On 3 July 2019, the Minister declined to consider intervening under both powers.

On 4 July 2019, the Department received additional information from Mr Anees, in support of his request for Ministerial Intervention. As the information was received after the Minister's decision, the Department registered this new information as a further request for Ministerial Intervention under section 195A of the Act.



Generally, cases that have been considered by the Minister will not meet the section 195A guidelines unless there is a significant change in an individual's circumstances. The information provided by Mr Anees on 4 July 2019 was found not to represent a significant change in circumstances. On 19 August 2019, the Department found that Mr Anees' case did not meet the section 195A Ministerial intervention guidelines for further referral to the Minister.

Mr Anees has been notified in writing of the Minister's decision of 3 July 2019 and the negative guidelines assessment of August 2019.

The Department therefore considers that the recommendation made by the AHRC has been actioned and that no further action is required.

140. I report accordingly to the Attorney-General.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM  
**President**  
Australian Human Rights Commission

5 November 2019

- 1 (New York, 16 December 1966), 999 UNTS 171, [1980] ATS 23 (entered into force for Australia 13 November 1980).
- 2 *Anees v Minister for Immigration and Border Protection* [2019] FCA 84.
- 3 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212-3 and 214-5.
- 4 UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112<sup>th</sup> Sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, Communication No. 560/1993, 59<sup>th</sup> Sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('A v Australia'); UN Human Rights Committee, Communication No. 900/1999, 67<sup>th</sup> Sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('C v Australia'); UN Human Rights Committee, Communication No 1014/2001, 78<sup>th</sup> Sess, CCPR/C/78/D/1014/2001 (2003) ('Baban v Australia').
- 5 UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112<sup>th</sup> Sess, UN Doc CCPR/C/GC/35 (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].
- 6 *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*, 39<sup>th</sup> Sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('Van Alphen v The Netherlands'); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, Communication No. 631/1995, 67<sup>th</sup> Sess, UN Doc CCPR/C/67/D/631/1995 (1999) ('Spakmo v Norway').
- 7 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)*, 112<sup>th</sup> Sess, UN Doc CCPR/C/GC/35 (2014); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- 8 *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- 9 *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90<sup>th</sup> Sess, UN Doc CCPR/C/90/D/1255/2004 (2007) ('Shams & Ors v Australia'); *Babhan v Australia*, CCPR/C/78/D/1014/2001; UN Human Rights Committee, Communication No. 1050/2002, 87<sup>th</sup> Sess, CCPR/C/87/D/1050/2002 (2006) ('D and E and their two children v Australia').
- 10 UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112<sup>th</sup> Sess, UN Doc CCPR/C/GC/35 (2014) [18], footnotes omitted.
- 11 UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- 12 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.
- 13 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s345, s 351, s 417 and s 501)*, 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the Department's Procedures Advice Manual.
- 14 See, eg, UN Human Rights Committee, *General Comment 16* (Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation), [5]; UN Human Rights Committee, *General Comment 19* (Article 23: Protection of the Family, the Right to Marriage and Equality of the Spouses), [2].
- 15 UN Human Rights Committee, *General Comment 19* (Article 23: Protection of the Family, the Right to Marriage and Equality of the Spouses), [2].
- 16 S Joseph, J Shultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004) 589.
- 17 *Communication No 417/1990*, UN Doc CCPR/C/51/D/417/1990(1994).
- 18 *Ibid* [10.2]. See also *AS v Canada, Communication No 68/1980*, UN Doc CCPR/C/OP/1, 27 (1985), where the UN Human Rights Committee did not accept that the author and her adopted daughter met the definition of 'family' because they had not lived together as a family except for a period of 2 years approximately 17 years prior.
- 19 *QKVH v Minister for Home Affairs* [2018] AATA 1855, [72].
- 20 *Mauritian Women v Mauritius*, Communication No 35 of 1978, UN Doc CCPR/C/OP/1 at 67 (1985), [9.2(b)].
- 21 Human Rights and Equal Opportunity Commission, *Nguyen and Okoye v Commonwealth (Department of Immigration and Multicultural Affairs) and GSL (Australia) Pty Ltd* [2008] AusHRC 39 (1 January 2008), [95]–[97].
- 22 UN Human Rights Committee, *General Comment 16* (1988), [4].
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- 24 *Communication No 488 of 1992*, UN Doc CCPR/C/D/488/1992, [8.3].
- 25 *QKVH v Minister for Home Affairs* [2018] AATA 1855, [72].
- 26 UN Human Rights Committee, *General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*, [3].
- 27 *Walker and Richards v Jamaica*, Communication No 529/1993, UN Doc CCPR/C/60/D/639/1995; *Kennedy v Trinidad and Tobago*, Communication No 845/1998, UN Doc CCPR/C/74/D/845/1998; *R.S. v Trinidad and Tobago*, Communication No 684/1996, UN Doc CCPR/C/74/D/684/1996.
- 28 [2007] NZSC 70.
- 29 [2007] NZSC 70, [79].
- 30 *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(a)*.
- 31 *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(b)*.
- 32 *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(c)*.

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