Mr Kuster v Commonwealth of Australia (Department of Home Affairs)

[2025] AusHRC 175

April 2025

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The Hon Mark Dreyfus KC MP
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Dear Attorney-General

Pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), I attach a report of the inquiry by the former President of the Australian Human Rights Commission, Emeritus Professor Rosalind Croucher AM into a complaint by Mr Kuster against the Department of Home Affairs (the Department).

Mr Kuster arrived in Australia from Papua New Guinea (PNG) at the age of four, and was later placed on a transitional permanent visa in 1994. Following criminal convictions, his visa was cancelled in December 2017 and Mr Kuster was transferred to immigration detention. After his voluntary removal from Australia request, Mr Kuster attempted to re-enter PNG. However, he was not recognised as a citizen, was denied entry into PNG, and was subsequently returned to immigration detention in August 2019.

Mr Kuster remained in immigration detention until his release in November 2023, pursuant to the High Court of Australia's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

Mr Kuster's detention was notwithstanding factors such as his significant family and community ties (including an Australian partner and minor son), his various health conditions, his efforts to rehabilitate, and the possibility of indefinite detention despite his possible stateless status and his claim of Indigeneity.

Viewing these factors cumulatively, Professor Croucher found as a result of this inquiry that the Department's failure to assess whether Mr Kuster was stateless according to international law, as well as the Department's failure to refer Mr Kuster's case to the Minister at any time until September 2023 for the Minister to consider exercising their discretionary powers under section 195A or section 197AB of the Migration Act, contributed to his detention becoming arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

In the time between the issuing of the notice making findings in this matter, and the preparation of this report, I assumed the role of President at the Australian

Human Rights Commission. As a result, I received the Department's response to Professor Croucher's findings and recommendations in this matter by letter dated 16 August 2024. I have set out the response of the Department in its entirety in part 8 of the report.

I enclose a copy of my report.

Yours sincerely,

Hugh de Kretser
President
Australian Human Rights Commission
April 2025

Contents

1 Introduction 4

2 Summary of findings and recommendations 4

3 Background 6
3.1 Visa cancellation 6
3.2 Health and behaviour in detention 8
3.3 Working Group on Arbitrary Detention 9

4 Legal framework 10
4.1 Functions of the Commission 10
4.2 Scope of 'act' and 'practice' 10
4.3 What is a human right? 10

5 Arbitrary detention 11
5.1 Law on article 9 of the ICCPR 11
5.2 Act or practice of the Commonwealth 12

6 Assessment 14
6.1 Failure to refer 14
6.2 Indigeneity 18
6.3 Statelessness 22

7 Recommendations 25
7.1 Statelessness 25
7.2 Indigeneity 26

8 The Department's response to the Commission's findings and recommendations 26

1 Introduction

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint by Mr Gus Thomas Kuster against the Commonwealth of Australia, Department of Home Affairs (Department) alleging a breach of his human rights. The inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

2. Mr Kuster was in immigration detention for over 5 years. This is a complaint of arbitrary detention contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).[1]

3. The right to liberty and freedom from arbitrary detention is not directly protected in the Australian Constitution or in legislation. As a result, there are limited avenues for an individual to challenge the lawfulness of their detention, outside seeking a writ of *habeas corpus*, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.[2]

4. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights. Detention may be lawful under domestic law but still arbitrary and contrary to international human rights law.

5. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary, and proportionate on the basis of the individual's particular circumstances. There is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the immigration policy, for example the imposition of reporting obligations, sureties or other conditions, in order to avoid the conclusion that detention was 'arbitrary'.

6. This document comprises a report of the Commission's findings in relation to this inquiry and its recommendations to the Commonwealth.

2 Summary of findings and recommendations

7. As a result of this inquiry, the previous President of the Commission, Emeritus Professor Rosalind Croucher found that the Department's failure to:

- refer the case to the Minister until September 2023 in order for the Minister to assess whether to exercise his discretionary powers under sections 195A or 197AB of the Migration Act 1958 (Cth); and
- implement an assessment of whether Mr Kuster is or is not stateless according to international law

contributed to his detention becoming arbitrary, contrary to article 9(1) of the ICCPR.

8. Based on those findings, Professor Croucher made the following recommendations:

Recommendation 1

The Commission recommends that the Australian Government should introduce a formal statelessness status determination procedure. The Commission recommends that, in formulating such a procedure, the Department should take the following steps:

- draft a proposed policy and procedure;
- consult on the draft with civil society;
- ensure that the policy and procedure are available on LEGEND.com.

Recommendation 2

The Commission recommends that a clear visa pathway to permanent residency should be established for stateless persons who are found not to be refugees or otherwise owed protection.

Recommendation 3

The Commission recommends that statelessness should be included as a specific consideration in the guidelines for Ministerial Intervention under ss 351, 417, 501J and 195A of the Migration Act.

Recommendation 4

The Commission recommends that any unlawful non-citizen who is or claims to be stateless should be automatically referred to the Minister for consideration of their intervention powers.

Recommendation 5

The Commission recommends that any person in detention who claims to be Indigenous be considered for an alternative to held detention while their claims are assessed, including for referral to the Minister for possible intervention where necessary.

3 Background

9. Mr Kuster was born in Papua New Guinea (PNG).

10. According to Mr Kuster, his maternal grandmother was born in the Torres Strait Islands and moved to PNG for marriage. His father's family is European-Australian.

11. He arrived in Australia in 1983 at the age of 4 years on a permanent entry permit.

12. In September 1994, Mr Kuster's permit was converted to a Transitional Permanent visa through the Migration Reform (Transitional Provisions) Regulations (Cth).

13. Mr Kuster is in a relationship with an Australian citizen and has an Australian citizen son from another relationship. With the exception of his mother and one sister, all members of Mr Kuster's immediate family are Australian citizens.

3.1 Visa cancellation

14. Mr Kuster received a number of criminal convictions and was sentenced to terms of imprisonment ranging from 7 days to 2 years.

15. Due to Mr Kuster's criminal history, his visa was cancelled on 21 December 2017 under s 501(3A) of the Migration Act on the basis that he had a substantial criminal record (sentenced to 12 or more months' imprisonment) and because he was at the time serving a sentence of imprisonment.[3] As a result, Mr Kuster became an unlawful non-citizen within the meaning of the Migration Act and subject to immigration detention and removal from Australia.[4] He had resided in Australia for over 34 years at the time his visa was cancelled.

16. On 29 January 2018, the Department received from Mr Kuster a request to revoke the cancellation of his visa. It was assessed as invalid at the time.

17. Mr Kuster sought review of this decision at the Administrative Appeals Tribunal (now the Administrative Review Tribunal), which found on 13 April

2018 that it had no jurisdiction to review the decision as he had not sought review within the relevant timeframe.

18. On 23 July 2018, Mr Kuster was detained under s 189(1) of the Migration Act and was transferred to immigration detention.

19. The Department advised that it conducted an Australian Citizenship Assessment in August 2018, which found that Mr Kuster was not an Australian citizen.

20. In April 2019, Mr Kuster's request to revoke the original visa cancellation decision was accepted as valid. The Department confirmed that Mr Kuster was not liable to be removed from Australia while he had an outstanding application for revocation.

21. On 20 June 2019, Mr Kuster made a request for voluntary removal from Australia while awaiting the outcome of his visa cancellation revocation request. On 29 July 2019, the PNG High Commission issued him a travel document.

22. On 21 August 2019, Mr Kuster was removed from Australia. Upon arrival in PNG, Mr Kuster was not recognised as a PNG citizen, was denied entry to PNG and was returned to immigration detention.

23. On 27 August 2019, Mr Kuster withdrew his application for voluntary removal from Australia.

24. Mr Kuster has claimed he will face harm if returned to PNG. As a person of mixed race, he states he will be subjected to discrimination, economic disadvantage and a risk of danger to his life. He has not made an application for a protection visa with respect to these claims.

25. On 16 November 2020, the PNG Immigration & Citizenship Authority confirmed its view that Mr Kuster was not a PNG citizen. In February 2021, the Department advised the Commission that the Department was 'currently considering the implications of this'.

26. On 14 April 2021, the Department wrote to Mr Kuster notifying him of the Minister's decision not to revoke the visa cancellation and confirming his visa remained cancelled. No merits review was available, but Mr Kuster sought judicial review of the decision in the Federal Court. His application was dismissed on 23 November 2021.[5]

27. On 21 December 2021 Mr Kuster applied for Australian citizenship by descent. The application was refused on the basis of Mr Kuster failing the good character test requirement. The Administrative Appeals Tribunal affirmed the decision on 16 October 2023. While Mr Kuster applied for judicial review of the Tribunal's decision, that application has since been withdrawn.

28. On 16 August 2022, the Department advised the Commission as follows:

> Mr Kuster is on an involuntary removal pathway to Papua New Guinea. However, there is no proposed timeframe for Mr Kuster's removal as he does not have a valid travel document. This matter has been referred to the Consular Engagement Liaison Team for engagement with the Papua New Guinea High Commission in Canberra, and it is unclear when it may be resolved.

29. On 8 November 2023, Mr Kuster was assessed as being affected by the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (*NZYQ*) and he was released from immigration detention following the decision.

3.2 Health and behaviour in detention

30. In April 2021, the Department reported that Mr Kuster's health was being monitored and he had a number of medical conditions including a widespread skin rash and depigmentation for which he had been prescribed a range of medication. He also suffered from severe headaches, asthma and depression, for which he takes medication.

31. During a mental health review with IHMS in January 2022, Mr Kuster reported experiencing nightmares in relation to his failed attempt to enter PNG. He presented with a low mood, depression, and poor sleep efficiency.

32. Several Department case reviews of Mr Kuster note the Community Protection Assessment Tool (CPAT) assessment of 'Tier 3 held detention'. From reviewing the most recent CPAT assessment, conducted 7 October 2022, it is clear that this assessment is solely related to Mr Kuster's criminal history, and not due to any behavioural issues while in immigration detention. The Department confirmed this in its response to Professor Croucher's preliminary view.

33. The Department noted that in the CPAT conducted on 21 July 2023, the status resolution officer substituted the Tier 3 recommendation with one of 'Tier 1 – Bridging Visa with Conditions' for the following reasons:

- minimal involvement in incidents in detention
- participation in courses in an attempt to address the causes of his offending
- strong family support in the Australian community
- positive engagement and cooperation with Status Resolution.

34. While in detention, Serco produced regular Security Risk Assessment Tool (SRAT) reports with respect to Mr Kuster. On the most recent of these provided to the Commission, dated 10 March 2022, a small number of minor incidents appear, including abusive/aggressive behaviour, minor damage, and food and fluid refusal.

35. The risk assessment has been overridden from 'high' to 'medium' for escort and placement for the following reasons:

> minimal adverse incidents over a lengthy period of time
>
> no intelligence indicating him to have been involved in adverse conduct
>
> known to engage respectfully with various stakeholders
>
> one of the minor incidents recorded against him was in fact him attempting to break up violence which had occurred against Serco staff
>
> no apparent justification for high ratings.

3.3 Working Group on Arbitrary Detention

36. On 29 March 2023, the UN Working Group on Arbitrary Detention (WGAD) adopted *Opinion No. 14/2023 concerning Gus Kuster (Australia).*[6]

37. In its opinion, the WGAD formed the view that

> The Government has not presented any particular reason specific to Mr. Kuster, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security, that would justify his detention. The Working Group also notes Mr. Kuster's health problems as a significant factor in favour of his release. The Working Group concludes that there was no reason for detaining Mr. Kuster other than his migration status. As his visa was mandatorily cancelled due to his criminal conviction, as required by the Migration Act, he has been subjected to the automatic immigration detention policy.[7]

38. The WGAD referred Mr Kuster’s case to the Special Rapporteur on the human rights of migrants and to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[8]

39. The WGAD found that Mr Kuster’s continued detention was arbitrary, and urged the Australian government to release him immediately, and ‘accord him an enforceable right to compensation and other reparations’.[9]

4 Legal framework

4.1 Functions of the Commission

40. 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.

41. 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.

42. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

4.2 Scope of ‘act’ and ‘practice’

43. 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.

44. 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.

45. 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, its officers or those acting on its behalf.[10]

4.3 What is a human right?

46. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.[11]

5 Arbitrary detention

5.1 Law on article 9 of the ICCPR

47. 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.

48. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:

    - 'detention' includes immigration detention[12]
    - 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[13]
    - 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[14]
    - detention should not continue beyond the period for which a State party can provide appropriate justification.[15]

49. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee found detention for a period of 2 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.[16] Similarly, the Human Rights Committee considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was 'considerably in excess of what is necessary'.[17]

50. The Human Rights Committee has held in several cases 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.[18]

51. Relevant jurisprudence of the Human Rights 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.[19]

52. 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'.[20]

53. It will be necessary to consider whether the detention of Mr Kuster in closed detention facilities could 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 'arbitrary' under article 9 of the ICCPR.

5.2 Act or practice of the Commonwealth

54. At the time of his detention, Mr Kuster was an unlawful non-citizen within the meaning of the Migration Act, which required that he be detained.

55. Mr Kuster is precluded from applying for any visa (excluding a Protection visa) due to the operation of section 501E of the Migration Act. The only way therefore that he can be granted a visa is through the personal intervention of the Minister.

56. There are a number of powers that the Minister could have exercised, either to grant a visa, or to allow the detention in a less restrictive manner than in a closed immigration detention centre.

57. Section 197AB of the Migration Act permits the Minister, where they think 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.

58. In addition to the power to make a residence determination under section 197AB, the Minister also has a discretionary non-compellable power under section 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.

59. These powers in the context of detainees who had visas cancelled or refused, and the legislative framework within the Migration Act regarding the character test, were outlined in the Commission's 2021 report, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*.[21]

60. Furthermore, Mr Kuster has made specific claims to the Department and Minister regarding his indigeneity and his statelessness.

61. On the proper application of the law as stated by the High Court, in *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia*,[22] if Mr Kuster is indeed an Aboriginal or Torres Strait Islander person, then he cannot be detained under the Migration Act and must be released from immigration detention. At present, with no legislative framework surrounding the determination of his claims to be Indigenous, it is solely at the discretion of the Department (or Minister) to accept or deny Mr Kuster's claims. If his claims were accepted, then he would be granted a special purpose visa, however this is not a visa that he can apply for. Merits review of a decision not to grant him a special purpose visa is not available, but a person who considers themselves not to be an 'alien' within the meaning of section 51(xix) of the Australian Constitution, can apply to the Federal Court for a declaration to that effect.

62. Finally, Mr Kuster may also be a person who is stateless. Without a specific framework to assess or rectify a person's claim of statelessness, it falls solely on the discretionary powers available to the Minister to address this

claim and decide whether it warrants consideration of an alternative to held detention.

63. Professor Croucher considered two acts of the Commonwealth as relevant to this inquiry:

- the failure of the Department to refer the case to the Minister until September 2023 in order for the Minister to assess whether to exercise his discretionary powers under sections 195A or 197AB of the Migration Act

- the Department's failure to formally assess whether Mr Kuster is stateless according to international law.

6 Assessment

6.1 Failure to refer

64. The Department commenced a ministerial intervention process for Mr Kuster's case to be assessed under the section 195A or section 197AB guidelines for the first time on 4 January 2023, after he had been detained for almost four and a half years. On 21 September 2023 (after the Commission had issued its preliminary view of his complaint), the Department referred Mr Kuster's case to the Minister under ss 195A and 197AB of the Migration Act.

65. Based on the material provided, there are a number of factors which weigh in favour of Mr Kuster being positively assessed for a referral.

66. In the Statements of Reasons for the decision not to revoke the visa cancellation dated 12 April 2021, the Minister noted:

> Mr KUSTER has been making a positive contribution for some 20 years to the community and that he and his family have significant ties to Australia.

67. In relation to his son, the Minister found that:

> it is in the best interests of [Mr Kuster's son] that I revoke the original decision to cancel Mr KUSTER's visa. I note that while [Mr Kuster's son] does not rely on Mr KUSTER for his daily care and welfare, he will nevertheless suffer hardship if Mr KUSTER were removed from Australia, as he would be deprived of the opportunity to develop personal contact with his father to bond with him in the future, if he so chooses.

68. In relation to the prospects of removal and risk of indefinite detention, the Minister found that:

> at least at the present time, it is not reasonably practicable to remove Mr KUSTER from Australia to PNG. Nor is it apparent to me at present that Mr KUSTER may be removed to any other country. In the meantime, he must continue to be detained … unless granted another visa. I have also noted that it is currently unclear whether and when his removal from Australia will become reasonably practicable.
>
> I have found the possibility of indefinite detention for Mr KUSTER weighs in favour of revocation of the cancellation of his visa.

69. However, when weighing up all the relevant factors, the Minister was not satisfied that Mr Kuster passed the character test, and determined that there was not another reason to revoke the cancellation of his visa, given his long history of reoffending, serious nature of the crimes committed, concerns about his ability to refrain from further offending, and concerns of harm to the Australian community should he reoffend in a similar manner.

70. By operation of the Minister's 2016 guidelines for section 195A,[23] the Minister would not expect referral of cases where a person's visa was refused or cancelled under s 501 of the Migration Act, unless there were compelling or compassionate circumstances. Similarly, under the Minister's 2017 guidelines for section 197AB,[24] the Minister would not expect referral of cases where a person may fail the character test under s 501 of the Migration Act, unless there were exceptional circumstances.

71. Professor Croucher acknowledged that Mr Kuster has a serious and extensive criminal history, and some of the offences committed were sufficiently serious to attract sentences of imprisonment. Professor Croucher also acknowledged that he was found by the Minister to pose a risk of re-offending and risk to the community. However, he served the criminal sentence imposed (2 years and 6 months). It was also noted that Mr Kuster spent more time in immigration detention than the sentence imposed by the court. The issue therefore was whether his administrative immigration detention can be considered arbitrary.

72. The only justification given by the Department as to why Mr Kuster was never previously considered under the ministerial guidelines for referral under ss 195A and 197AB, is that he failed the character test.

73. In response to Professor Croucher's preliminary view however, the Department stated:

> The Department does not accept that Mr Kuster's character was the only reason he was not previously considered for Ministerial Intervention under sections 195A and 197AB of the Act. In line with the Department's policies and procedures, a SRO actively considers a person's circumstances including the appropriateness of placement in held detention on a regular basis and liaises with the Ministerial Intervention Section if a person has requested Ministerial Intervention in their case or where there are particular vulnerabilities such as significant health issues, cases involving children in detention or if a person has been in detention for a significant period of time without progress.
>
> The SRO was satisfied that Mr Kuster could continue to be appropriately managed in a held detention environment, as he had an ongoing immigration matter and his removal was being progressed. As a result, Mr Kuster's case was not referred to the Ministerial Intervention Sections at the time for consideration, noting that a Ministerial Intervention process had already been initiated.

74. Not being able to remove a person from Australia or failing the character test under section 501 of the Migration Act are not, in and of themselves, sufficient justification for continued immigration detention. Closed detention should only be used in exceptional circumstances, where identified risks cannot be managed through less restrictive means.

75. Instead, the Department's policy is to continue to detain a person unless factors justifying release exist.

76. Alternatives to closed detention should be routinely considered for all individuals in immigration detention, with conditions applied to mitigate risks as appropriate.

77. Detention may become 'arbitrary' in cases where closed detention is disproportionate or not justified in a person's particular circumstances, such as where a person does not pose a risk to the community, or an identified risk could be managed in a less restrictive way.

78. In light of the Department's concerns about Mr Kuster's criminal history and risk to the community, any referral to the Minister should have included a risk assessment of whether any risks of harm to the community could be mitigated by the imposition of conditions, for example parole-like conditions attaching to community detention.

79. As set out in the Commission's 2021 report, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)*,[25] the Minister has the power to grant a Bridging visa or make a residence determination and attach any conditions the Minister considers appropriate to manage any risk, real or perceived, that person poses to the community.[26] Examples of these conditions include a requirement that

the person 'be of good behaviour', report to immigration authorities on a regular basis, notify immigration authorities of the person's movements, such as interstate travel, and not associate with certain persons or organisations.

80. The Commission considers that these parole-like conditions could be applied to manage potential risks to the community. Consideration of alternatives to closed detention, with appropriate risk management, is particularly important for people such as Mr Kuster and other individuals in similar circumstances, when removal is not reasonably practicable.

81. However, there is no evidence that the Department considered Mr Kuster's individual circumstances surrounding his offending, risk of re-offending, behaviour while in detention, or support in the community to assess whether any risk to the Australian community could be mitigated.

82. Under the section 195A guidelines, the fact that Mr Kuster's removal was not reasonably practicable warranted referral of his case to the Minister. The existence of a criminal record does not preclude the referral of a case to the Minister for consideration of the use of the discretionary powers.

83. Professor Croucher considered the following factors weighed in favour of Mr Kuster's case being considered by the Department for referral to the Minister under sections 195A and/or 197AB sooner than it was:

- he has lived in Australia for more than 34 years with significant family and community ties
- he has an Australian partner and minor son
- his protracted removal and recognised possibility of indefinite detention, given his difficulty in obtaining travel documents, and non-recognition of citizenship by PNG authorities
- possible stateless status (discussed in section 6.3 below)
- he was regarded as a role model detainee
- his positive, genuine efforts to rehabilitate
- his various health conditions
- his claim of indigeneity (after April 2021) (discussed in section 6.2 below).

84. Viewed cumulatively, Professor Croucher considered the above factors should have led to a referral to the Minister at a much earlier stage. Professor Croucher considered the above factors met the criteria in the respective guidelines of ‘unique or exceptional’ and ‘compelling or compassionate’ circumstances warranting referral to the Minister. The failure to refer effectively precluded any consideration by the Minister of less restrictive alternatives to held detention.

85. Professor Croucher found that the failure of the Department to refer the case to the Minister until September 2023 in order for the Minister to assess whether to exercise his discretionary powers under sections 195A or 197AB of the Migration Act is an act or practice which has contributed to his detention becoming arbitrary, contrary to article 9(1) of the ICCPR.

6.2 Indigeneity

86. On 16 August 2022, the Department advised the Commission that removal planning had been delayed due to Mr Kuster’s claim to have an Indigenous Australian heritage.

87. The Minister’s reasons of 12 April 2021 do not refer to this claim.

88. The first mention on the material before the Commission of Mr Kuster raising these claims occurs in a report from the Department to the Commonwealth Ombudsman on 6 August 2021, stating that the claims had been raised on 19 and 22 April 2021. This was after the Minister made his decision not to revoke the cancellation of Mr Kuster’s visa.

89. The Department’s report to the Ombudsman states:

> The Department has assessed these claims and has found that Mr Kuster does not meet, or probably meet, the first or third limbs of the tripartite test. On 19 July 2021, Mr Kuster was invited to provide further information to the Department in respect of his claims against the tripartite test. The Department will consider any further information provided by Mr Kuster in respect of the tripartite test.

90. Professor Croucher noted, however, that in the Department’s communication to the UN Working Group on Arbitrary Detention, dated 8 February 2022, the following appears:

> Mr Gus Kuster was born in Papua New Guinea (‘PNG’) of Torres Strait Islander descent.

91. This acknowledgement appears to be at odds with the extract noted above.

92. Further material before the Commission indicates that the overall assessment remained the same as of February 2023. On 23 February 2023, the Australian Government Solicitor wrote to Mr Kuster's representative informing her that the Commonwealth continued to hold the view that Mr Kuster did not meet the tripartite test, and inviting further information from him to support his claim. The letter did not specifically refer to which limbs of the test Mr Kuster was considered to not meet. The Department informed the Commission that it received advice on 22 June 2023 that Mr Kuster did not meet the first or third limb of the tripartite test.

93. On 11 February 2020, the High Court handed down its decision in the case of *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* (Love).[27] In that case, it was held that Aboriginal and Torres Strait Islanders are not 'aliens' as referred to in section 51(xix) of the Australian Constitution. The definition of Aboriginal and Torres Strait Islander was determined according to the test set out in *Mabo v Queensland [No 2]* by Justice Brennan, referred to as 'the tripartite test'.[28]

94. It is understood that, following the decision in Love, a number of detainees who were able to establish their indigeneity were released from detention.[29] The Department informed the Commission that:

> The Minister for Immigration, Citizenship and Multicultural Affairs grants special purpose visas to individuals who are not Australian citizens or visa holders and have been found to meet or probably meet this tripartite test, consistent with the High Court's judgement [sic].

95. Section 33(2)(b)(i) of the Migration Act allows the Minister to declare in writing that a non-citizen is taken to have been granted a special purpose visa. A declaration may also be made under subsection (ii) with respect to a class of persons.

96. The test for recognition as an Indigenous person of Australia requires each of the following:

    - biological descent;
    - self-identification as an Aboriginal or Torres Strait Islander person;
    - recognition by elders or other persons of the same group enjoying traditional authority.

97. The first of these limbs, biological descent, has been the subject of further consideration, but the question of whether it is limited to a proven genetic relationship has not been answered by the court.

98. It is the Commission's view that Justice Brennan's statement of the test must be read in the context of other aspects to his judgment, including the need to ascertain membership of a native title group 'according to the laws and customs of' the relevant group,[30] and that it must leave open the question of biological descent to be determined by the group itself.[31]

99. The proposition that traditional law and custom has a role to play in each limb of the test is consistent with articles 9 and 33(1) of the *United Nations Declaration on the Rights of Indigenous Peoples* and recent case law.[32] In a 1995 paper prepared for the UN Working Group on Indigenous Populations, the Chairperson-Rapporteur noted that:

> historically speaking, indigenous peoples have suffered from definitions imposed by others. For example, in the past the criterion for membership of an indigenous population in certain countries was based upon parentage or blood quotient and this is now deemed discriminatory as it denies the right of indigenous people to determine their own membership. For this and other relevant reasons the Working Group would not consider it appropriate to develop a definition of its own without full consultation with indigenous peoples themselves.[33]

100. In a submission to the Minister by his legal representative, it was put to the Minister that:

> Mr Kuster's oral family history on his maternal side is that they are biological Torres Strait Islanders. The family has always identified as such, and have received government support on this basis. Mr Kuster also identifies as a Torres Strait Islander and Aboriginal. Finally, since 1992, Mr Kuster has been recognised by an Aboriginal Elder as Aboriginal.

101. However, before the Administrative Appeals Tribunal, Mr Kuster's mother gave evidence that she was from PNG and had no Torres Strait ancestry. Following this, the Department:

> was advised that … the Department was not required to take any further steps to determine if there were any Commonwealth Government records relating to Mr Kuster's ancestors who he claimed were of Torres Strait Islander descent, or make further enquiries with Mr Kuster's mother or father. The Department is considering seeking further information from Mr Kuster in relation to his previous claims of being of Torres Strait Islander descent. To date, the Department has yet to request Mr Kuster to provide further information related to the aforementioned claims.

102. Mr Kuster's representative made submissions that provided some context to this evidence. It is unnecessary for those to be repeated in the Commission's report, given that it is beyond the scope of this inquiry to make any findings on whether Mr Kuster is or is not descended from a person of the Torres Strait.

103. Mr Kuster has apparently been represented previously by Aboriginal and Torres Strait Islander legal services, but has no paperwork to demonstrate his grandmother's descendancy from a Torres Strait Islander community. Such issues are systemic for those attempting to demonstrate their eligibility under the tripartite test, as outlined above, and similarly occurs in establishing continuity for native title purposes.[34] Mr Kuster has also provided to the Department in support of his eligibility under the third limb of the test, a statutory declaration from an elder of the Gumbayngirr nation, who states that Mr Kuster and his family were welcomed as members into that nation through a cultural ceremony performed in 1992.

104. No guidelines appear to be available on the Department's database (LEGENDcom) to explain its interpretation of the tripartite test, and the Department was unwilling to provide to the Commission its 'internal document' used for guiding their assessments under the tripartite test.

105. The test was however accurately outlined by the Department in its response to the Commission's request. The Department has also released through freedom of information laws a document outlining the impact of a person's claim to meet the tripartite test on their removal, which indicates that the case must be immediately escalated for assessment, but that plans for removal should not cease while that assessment is being conducted.[35]

106. An avenue may remain for Mr Kuster to seek a declaration that he is not an alien for the purposes of section 51(xix) of the Constitution. Professor Croucher did not have any information before her as to whether this has been or is being contemplated by him.

107. Mr Kuster's complaint related to the arbitrariness of his detention, not the Department's application of the tripartite test. Professor Croucher had insufficient information before her to fully ascertain the Department's reasons for rejecting Mr Kuster's claims, and also did not have sufficient evidence to determine whether he should meet it. Nor was that a task within the scope of this inquiry.

108. However, on the basis of the Department's explanation that removal attempts had stalled due to his claim of indigeneity, Professor Croucher was of the view that his claim, and the evidence he has put forward in support of it, are additional factors which amount to exceptional circumstances that warranted his referral to the Minister, at least since April 2021 when these claims were formally made. There is no reason why Mr Kuster could not have been considered for an alternative to held detention while further consideration was given to his claim of indigeneity.

6.3 Statelessness

109. As outlined above, Mr Kuster requested voluntary return to PNG but on 21 August 2019 was not permitted to enter the country. He has since raised a claim of statelessness which appears not to have been substantively assessed by the Department.

110. Two international conventions exist with the goal of addressing statelessness internationally. They are the *1954 Convention relating to the Status of Stateless Persons* (1954 Convention) and the *1961 Convention on the Reduction of Statelessness*. Australia acceded to both conventions in December 1973.[36]

111. The 1954 Convention defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'. Such persons are considered stateless *de jure*. A further category of persons not considered by either convention is known as stateless *de facto*, being a term not specifically defined, but in the context of this particular complaint, can include a person who has a nationality according to a particular country's laws, but who is unable or unwilling to utilise the protection of that country.[37] This might include where that country has refused to recognise their nationality despite the operation of the law.

112. The Commission has previously expressed concerns regarding the lack of any formal administrative process within the Migration Act or in other domestic legislation for assessing statelessness, nor the availability of a specific visa for a stateless person in Australia, other than a protection visa.[38] These concerns were mirrored in a 2020 joint submission by statelessness experts to the UN Human Rights Council in its Universal Periodic Review of Australia.[39] While it might be that some stateless people also qualify for protection under the Refugees Convention or the complimentary protection provisions, others will not. Mr Kuster has not made an application for a protection visa, and Professor Croucher did not form any views as to whether he would qualify for such.

113. There is limited availability for a stateless person to apply for Australian citizenship. This may occur, in simplified terms, if the person was born in Australia without any nationality or citizenship (or the ability to acquire one).[40]

114. If a person was born outside Australia to an Australian citizen parent and either their parent was present in Australia for at least 2 years before their application, or the person is not a national or citizen of any other country at the time of their application (i.e. is stateless), then they may also be eligible for Australian citizenship.[41]

115. However, if a person in the latter category has ever been a national or citizen of another country, then they must satisfy the Minister that they are of good character.[42] As described below, the Department assessed that Mr Kuster was precluded as a result of his character from falling within this category.

116. Professor Croucher had not formed a view as to whether Mr Kuster is indeed stateless, and if he is, whether that is *de jure* or *de facto* statelessness. What is clear however is that the Department has assessed Mr Kuster as not being an Australian citizen, and PNG has not, to date, been willing to recognise him as a citizen of PNG, which means that he does not presently have any effective nationality. This had clearly impacted upon the duration of his detention.

117. According to documents provided to the UN Working Group on Arbitrary Detention, the PNG Immigration and Citizenship Authority (ICA) has informed the Department that Mr Kuster does not hold citizenship and is ineligible to apply because he was born after the PNG Day of Independence, and that any future application would require him to meet residence and character requirements, both of which he is 'currently unable to satisfy'.

118. In response to a request for further information by the Commission, the Department confirmed that Mr Kuster's claim of statelessness had not been assessed through a protection visa application, nor through an application for Australian citizenship by descent. The reason for the lack of assessment through his citizenship application was because, by operation of section 16(2)(c) of the *Australian Citizenship Act 2007* (Cth), Mr Kuster was required to meet the character test to be eligible for Australian citizenship. His application was apparently refused without the assessment made first as to statelessness.

119. In response to Professor Croucher's preliminary view, the Department stated:

> The Department does not agree with the Commission's view that steps were not taken to assess or confirm Mr Kuster's alleged status of stateless[ness]. On 4 April 2019, as part of the removal planning process, the Removal Helpdesk in the ABF advised that the PNG HC could not locate records that identified Mr Kuster as being a PNG citizen. A number of subsequent enquiries regarding Mr Kuster's citizenship were made including meeting with the PNG HC in Canberra in July 2022 and correspondence with the PNG Immigration Citizenship Authority.

120. Mr Kuster's representative referred to the fact that the Department and the Tribunal both found that Mr Kuster was not stateless when he was born, and as such is not entitled to Australian citizenship (because he is not of good character). The fact however remains that Mr Kuster is not apparently a national of any state. The release of Mr Kuster from detention following *NZYQ* might be an indication that this has been accepted, but it also could merely be an acknowledgement that his removal from Australia is not practicable in the reasonably foreseeable future. Mr Kuster's representative submits that the Department has not formally acknowledged to Mr Kuster their position on whether he is or is not stateless.

121. Professor Croucher acknowledged that the Department had taken steps to resolve this issue as part of their efforts to remove Mr Kuster from Australia, but there appears to have been no progress for a significant period of time, since the meeting with the PNG High Commission in July 2022. The failure identified in Professor Croucher's preliminary view was not a failure to take steps, but a failure to formally assess whether Mr Kuster is stateless according to international law.

122. With no process in place for him to have his claim of statelessness assessed, it falls again on the Minister's personal, discretionary powers, for there to be hope for Mr Kuster to resolve his predicament. Professor Croucher noted in this respect that the discretion afforded to some detainees under section 501J of the Migration Act is not available to Mr Kuster, because it was the Minister personally who decided against revocation of his visa cancellation. Visa cancellation decisions made by a delegate of the Minister in contrast, are reviewable by the Administrative Appeals Tribunal, and can have more favourable decisions substituted by the Minister, including in circumstances where:

> the Department has determined that the person cannot be returned to their country/countries of citizenship or usual residence due to circumstances outside the person's control.[43]

123. Professor Croucher remained of the view that the failure of the Department to implement an assessment of whether Mr Kuster is or is not stateless according to international law is an act which has contributed to his detention becoming arbitrary, because this assessment is information which is necessarily required by the Minister in order to make a fully informed decision about whether or not to intervene in Mr Kuster's case.

7 Recommendations

124. 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.[44] The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.[45] The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.[46]

7.1 Statelessness

125. As expressed at paragraph 112, the Commission continues to see the need for a formal procedure to be established for the assessment of statelessness.

Recommendation 1

The Commission recommends that the Australian Government should introduce a formal statelessness status determination procedure. The Commission recommends that, in formulating such a procedure, the Department should take the following steps:

- draft a proposed policy and procedure;
- consult on the draft with civil society;
- ensure that the policy and procedure are available on LEGEND.com.

Recommendation 2

The Commission recommends that a clear visa pathway to permanent residency should be established for stateless persons who are found not to be refugees or otherwise owed protection.

Recommendation 3

The Commission recommends that statelessness should be included as a specific consideration in the guidelines for Ministerial Intervention under ss 351, 417, 501J and 195A of the Migration Act.

Recommendation 4

The Commission recommends that any unlawful non-citizen who is or claims to be stateless should be automatically referred to the Minister for consideration of their intervention powers.

7.2 Indigeneity

126. The Commission notes the Department's policy document referred to at paragraph 105 regarding the continuation of removal planning for detainees who may be Indigenous. It appears from the document that the Department's intention is for a person to remain detained and subject to such planning, while the status resolution team assess their eligibility under the tripartite test.

127. The Commission instead recommends that any such person should be considered for an alternative to held detention, including for referral to the Minister for possible intervention. This will mitigate the risk that their detention may become arbitrary while the assessment is being conducted.

Recommendation 5

The Commission recommends that any person in detention who claims to be indigenous be considered for an alternative to held detention while their claims are assessed, including for referral to the Minister for possible intervention where necessary.

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

128. On 3 May 2024, Professor Croucher provided the Department with a notice of her findings and recommendations.

129. On 16 August 2024, the Department provided the following response to Professor Croucher's findings and recommendations:

> The Department of Home Affairs (the Department) values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings identified in this

report and the recommendations made by the President of the Commission.

The Department notes that Mr Kuster was assessed as being impacted by the High Court's decision on 8 November 2023 in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S28/2023)* [2023] HCA 37 (NZYQ) and was released from immigration detention as soon as reasonably practicable following the decision. At no point before Mr Kuster's release did his detention become arbitrary. The Department does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, article 9 of the *International Covenant on Civil and Political Rights* (ICCPR). The Department maintains that Mr Kuster's placement in held immigration detention was reasonable, necessary and proportionate in the individual circumstances of his case.

Recommendation 1 – Noted

The Commission recommends that the Australian Government should introduce a formal statelessness status determination procedure. The Commission recommends that, in formulating such a procedure, the Department should take the following steps:

- *draft a proposed policy and procedure;*
- *consult on the draft with civil society;*
- *ensure that the policy and procedure are available on LEGEND.com.*

This recommendation is noted.

Australia takes very seriously its obligations under the two statelessness-related international conventions to which it is a Party (*the Convention relating to the Status of Stateless Persons* and the *Convention on the Reduction of Statelessness*) and relevant provisions of other human rights instruments. Australia's obligations under the *Convention on the Reduction of Statelessness* have been part of Australian citizenship legislation since 1973. The *Australian Citizenship Act 2007* sets out the eligibility of persons in different circumstances of statelessness for citizenship.

There are processes in place to identify stateless persons though the Protection visa process and to grant them protection if they engage Australia's *non-refoulement* obligations in relation to certain types of harm under the *Convention relating to the Status of Refugees* (and its 1967 *Protocol relating to the Status of Refugees*), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *ICCPR* (and its *Second Optional Protocol*) to which Australia is a party.

The *Protection Visa Processing Guidelines Procedural Instruction Annexure 3: Assessing claims of statelessness guidelines* helps Protection visa officers make findings in relation to claims of statelessness for the purpose of a protection visa assessment. These instructions are available on LEGEND.com.

Recommendation 2 – Noted

The Commission recommends that a clear visa pathway to permanent residency should be established for stateless persons who are found not to be refugees or otherwise owed protection.

This recommendation is noted.

Those who do not engage Australia's protection obligations and do not hold a valid visa are expected to return to their country of origin or former habitual residence, or another country that may accept their return or entry. Where this is not possible, the person's case may be referred to the relevant Minister for consideration of whether it is in the public interest to allow lodgement of a further Protection visa application or to grant a visa.

Recommendation 3 – Partially Agrees

The Commission recommends that statelessness should be included as a specific consideration in the guidelines for Ministerial Intervention under ss 351, 417, 501J and 195A of the Migration Act.

The Department partially agrees with recommendation three.

The Department is preparing new ministerial instructions for the Minister following the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 10*.

Further information about the Department's approach will be made available in due course.

Recommendation 4 – Disagree

The Commission recommends that any unlawful non-citizen who is or claims to be stateless should be automatically referred to the Minister for consideration of their intervention powers.

The Department disagrees with recommendation four.

In November 2022, the Minister for Immigration, Citizenship and Multicultural Affairs agreed to the Department conducting a Detention Status Resolution Review. This review involves a streamlined referral of submissions for possible Ministerial Intervention under sections 195A and 197AB of the Act for long-term detainees in held detention and those who will likely be subject to protracted detention due to complex removal barriers. This review includes individuals who are confirmed to be

stateless. The Department continues to refer individuals for Ministerial Intervention consideration through this review.

If an individual's statelessness claim has been assessed and not supported through a process such as assessment of a Protection visa application, this does not result in an automatic referral for Ministerial Intervention consideration. It is open to the individual to lodge a request for Ministerial Intervention consideration. A Status Resolution Officer may also decide to refer a case for Ministerial Intervention consideration due to the individual's particular circumstances. Alternatively, the individual may fall in scope of the review (discussed above) and would be referred for Ministerial Intervention consideration through this review. In cases which are referred to the Minister and where an assessment of statelessness claims has been undertaken, details of that assessment would be included in the submission to the Minister.

The Department is preparing new ministerial instructions for the Minister following the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 10*.

Further information about the Department's approach will be made available in due course.

Recommendation 5 – Disagree

The Commission recommends that any person in detention who claims to be Indigenous be considered for an alternative to held detention while their claims are assessed, including for referral to the Minister for possible intervention where necessary.

The Department disagrees with recommendation five.

The Department is required to apply the law as decided by the High Court in the matter of *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 (*Love*), and any subsequent decisions, and the Department is assisted by legal advice where relevant.

On 11 February 2020, the High Court found in *Love* that Aboriginal or Torres Strait Islander people who meet the tripartite test as formulated by Justice Brennan in *Mabo [No. 2]* (1992) 175 CLR 1 (*Mabo [No. 2])* are not 'aliens' for the purposes of the aliens power in the Constitution, even if they are not Australian citizens.

An individual who is not an Australian citizen and meets the tripartite test as established in *Mabo [No. 2],* will not be held in immigration detention or removed from Australia.

For the purposes of administering the Migration Act, the Department considers the claims and evidence provided by anyone who is not an

Australian citizen and who claims to be an Aboriginal or Torres Strait Islander person. The nature and length of each assessment is influenced by the necessary steps required that enable the Department to reach a considered view.

The Department ensures that an individual is given a reasonable opportunity to provide information that is relevant to their claims. The Department considers any new information as a matter of urgency and whether it might affect any assessments about an individual.

The Department maintains that its review mechanisms regularly consider the necessity of immigration detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention. The Department undertakes regular review for persons in immigration detention to ensure the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status.

If an individual claims to be affected by the *Love* High Court decision and their claims are being assessed against the tripartite test, it is open to the individual to lodge a request for Ministerial Intervention consideration. Alternatively, the individual may fall in scope of the Detention Status Resolution Review (discussed at recommendation 4) and would be referred for Ministerial Intervention consideration through this review. In cases that are referred to the Minister where an assessment against the tripartite test is being undertaken, details of the status of that assessment would be included in the submission for the Minister's consideration.

Further, the Alternatives to Held Detention model is being considered in light of the High Court judgment in NZYQ.

130. I report accordingly to the Attorney-General.

Hugh de Kretser
President
Australian Human Rights Commission
April 2025

Endnotes

[1] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), [1980] ATS 23 (entered into force for Australia 13 November 1980).

[2] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005.

[3] Migration Act 1958 (Cth) sections 501(6)(a) and 501(7)(c).

[4] *Migration Act 1958 (Cth)* sections 189(1) and 198.

[5] *Kuster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1462.

[6] UN Doc A/HRC/WGAD/2023/14 (2023).

[7] Ibid, 10 [74].

[8] Ibid, 14 [99].

[9] Ibid, 14 [96].

[10] See Secretary, Department of Defence v HREOC, Burgess & Ors (1997) 78 FCR 208.

[11] The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.

[12] Human Rights Committee, General Comment No 8 (1982): *Article 9* (*Right to liberty and security of persons)*. See also Human Rights Committee, *Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*'); Human Rights Committee, *Communication No 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('*C v Australia*'); Human Rights Committee, Communication No 1014/2001, 78th sess, CCPR/C/78/D/1014/2001 (2003) ('*Baban v Australia*').

[13] Human Rights Committee, *General Comment No 31*: *The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) 308 [11.10].

[14] *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee, *Communication No. 305/1988,* 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('*Van Alphen v The Netherlands*'); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Communication No. 631/1995,* 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) ('*Spakmo v Norway*').

[15] *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).

[16] United Nations Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).

[17] United Nations Human Rights Committee, concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].

[18] *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communication No 1255,1256,1259,1260,1266,1268,1270,1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (2007) ('*Shams & Ors v Australia*'); *Baban v Australia*, CCPR/C/78/D/1014/2001; UN Human Rights Committee, Communication No 1050/2002, 87th sess, CCPR/C/87/D/1050/2002 (2006) ('*D and E and their two children vAustralia*').

[19] Human Rights Committee, *General Comment No 35*, *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 (16 December 2014) [18].

[20] Human Rights Committee, *General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6].

[21] [2021] AusHRC 141, <https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>, 21-24

[22] [2020] HCA 3.

[23] Department of Home Affairs, PAM3: Act – Compliance and Case Resolution – Case resolution – Minister's powers – Minister's detention intervention power, November 2016, accessed through LEGENDcom on 7 March 2023.

[24] Department of Home Affairs, PAM3: Act – Compliance and Case Resolution – Case resolution – Minister's powers – Minister's residence determination power, 10 October 2017, accessed through LEGENDcom on 7 March 2023.

[25] See also: The detention of refugees following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth) [2022] AusHRC 143, <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/detention-refugees-following-visa-refusal-or>.

[26] HYPR v Minister for Immigration and Border Protection [2016] AATA 864 [Part 4.2].

[27] [2020] HCA 3.

[28] (1992) 175 CLR 1, at 70.

[29] Commonwealth, *Parliamentary Debates*, Senate, 7 September 2022, 888 (Murray Watt, Minister for Agriculture, Fisheries and Forestry and Minister for Emergency Management).

[30] *Mabo v Queensland (No 2)* 175 CLR 1, at 61 and 70.

[31] *Western Australia v Ward* (2000) 99 FCR 316, at [230]-[232].

[32] See *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* (2020) 379 ALR 248, at [148]-[149].

[33] UN Working Group on Indigenous Populations, *Note by the Chairperson-Rapporteur on criteria which might be applied when considering the concept of indigenous peoples*, 21 June 1995 (E/CN.4/Sub.2/AC.4/1995/3) p 4 at [6].

[34] See *Webster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 702 at [52]; *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* FCA 647 at [59], [85].

[35] Department of Home Affairs, *Removal from Australia: Procedural Instruction*, (5 April 2023), available at <https://www.homeaffairs.gov.au/foi/files/2023/fa-230400225-document-released.PDF>.

[36] UN Treaty Collection, *3. Convention relating to the Status of Stateless Persons*, 1 <https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en>; UN Treaty Collection, *4. Convention on the Reduction of Statelessness,* 1 <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=_en>.

[37] Peter McMullin Centre on Statelessness, *Factsheet: An Overview of Statelessness*, October 2021, <https://law.unimelb.edu.au/__data/assets/pdf_file/0011/3937160/UPR_factsheet_Oct_2021.pdf>, 3; UNHCR, *UNHCR and* De Facto *Statelessness*, April 2010 <https://www.unhcr.org/4bc2ddeb9.pdf>, 61.

[38] Australian Human Rights Commission, *Community arrangements for asylum seekers, refugees and stateless persons: Observations from visits conducted by the Australian Human Rights Commission from December 2011 to May 2012*, (Report, July 2012), <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/community-arrangements-asylum-seekers-refugees>, 32.

[39] Peter McMullin Centre on Statelessness, Statelessness Network Asia Pacific, Refugee Advice & Casework Service, Institute on Statelessness and Inclusion, *Joint Submission to the Human Rights Council*, 9 July 2020, <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/3436278/ISI-UPR-Submission-Australia-For-Website.pdf>, 9.

[40] *Australian Citizenship Act 2007* (Cth), s 21(8).

[41] *Australian Citizenship Act 2007* (Cth), s 16(2). An alternative criteria also exists in s 16(3) for a person born before 26 January 1949 but for simplicity, as Mr Kuster was born after this date, this test was not referred to.
[42] *Australian Citizenship Act 2007* (Cth), s 16(2)(c). Note that 'good character' is not defined within the Australian Citizenship Act, and is a separate assessment to whether or not a person meets the character test set out in section 501 of the Migration Act.
[43] Department of Home Affairs, *Minister's guidelines on ministerial powers (s351, s417 and s501J)*, accessed through LEGENDcom on 7 March 2023, [4].
[44] Australian Human Rights Commission Act ('AHRC Act'), s 29(2)(a).
[45] AHRC Act, s 29(2)(b).
[46] AHRC Act, s 29(2)(c).