



Australian  
Human Rights  
Commission

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**Charlie v**

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**Commonwealth of**

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**Australia (DIBP)**

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[2014] AusHRC 90

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# Charlie v Commonwealth of Australia (DIBP)

Report into arbitrary detention  
and interference with family

[2014] AusHRC 90

Australian Human Rights Commission 2014



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September 2014

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

Dear Attorney

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr Daniel Charlie against the Commonwealth of Australia, alleging a breach of his human rights.

I have found that the failure of the former Ministers for Immigration to exercise their powers under section 197AB of the *Migration Act 1958* (Cth) in respect of Mr Charlie during the period from November 2009 to September 2011 when he was detained at Villawood Immigration Detention Centre was inconsistent with his right to liberty in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) and arbitrarily interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR.

By letter dated 9 May 2014 the Department of Immigration and Border Protection provided a response to my findings and recommendations. I have set out the Department's response to my recommendations at Part 11 of my report.

I enclose a copy of my report.

Yours sincerely

**Craig Lenehan**

Delegate for Gillian Triggs,  
President of the Australian Human Rights Commission

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# 1 Introduction to this inquiry

This is a report setting out my findings following an inquiry into a complaint made to the Australian Human Rights Commission by Mr Daniel Charlie against the Commonwealth of Australia, alleging a breach of his human rights.<sup>1</sup>

Mr Charlie's visa was cancelled pursuant to section 501 of the *Migration Act 1958* (Cth) (Migration Act) on the basis of his criminal record. He was detained at Villawood Immigration Detention Centre (VIDC) for some four years, pending removal to Papua New Guinea (PNG). On 20 September 2011 he was granted a Removal Pending Bridging Visa. Mr Charlie was then released into the community with requirements to report and notify of his address.

Mr Charlie complains that his detention at VIDC from 8 August 2007 until 20 September 2011 was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR), and interfered with his family contrary to articles 17 and 23 of the ICCPR.

This inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1983* (Cth) (AHRC Act).

As a result of the inquiry, I have found that the acts of the Commonwealth identified below were inconsistent with or contrary to human rights recognised in articles 9(1), 17(1) and 23(1) of the ICCPR.

The recommendations made in this report are that:

- (a) the Commonwealth pay to Mr Charlie compensation in the amount of \$200,000; and
- (b) the Commonwealth provide a formal written apology to Mr Charlie.

## 2 The complaint

The circumstances in which Mr Charlie came to be in Australia were the subject of findings made by Branson J in *Charlie v Minister for Immigration and Citizenship* (2008) 171 FCR 44 (at 45-6 [3]-[6]):

Mr Charlie was born in Daru Island, Papua on 6 October 1973. At that time Papua was administered by Australia as a possession of the Crown and as part of an administrative union known as the Territory of Papua and New Guinea. However, Papua maintained its separate identity as an external territory.

In April 1975 Mr Charlie, who was then approximately 18 months old, moved with his mother and two siblings to Darnley Island to join his father and take up residence there.

Darnley Island is situated approximately 92 miles in a north-easterly direction from the tip of Cape York Peninsula. It has at all material times been part of the State of Queensland. It is accessible by small boat from Daru Island.

On 16 September 1975 Papua New Guinea became an independent sovereign State.

I do not understand either party to dispute those findings, which I propose to adopt. Her Honour went on to find that Mr Charlie was not an Australian citizen, rejecting Mr Charlie's claim that he had become so by being absorbed into the Australian community prior to 16 September 1975 (at 52 [38]). Her Honour also rejected Mr Charlie's contention that he had a right of permanent residence in Australia on that date (at 54 [48]).

In 1981 Mr Charlie was granted a Permanent Entry Permit and in 1994 he was assessed as possessing an Absorbed Persons visa.

Mr Charlie has been convicted of a range of criminal offences and has served two periods of imprisonment, one from 1992 until 1999 (for attempted rape and assault occasioning actual bodily harm) and the other from 2001 until 2007 (for break and enter with violence).



On 6 August 2007, Mr Charlie's visa was cancelled pursuant to section 501 of the Migration Act. On 8 August 2007, Mr Charlie was released from police custody and detained at VIDC under section 189 of the Migration Act. Mr Charlie was detained by the Department of Immigration and Citizenship (as it then was – it has subsequently been redesignated the Department of Immigration and Border Protection) (the Department) with a view to removal to PNG.

On 25 July 2011, Mr Charlie commenced High Court proceedings challenging the lawfulness of his ongoing detention and seeking orders for his release from immigration detention. On 16 September 2011, the Commission wrote to the parties advising that I had decided to postpone any further consideration of the complaint pending the outcome of the High Court proceedings and discussions with the Department. Both parties supported this approach.

Mr Charlie was released from VIDC on 20 September 2011 when he was granted a Removal Pending Bridging Visa. The Minister agreed to review Mr Charlie's case after a period of two years. The High Court proceedings were withdrawn.

Mr Charlie later confirmed that he wished to continue with this complaint and I therefore resumed my inquiry into that matter.

Mr Charlie claims that his detention in VIDC from 8 August 2007 to 20 September 2011 was arbitrary within the meaning of article 9(1) of the ICCPR and interfered with his family in breach of articles 17 and 23 of the ICCPR.

### **3 Response**

The Commonwealth agrees that Mr Charlie was detained in VIDC from 8 August 2007 until 20 September 2011 as a result of the cancellation of his visa pursuant to section 501 of the Migration Act. However, the Commonwealth denies that Mr Charlie's detention was arbitrary. The Commonwealth claims that it worked with the staff of the PNG High Commission from 21 April 2008 to establish Mr Charlie's identity as a PNG national and to remove him to PNG.

Section 197AB of the Migration Act permits the Minister, if she or he thinks it is in the public interest to do so, to make a determination that specified persons detained under the Act are to reside at a specified place, rather than being detained at a place covered by the definition of 'immigration detention' in section 5(1) of the Act. Consideration of that avenue appears to have proceeded as follows in Mr Charlie's case:

- (a) In November 2009, an option regarding section 197AB residence determination was presented to the then Minister, who decided (seemingly on 2 December 2009) not to intervene and indicated that he did not wish to receive any further such submission in relation to Mr Charlie.<sup>2</sup>
- (b) In June 2010, Mr Charlie's case was assessed as not meeting the guidelines for referral to the then Minister for consideration under section 197AB. In making that decision, the Department considered the delay in obtaining Mr Charlie's travel document, the length of time he had been in detention and that Mr Charlie's entire family was living in the Australian community (all factors that would have weighed in favour of referral). However, the Department assessed Mr Charlie as not meeting the guidelines due to his history of aggressive and abusive behaviour and the fact that he had no pending visa applications. In this inquiry, the Department made the following observations regarding the reasoning underlying that decision:

...on 2 December 2009 the former Minister did not agree to receive a further submission regarding placing Mr Charlie in a residence determination. The subsequent decision to not refer Mr Charlie's case in June 2010 was premised by this decision and by the Minister's direction that removal be progressed.<sup>3</sup>

- (c) A new Minister was appointed after June 2010. On 13 October 2010, the Department stated that it had assessed Mr Charlie's case against the section 197AB residence determination guidelines and that the new Minister would be briefed on the circumstances of Mr Charlie's case. Two reasons were given for the change in approach. First, 'removal continue[d] to be delayed'. Second, it was said that Mr Charlie's 'detention related behaviour' had improved. In that regard, the Commonwealth stated that Mr Charlie had previously been involved in a number of incidents involving aggressive and abusive behaviour towards staff at the VIDC and other detainees. The improvement in Mr Charlie's behaviour had first been noted in the Department's decision not to refer Mr Charlie's case for section 197AB consideration in June 2010. However, at least by 13 October 2010, Mr Charlie's behaviour, having 'improved throughout 2010', was no longer regarded by the Department as fatal to the exercise of the power under section 197AB.

According to the information before me, following the change of Minister in 2010 the Department did refer Mr Charlie's case to the Minister for consideration. The Minister decided not to intervene.<sup>4</sup> I have not been provided with the reasons for that decision.

- (d) On 4 February 2011, the Department made a further submission to the then Minister regarding possible intervention in Mr Charlie's case. In that submission it was said:

During the first two and a half years of his immigration detention, Mr Charlie was involved in several altercations with other detainees and Serco [the contractor managing VIDC]... and was found to be in the possession of prohibited articles on four occasions. However, Mr Charlie's case manager has advised that during the last 12 months, his behaviour has improved and he has not been involved in any further reported incidents.

During this inquiry, the Department stated that it did not draw any conclusions from that information and provided the then Minister with options under both sections 195A and 197AB.<sup>5</sup>

- (e) On 7 February 2011, the then Minister again decided not to intervene in Mr Charlie's case to exercise his powers under sections 195A and 197AB of the Migration Act. The Department observed that in declining to intervene, the Minister commented on the submission:

Can DFAT assist with engaging PNG on his removal?

- (f) On 28 February 2011, Mr Charlie's case was referred to Case Escalation for preparation of a new submission to the Minister to consider the advice that DFAT would not intervene in the case.<sup>6</sup>
- (g) In April 2011, the Department advised the Commission that a new submission 'is currently being prepared for the then Minister' to convey the information that DFAT was not in a position to assist in Mr Charlie's case.
- (h) By email dated 14 July 2011, the Department advised the Commission that there was, in fact, no submission made to the Minister in April 2011 (or after that time). The Department explained the position at that time as follows:

Engagement with DFAT remains ongoing and the Department is assessing management options while this continues. This process has included seeking legal opinion with regard to options to be presented to the Minister given the complexities of Mr Charlie's case. A submission will be referred when the options have been fully considered by the Department.

By letter dated 28 October 2013, the current Minister responded to my preliminary view in this matter, noting:

...any decisions made under s195A or section 197AB of the Act require the consideration of many factors, including: the risk to the Australian community; a client's immigration pathway; behaviour in detention; and connection to the Australian community... his significant and escalating criminal history, and imprisonment as the result of a serious crime involving violence would have been relevant in considering risk to the Australian community...it is my opinion that Mr Charlie's detention was... proportionate to the aims of the Commonwealth. I note that the then Minister intervened under section 195A of the Act to grant Mr Charlie a Removal Pending Bridging visa [in September 2011].

On that basis, the Minister indicated that he did not accept my preliminary view.

## **4 Relevant agreed facts**

Having regard to the material provided to me by the parties, it seems that the following facts are uncontroversial:

- (a) Mr Charlie was born in the country now known as Papua New Guinea.
- (b) In 1981, Mr Charlie was granted a Permanent Entry Permit and in 1994 he was assessed as possessing an Absorbed Persons visa.
- (c) Mr Charlie's father, mother, nine siblings and members of his extended family reside in Cairns or on Darney Island.
- (d) Mr Charlie has been convicted of a range of criminal offences and has served two periods of imprisonment.
- (e) Mr Charlie's visa was cancelled on 6 August 2007 pursuant to section 501 of the Migration Act.
- (f) Mr Charlie was detained at VIDC on 8 August 2007.
- (g) The Commonwealth worked with staff of the PNG High Commission to determine Mr Charlie's identity since April 2008. However, PNG authorities were unable to confirm Mr Charlie's identity as a PNG national.

- (h) On 25 July 2011, Mr Charlie commenced High Court proceedings challenging the lawfulness of his ongoing detention and seeking orders for his release from immigration detention.
- (i) On 20 September 2011, Mr Charlie was granted a Removal Pending Bridging Visa and released from VIDC. The High Court proceedings were withdrawn.

## **5 Relevant issues in dispute**

The determination of this matter turns on the resolution of the following issues:

- (a) Whether the Commonwealth has arbitrarily detained Mr Charlie within the meaning of article 9(1) of the ICCPR.
- (b) Whether the Commonwealth has arbitrarily interfered with Mr Charlie's family in breach of articles 17(1) and 23(1) of the ICCPR.

## **6 Relevant law**

### **6.1 Functions of the Commission**

Section 11(1)(f) of the AHRC Act empowers the Commission to inquire into any act or practice that may be inconsistent with or contrary to any human right.

Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.

### **6.2 What is an ‘act’ or ‘practice’**

The terms ‘act’ and ‘practice’ are defined in section 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.

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.

The functions of the Commission identified in section 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>7</sup> Therefore, if a law requires that the act or practice be done by or on behalf of the Commonwealth, and there is no discretion involved, the act or practice done pursuant to that statutory provision will be outside the scope of the Commission’s human rights inquiry jurisdiction.

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

The phrase ‘human rights’ is defined by section 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.

As I have said above, the following articles of the ICCPR are relevant to this inquiry.

Article 9(1) of the ICCPR provides:

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

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.

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.

## 7 Was there an act or practice of the Commonwealth?

Section 189(1) of the Migration Act requires the detention of unlawful non-citizens. As Mr Charlie's visa had been cancelled before his release from prison, he was an unlawful non-citizen upon his date of release and as such the Migration Act required that he be detained. However, the Migration Act did not require that Mr Charlie be detained in an immigration detention centre.

I have referred above to section 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).

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'.<sup>8</sup>

Mr Charlie was detained in VIDC from 8 August 2007 until 20 September 2011.



I have set out above the sequence of events in which the Minister declined to exercise his power to intervene in Mr Charlie's case.

It appears to be uncontroversial that it was within the power of the former Ministers to have made a residence determination in relation to Mr Charlie under section 197AB of the Migration Act or to have approved a place other than VIDC where Mr Charlie could have been "held". Further, it was open to the former Ministers to exercise the power conferred by section 197AB in relation to Mr Charlie subject to additional conditions: see section 197AB(2)(b) of the Migration Act.

It is true, as the Department notes, that the exercise of the power conferred by section 197AB is conditioned upon the Minister being satisfied that it is in the public interest to do so. But that only serves to emphasise the breadth of the Minister's power – it being well established that the expression "in the public interest" has "no fixed and precise content and involves a value judgment often to be made by reference to undefined matters".<sup>9</sup>

I consider that the failure by the former Ministers to exercise those discretionary powers constitutes an act within the definition of section 3 of the AHRC Act.

## 8 Arbitrary detention

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>10</sup>
- (b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system;<sup>11</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>12</sup> and
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>13</sup>

In *Van Alphen v The Netherlands*, the UN Human Rights Committee (UNHRC) found detention for a period of two months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.<sup>14</sup>

The UNHRC has held in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.<sup>15</sup>

Mr Charlie claims that his detention in VIDC from 8 August 2007 until 20 September 2011 was arbitrary within the meaning of article 9(1) of the ICCPR.

It is arguable that Mr Charlie's detention immediately on release from prison in August 2007 was not arbitrary, given his status as an unlawful non-citizen awaiting removal from Australia.

The question is whether the detention of Mr Charlie in VIDC became arbitrary in breach of article 9 of the ICCPR after that time.

The Commonwealth denies that Mr Charlie's detention was arbitrary at any time. The Commonwealth claims that Mr Charlie's detention was both lawful and appropriate as it was both (a) based on legitimate concerns about Mr Charlie's character and the risk his release could pose to the Australian community, and (b) for the purpose of removing him from Australia.

**(a) Mr Charlie's character and risk to the Australian community**

The Department submitted that:

Mr Charlie's most serious criminal convictions were on 7 December 1992 – six years' imprisonment for attempted rape and two years' imprisonment for assault occasioning bodily harm. He has been convicted of a large number of other offences, including:

1988-89 several counts of entering dwelling house with intent in the Mareeba Children's Court, in both cases being placed under care and control orders.

1990 two counts of entering a dwelling house with intent, three counts of breaking and entering and one count of stealing (8 months' imprisonment each charge, concurrent);

1991 entering a dwelling house with intent (12 months' imprisonment);

1994 escaping legal custody (12 months' imprisonment);

2001:

- Entering a dwelling and committing an indictable offence; breaking (3 years' imprisonment)

Entering a dwelling and committing an indictable offence (4 years' imprisonment)

Entering a dwelling with intent; breaking in the night; using/attempting to use actual violence; damaging/threatening/attempting to damage property (5 years' imprisonment)

Entering a dwelling at night with intent; using actual violence; breaking (6 years' and 6 months' imprisonment)

Possession of property suspected of being tainted; possession of utensils or pipes; obstructing police officer (3 months' imprisonment each charge, concurrent).

2006 Escape by persons in lawful custody (12 months' imprisonment).<sup>16</sup>

The Department stated that Mr Charlie's detention in VIDC was not arbitrary as it was based on legitimate concerns about Mr Charlie's character and the risk his release could pose to the Australian community. Further:

Alternative detention options have been canvassed for Mr Charlie, however, as Mr Charlie has an extensive and serious criminal history, including the use of violence and his history of escapes from legal custody, the Department considers placement within the Immigration Residential Housing near family groups and in a less secure environment inappropriate.<sup>17</sup>

The Department also noted that, 'It is not a fait accompli that the Minister could have been satisfied that making a residence determination in respect of a man with both violent and sexual criminal convictions was in the public interest'.<sup>18</sup>

However, while Mr Charlie has an extensive criminal record, this does not appear to be evidence, of itself, that Mr Charlie posed a danger to the community such that the Commonwealth could detain him in no less restrictive way than in VIDC. And ultimately, in September 2011, Mr Charlie was in fact released from immigration detention following the Minister's decision to grant him a Removal Pending Bridging visa.

In addition to his criminal record, the Department had concerns about Mr Charlie's behaviour within VIDC:

Since Mr Charlie has been in VIDC, he has had significant behavioural issues and has been involved in numerous incidents. He has an extensive history of abusive and aggressive behaviour towards DIAC staff, SERCO staff and fellow detainees. On 5 November 2007, Mr Charlie attempted to escape from VIDC while on an escort for a dental appointment. However, Mr Charlie's case manager has reported that there has been a significant change in Mr Charlie's behaviour in the past three months [at 2 June 2010]. He does not feel that there is evidence to suggest a real risk of Mr Charlie attempting to escape or be non-compliant should he be placed into community detention. The case manager has encouraged Mr Charlie to request a community detention placement.<sup>19</sup>

The Director of the Department's Case Escalation and Liaison Section also noted on 2 June 2010:

I note the improved attitude of Mr Charlie. Please monitor case, if obtaining travel document becomes intractable a further assessment should be completed for section 197AB.<sup>20</sup>

Further, the Department in its response to the Commission dated 13 October 2010 stated:

It has been noted that Mr Charlie's detention related behaviour has improved throughout 2010.<sup>21</sup>

The last behavioural incident recorded on the list provided by the Department to the Commission on 31 March 2011 took place in August 2009:

17/08/2009 09:55 Use of instruments of restraint Minor Open

On 11 October 2009, Mr Charlie was transferred out of the higher security Blaxland accommodation area in VIDC.<sup>22</sup> I infer that that was due to his improved behaviour.

The Department noted that Mr Charlie was involved in one further minor incident on 4 February 2011, in which a mobile phone with a camera (a contraband item) was found in Mr Charlie's room.<sup>23</sup>

It follows from the above that, from August 2009, Mr Charlie was not involved in any serious incident within VIDC that would indicate he posed a danger to the community or could not be detained in a less restrictive way, for example, in community detention with conditions to mitigate risk.

Again, that, it would seem, was also the view ultimately reached by the then Minister in granting Mr Charlie a Removal Pending Bridging Visa.

**(b) Detention for the purpose of removal from Australia**

As I have noted above, the Department worked with the staff of the PNG High Commission from 21 April 2008 to confirm Mr Charlie's identity as a PNG national.

The Department states that in September 2009 it received information from the PNG Deputy High Commissioner that Mr Charlie's status as a PNG national could not be confirmed. The Department was further advised that a travel document could not be issued until Mr Charlie's status was confirmed.

In November 2010, the PNG Attorney-General gave written advice that PNG Immigration and the PNG Minister were not able to exercise their discretion to issue an emergency travel document to facilitate Mr Charlie's return to PNG until such time as PNG authorities were satisfied as to Mr Charlie's nationality.

In January 2011, PNG Immigration conducted a site visit to Daru Island and advised the Commonwealth that they were unable to confirm Mr Charlie's identity or locate, or identify, any records or family members of Mr Charlie.

On 4 February 2011, the Department sent a submission to the Minister advising him of the difficulties in confirming Mr Charlie's identity and nationality. The submission stated:

Should you decline to consider Mr Charlie's case under section 195A or 197AB, Mr Charlie will remain in VIDC until the PNG authorities are willing to accept his nationality and issue a travel document to facilitate his return to PNG. Given the timeframe for this process is not known, Mr Charlie could remain detained in VIDC for a protracted period.

That submission went on to state that one factor in the decision whether to grant Mr Charlie a bridging visa or a community detention placement was:

the extended period of Mr Charlie's detention and the fact that his return to PNG is not likely to take place in the near future.

As I have noted above, on 7 February 2011 the Minister asked the Department whether DFAT may be able to assist in progressing the removal of Mr Charlie to PNG.<sup>24</sup>

On 24 February 2011, DFAT advised the Department that they would not intervene in the case as any such intervention could damage bilateral relations.<sup>25</sup>

Nevertheless, on 14 July 2011, the Department advised the Commission that ‘engagement with DFAT remains ongoing’.<sup>26</sup> No further details have been provided of those matters and the nature of that ‘engagement’ is opaque.

**(c) Findings and reasons**

I find that Mr Charlie’s detention became arbitrary in breach of article 9 of the ICCPR from November 2009.

In September 2009, the Department first received notice that the PNG authorities could not identify Mr Charlie as a PNG national and that they would not issue an emergency travel document without confirmation of identity. After that time, the Commonwealth was aware that Mr Charlie’s removal was not imminent and indeed was unlikely to take place in the foreseeable future.

Relevantly, it was also around this time that:

- (a) Mr Charlie’s behaviour within VIDC improved. There are no significant incidents reported since August 2009 that indicate that Mr Charlie posed a danger to the community or could not be detained in a less restrictive way (including community detention) pending his removal.
- (b) Mr Charlie’s case was first referred to the then Minister for consideration regarding the exercise of his powers under section 197AB (in November 2009).

In all the circumstances, including that by this time:

Mr Charlie had already been detained in VIDC for a period of two years;

the Commonwealth was on notice of ongoing difficulties associated with securing his removal to PNG; and

Mr Charlie's behaviour had improved such that he was no longer considered a danger to the community or a flight risk,

I find that the detention of Mr Charlie in VIDC from November 2009 to September 2011 was not necessary and not proportionate to any legitimate aim of the Commonwealth. It was no longer necessary and integral to the Commonwealth's legitimate aim of protecting the community from non-citizens who pose an unacceptable risk to the Australian community, or to the aim of preventing the flight of a non-citizen pending their removal.

The statutory provisions identified above in section 7 empowered the then Ministers to make less restrictive arrangements for Mr Charlie. I find that, from November 2009, the failure of the former Ministers to exercise those powers was an act or a practice that was inconsistent with or contrary to the human right recognised in article 9(1) of the ICCPR.

## **9 Interference with family**

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

For the reasons set out in *Australian Human Rights Commission Act Report 39*, 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).<sup>27</sup> If this breach is made out, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).



In its General Comment on Article 17(1), the UNHRC confirmed that a lawful interference with a person's family may still be arbitrary, unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.<sup>28</sup> It follows that the prohibition against arbitrary interferences with family incorporates notions of reasonableness. In relation to the meaning of 'reasonableness', the UNHRC 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>29</sup>

Mr Charlie states that his parents, nine siblings and 18 nieces and nephews live in Queensland and his detention at VIDC separated him from them.

## **9.1 The Department's response**

The Department submitted that the interference with Mr Charlie's family as a result of his detention is not disproportionate when considered against Mr Charlie's criminal history and the risk he posed to the Australian community.

The Department observed that Queensland Corrective Services confirmed that Mr Charlie was regularly visited by family members during his incarceration in prison. However, while he was detained at VIDC, Mr Charlie received no visitors although it was open to his family to visit him.

According to the Department, when asked to formally list family for the purposes of a recent section 195A/197AB submission, Mr Charlie failed to provide details.

The Department further stated that Mr Charlie's Case Management officers believed that Mr Charlie had little, if any, contact with his relatives when held in immigration detention. However, the Department also explained that clients are permitted to hold mobile phones and to make calls freely. The Department accepted that Mr Charlie had a mobile phone at the relevant times.

In three submissions to the former Minister, one in 2008, one in 2009 and one in 2011, the Department provided information in relation to Mr Charlie's family relationships, including information about Mr Charlie's 'strong ties with relatives and family networks in Australia' and the fact that Mr Charlie's parents and nine siblings are Australian citizens.

The Department acknowledged that Mr Charlie was detained at a great distance from the majority of his family in northern Queensland, but stated that VIDC was the only appropriate facility in which to house him given the risk-based security requirements of his detention.

The Department also noted that:

In discussion with Mr Charlie regarding his possible release from detention he advised the Department that he did not consider co-location with his family to be in his best interests. He further advised that should he be released from detention that he would not reside with his family due to the negative impacts their behaviours could have on his life. Further, the Department is advised that since his release Mr Charlie has remained in New South Wales and not had direct contact with his Queensland-based family members.<sup>30</sup>

In response, Mr Charlie stated that he would like to see his family, however he is committed to his volunteer work with the Hillsong Church in Sydney, and since his release from immigration detention, has had no money to travel to Far North Queensland. That explanation has not been challenged by the Department.

## **9.2 Finding**

In light of the fact that:

Mr Charlie and his family were separated for four years as a result of his detention in VIDC;

VIDC was a great distance from his family in Northern Queensland;  
and

during his earlier incarceration in Queensland, Mr Charlie was able to maintain a relationship with his family through frequent visits;

I find that Mr Charlie's lengthy detention in VIDC interfered with his ability to maintain a relationship with his family.

In considering whether any interference with Mr Charlie's family was arbitrary, I must consider whether it was reasonable and proportionate to a legitimate aim of the Commonwealth, including ensuring that non-citizens who pose an unacceptable risk to the community are not released into the Australian community, or preventing a flight risk.

In light of my finding above in relation to the period in which Mr Charlie's detention was arbitrary and no longer necessary and proportionate to any legitimate aim of the Commonwealth, I find that, from November 2009, the failure of the former Ministers to exercise the powers identified above in section 7:

- (a) arbitrarily interfered with Mr Charlie's family; and (accordingly)
- (b) was an act or practice that was inconsistent with or contrary to the human rights recognised in articles 17(1) and 23(1) of the ICCPR.

## **10 Findings and recommendations**

### **10.1 Power to make recommendations**

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>31</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>32</sup>

The Commission may also recommend:

- (a) the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
- (b) other action to remedy or reduce the loss or damage suffered by a person.<sup>33</sup>

## **10.2 Consideration of compensation**

I have been asked to consider compensation for Mr Charlie for being arbitrarily detained in contravention of article 9(1) of the ICCPR, and for the consequent interference with his family in breach of articles 17(1) and 23(1) of the ICCPR.

There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.

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.<sup>34</sup>

I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.

### **(a) Principles relating to compensation for loss of liberty**

The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR. This is because an action for false imprisonment cannot succeed where there is lawful authority for the detention, whereas a breach of article 9(1) of the ICCPR will be made out where it can be established that the detention was arbitrary, irrespective of legality.

Notwithstanding this important distinction, the damages awarded in false imprisonment 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.

The principal heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).<sup>35</sup>

In *Fernando v Commonwealth of Australia (No 5)*,<sup>36</sup> Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Siopis J referred to the case of *Nye v State of New South Wales*:<sup>37</sup>

...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.<sup>38</sup>

Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock (NSWCA)*.<sup>39</sup> In that case at first instance,<sup>40</sup> 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.

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'.

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.<sup>41</sup>

On appeal, in the New South Wales Court of Appeal, Spigelman CJ considered the adequacy of the damages awarded to Mr Taylor and observed that the quantum of damages was low, but not so low as to amount to appellable error.<sup>42</sup> Spigelman CJ also observed that:

Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as “the initial shock of being arrested”. (*Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 at 515.) As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.<sup>43</sup>

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,<sup>44</sup> his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando’s claim if his findings in respect of the Commonwealth’s argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre. Siopis J accepted Mr Fernando’s evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando’s evidence did not suggest that in immigration detention he was subjected to the harsh ‘strict protection’ regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of inmates in the same way that Mr Nye did whilst he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando in respect of his 1,203 days in detention the sum of \$265,000.<sup>45</sup>

**(b) Recommendation that compensation be paid**

I have found that Mr Charlie’s detention from November 2009 until his release from VIDC on 20 September 2011 was arbitrary within the meaning of article 9(1) of the ICCPR and arbitrarily interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR.

I consider that the Commonwealth should pay to Mr Charlie an amount of compensation to reflect the loss of liberty caused by his detention at VIDC and the consequent interference with his family.

I have taken into account the fact that had Mr Charlie been transferred to community detention in September 2009, he still would have suffered some curtailment of liberty. I have also taken into account the fact that Mr Charlie had experienced lengthy periods of detention following his criminal convictions, and the statement of the Court of Appeal in *Ruddock v Taylor*, that the effect of false imprisonment on a person progressively diminishes with time.

Assessing compensation in such circumstances is difficult and minds may differ on that issue. Taking into account the guidance provided by the decisions referred to above I consider that payment of compensation in the amount of \$200 000 is appropriate.

### **10.3 Apology**

In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Charlie for the breaches of his human rights. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.<sup>46</sup>

## **11 The Department's response to my findings and recommendations**

On 28 March 2014, I provided a notice to the Department under section 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to this complaint.

By letter dated 9 May 2014, the Acting Secretary of the Department provided the following response to my recommendations:

### **Recommendation 1**

That the Commonwealth pay Mr Charlie compensation in the amount of \$200 000.

## **DIBP response**

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

The Department is required to consider any legal claim for compensation against the Commonwealth in a manner which is consistent with the *Legal Services Directions 2005*. The *Legal Services Directions 2005* provide that a matter must only be settled in accordance with legal principle and practice, which requires that there be at least a meaningful prospect of liability being established against the Commonwealth before a monetary settlement will be offered. Mr Charlie's detention was lawful and decisions around his placement in detention facilities were appropriate having regard to his circumstances. The Department therefore considers there is no meaningful prospect of liability being established against the Commonwealth in relation to this matter and as such no proper legal basis to consider a payment of compensation to Mr Charlie.

Although there are limited circumstances in which the Commonwealth may pay compensation on a discretionary basis, the *Finance Circular 2009/09* generally limits such payments to situations where a person has suffered some form of financial detriment or injury arising out of defective acts on the part of the Commonwealth, or otherwise experienced an anomalous, inequitable or unintended outcome as a result of the application of Commonwealth legislation or policy. On the basis of the information the Commonwealth is currently aware of, the Department is not satisfied there is a proper basis for payment of compensation at this time.

The Department therefore holds the view that there is no basis for any payment of compensation to Mr Charlie. Accordingly, the Department advises the AHRC that there will be no action taken with regard to this recommendation.



## **Recommendation 2**

That the Commonwealth issue Mr Charlie a formal written apology for the breach of his human rights.

### **DIBP response**

The Department notes the recommendation of the AHRC in this case. Given the Department's view is that Mr Charlie's detention was lawful and that decisions regarding his placement in detention facilities were appropriate at all times, the Commonwealth will not issue Mr Charlie a formal written apology.

Accordingly, the Department advises the AHRC that there will be no action taken with regard to this recommendation.

I report accordingly to the Attorney-General.

### **Craig Lenehan**

Delegate for Gillian Triggs,  
President of the Australian Human Rights Commission

September 2014

## Endnotes

- 1 Pursuant to section 19(2) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), the President of the Commission, Gillian Triggs, delegated her powers under the AHRC Act to me for the purposes of inquiring into this complaint. A copy of this delegation is attached (and marked 'Attachment A'). The former President of the Commission, Catherine Branson, also delegated her powers under the AHRC Act to me for the purposes of inquiring into this complaint. A copy of this delegation is attached (and marked 'Attachment B').
- 2 Department response to preliminary view under cover of letter dated 1 March 2012 from Andrew Metcalfe to the Commission, p 2.
- 3 As above.
- 4 Email from Helen Byrne to Danielle Noble, 14 July 2011.
- 5 Department answers to Commission questions, provided on 15 April 2011, p 4.
- 6 Chronology of Events with PNG High Commission engagement, attached to Department answers to supplementary questions sent by email from Helen Byrne on 8 March 2011.
- 7 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.
- 8 *Migration Act 1958* (Cth) s 5.
- 9 See *Plaintiff S10/2010 v Minister for Immigration* ('S10') (2012) 246 CLR 636 at 667-668 [99] per Gummow, Hayne, Crennan and Bell JJ referring to *Osland v Secretary to the Department of Justice (No 2)* (2010) 241 CLR 320. See also the reasons of French CJ and Kiefel J in *S10* at 648-649 [30] (and the authorities there referred to) and the reasons of Heydon J at 671 [113].
- 10 UN Human Rights Committee, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
- 11 UN Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- 12 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.
- 13 *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.
- 14 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 15 *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* [2007] UNHRC 73, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia* [2003] UNHRC 22, CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, CCPR/C/87/D/1050/2002.
- 16 Department's response to the Commission headed 'Draft 31 August 2010' under cover of letter dated 13 October 2010.
- 17 Department's letter to the Commission dated 13 October 2010.
- 18 Department response to preliminary view under cover of letter dated 1 March 2012 from Andrew Metcalfe to the Commission, p 3.
- 19 'Checklist for consideration of referral for s197AB residence determination' dated 2 June 2010, provided by the Department to the Commission under cover of email dated 14 July 2011 to Danielle Noble.

20 As above.  
21 Response from Department to Commission under cover of letter dated 13 October 2010 to Domenic Viricillo, at page 2 of response, paragraph 2.  
22 Response from Department to Commission under cover of email dated 31 March 2011 to Bridget Akers, under heading 3 of response, paragraph 6.  
23 Response from Department to Commission under cover of email dated 31 March 2011 to Bridget Akers, under heading 3 of response, paragraph 14.  
24 Email from Helen Byrne to Danielle Noble, 14 July 2011.  
25 Department of Immigration and Citizenship, File Note Re: Mr Daniel Frank Charlie, 24 February 2011.  
26 Email from Helen Byrne to Danielle Noble, 14 July 2011.  
27 Australian Human Rights Commission, *Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia and GSL (Australia) Pty Ltd* [2007] AusHRC 39, [80]-[88].  
28 United Nations Human Rights Committee, General Comment 16 (Thirty-second session, 1988), Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc HRI/GEN/1/Rev.6 (2003) 142 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation) [4].  
29 *Toonen v Australia* Communication No. 488/1992 UN Doc CCPR/C/50/D/488/1992 at [8.3]. Whilst this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.  
30 Letter from Andrew Metcalfe the Commission dated 1 March 2012, at page 3.  
31 AHRC Act s 29(2)(a).  
32 AHRC Act s 29(2)(b).  
33 AHRC Act s 29(2)(c).  
34 *Peacock v The Commonwealth* (2000) 104 FCR 464 at 483 (Wilcox J).  
35 *Cassell & Co Ltd v Broome* (1972) AC 1027 at 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999) at [87].  
36 [2013] FCA 901.  
37 [2003] NSWSC 1212.  
38 [2013] FCA 901 at [121].  
39 *Ruddock v Taylor* (2003) 58 NSWLR 269.  
40 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).  
41 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].  
42 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.  
43 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.  
44 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].  
45 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [139].  
46 D Shelton, *Remedies in International Human Rights Law* (2000) 151.