Australian Human Rights Commission

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

[2024] AusHRC 167

July 2024

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Report into inhuman treatment, arbitrary detention, and arbitrary interference with family.

Australian Human Rights Commission 2024

The Hon Mark Dreyfus KC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into the human rights complaint of Mr MF, alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr MF arrived in Australia in September 2012 on a partner visa. In June 2017, Mr MF was transferred into immigration detention, following the cancelling of his Bridging E visas as a result of his criminal conviction. Mr MF remained detained in various immigration detention centres from June 2017 until his placement into community detention in December 2022.

Mr MF subsequently brought a complaint against the Department of Home Affairs (Department). The complaint raised three issues, which I identified as possibly being contrary to articles 7, 9(1), 10, 17 and/or 23 of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the Department's failure to consider Mr MF for the grant of a Bridging E visa prior to November 2020, or otherwise from March 2021 to December 2022, as well as the Department's failure to refer Mr MF to the Minister for consideration for an alternative to held detention before November 2022, resulted in his prolonged detention. This was inconsistent with, or contrary to, the right to freedom from arbitrary detention under article 9(1) of the ICCPR.

I have also found that Mr MF's physical and mental conditions were worsened as a direct result of his being held in prolonged detention. His ongoing detention with chronic pain was injurious to his mental health, and the sedentary nature of detention was disadvantageous to his physical recovery. The failure to refer Mr MF's case to the Minister prior to November 2022 resulted in the prolonged detention of Mr MF that inflicted serious harm and amounted to cruel, inhuman or degrading treatment, in breach of article 7 of the ICCPR.

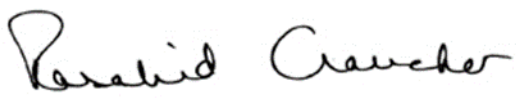
However, within the scope of the complaints accepted by the Commission for this inquiry, on the basis of the materials before me, I have not been satisfied as to a breach of article 10.

I am also not satisfied Mr MF has substantiated his complaint of arbitrary interference with his family with respect to his relationship with his de facto partner, or with his sister. Thus, I do not find the Department in breach of articles 17 and 23 of the ICCPR.

On 15 December 2023, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 4 June 2024. That response can be found in Part 9 of this report.

I enclose a copy of my report.

Yours sincerely,



Emeritus Professor Rosalind Croucher AM FAAL
President
Australian Human Rights Commission
July 2024

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1 Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint by Mr MF 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. This is a complaint encompassing 3 issues which have been identified as possibly being contrary to articles 7, 9(1), 10, 17 and/or 23 of the *International Covenant on Civil and Political Rights* (ICCPR).[1] Each of the issues arises from or relates to the period of time in which Mr MF was in held immigration detention.

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 my findings in relation to this inquiry and my recommendations to the Commonwealth.

7. At Mr MF's request, and given that Mr MF has been found to be owed protection obligations, I have made a direction under s 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

2 Summary of findings and recommendations

8. As a result of the inquiry, I find that the following acts of the Commonwealth are inconsistent with, or contrary to, articles 7 and 9(1) of the ICCPR:

   - the failure of the Department to consider Mr MF for the grant of a Bridging E visa prior to 5 November 2020
   - the failure of the Department to consider Mr MF for the grant of a Bridging E visa from March 2021 to 9 December 2022
   - the Department's failure to refer Mr MF to the Minister for consideration, either to substitute a more favourable decision for that of the AAT, or for an alternative to closed detention, before 6 November 2022.

9. I make the following recommendations:

Recommendation 1

The Commission recommends that the Commonwealth pay to Mr MF an appropriate amount of compensation to reflect the loss and damage he has suffered as a result of the breaches of his human rights under article 7 of the ICCPR identified in the course of this inquiry.

Recommendation 2

The Department's written policy on the exercise of the discretion available to grant a Bridging E visa pursuant to regulation 2.25 should be made available on LEGENDcom.

Recommendation 3

The Department's policy on regulation 2.25 and the guidelines for ministerial intervention under section 195A and/or section 197AB should be updated to make clear that if a delegate decides not to consider exercising their discretion to grant a Bridging E visa pursuant to regulation 2.25, they should automatically consider referring the detainee for consideration by the Minister for intervention, and reasons for both sets of decisions should be recorded.

Recommendation 4

In the guidelines for referral to the Minister for consideration under sections 351, 417 or 501J of the Migration Act, it should be noted that, if the AAT considers referral to the Minister appropriate, then the Department is to do so without undertaking its own assessment of the merits of referral.

Recommendation 5

The Department and IHMS should conduct a review of IHMS policies and procedures in light of the particular circumstances raised by Mr MF's complaint and identify suitable contingencies for the provision of prescription medications overnight where medically necessary.

Recommendation 6

The Department should review all of its operating procedures and training manuals to emphasise to all officers that a person who has been found to engage Australia's protection obligations, and those who have an active Protection visa application on foot (including merits and judicial review of negative decisions), is not expected to voluntarily return to the country in respect of which the protection finding or protection application is made.

3 Background

10. Mr MF is a citizen of Fiji and is aged 43 years of age.

11. Mr MF was in held immigration detention from 15 June 2017 to 9 December 2022 – a period of 2004 days or 5 years and 5 months.

12. From 9 December 2022, Mr MF has been placed in community detention.

13. Mr MF has indicated that he wishes to continue with his complaint, and that he wishes to be released from community detention. I have therefore considered two periods of time in this report – first, the period during which he was in held detention, and secondly, the current period during which he is in community detention.

3.1 Procedural history

14. Mr MF lodged a complaint with the Commission on 27 June 2020. In the complaint he raised 4 issues:

    - the length and conditions of his detention (first issue)

- the inadequacy of his medical treatment following an incident which occurred while he was in immigration detention (second issue)
- the Department's decision to refuse his application for a medical treatment visa (third issue)
- the separation from his family by his placement in detention in Western Australia (fourth issue).

15. Mr MF also checked on his complaint form the boxes for disability and racial discrimination but with no detail as to what he claimed these aspects of discrimination entailed. Accordingly, these were not accepted by the Commission as complaints under either the *Disability Discrimination Act 1992* (Cth) or the *Racial Discrimination Act 1975* (Cth).

16. On 16 December 2020, Mr MF, through his representative, provided further information to the Commission raising a further allegation of a human rights breach. My delegate decided on 1 March 2021 to expand the complaint to include:

> the delay in his transfer to hospital following the incident referred to within the second issue (fifth issue).

17. The complaint was further expanded as a result of more information provided on 11 March 2021 to include:

> the failure to administer pain medication every 4 hours through the night (sixth issue).

18. By letter dated 7 September 2021, the Commission notified Mr MF that it declined to inquire into the second, fifth and sixth issues pursuant to section 20(2)(vi) of the AHRC Act on the basis that these complaints could more effectively or conveniently be dealt with by another statutory authority, being the Health and Disability Services Complaints Office (HaDSCO) in Western Australia.

19. The first, third and fourth issues were unable to be conciliated with the Department and referred for further inquiry and possible reporting under section 29 of the AHRC Act.

20. With respect to the third issue raised by Mr MF in his complaint to the Commission, namely the refusal of a Medical Treatment visa, I note that Mr MF sought a review of the decision of the Department to refuse that visa to the Administrative Appeals Tribunal (AAT), which affirmed the

Department's decision on 17 March 2020. Mr MF did not seek judicial review of the AAT's decision.

21. It is not within the scope of powers vested in the Commission to review the merits of a visa decision – a power specifically conferred on the AAT. Mr MF appropriately exercised his ability to have that decision reviewed, but remains dissatisfied with the outcome.

22. I decided not to continue to inquire into the third issue raised by Mr MF on the basis that the subject matter of the complaint has been adequately dealt with by the AAT, pursuant to section 20(2)(c)(v) of the AHRC Act.

23. On 29 August 2023, I issued a preliminary view with respect to Mr MF's complaint, and provided the Department and Mr MF an invitation to comment on it prior to making any findings.

24. On 5 December 2023, the Department responded to my preliminary view.

3.2 Factual history

25. Mr MF arrived in Australia on 15 September 2012 as the holder of a Prospective Marriage visa. He lodged an application for a Partner (subclass 820/801) visa onshore on 13 February 2013. On the basis of that visa application, he was granted a Bridging A visa.

26. On 10 May 2013, Mr MF was granted a temporary Partner (subclass 820) visa on the basis of the sponsorship of his Australian citizen wife.

27. His wife withdrew her sponsorship of the visa on 17 August 2015, and in November 2015, Mr MF was charged with unlawful assault against her.

28. The Department refused Mr MF's application for a permanent Partner (subclass 801) visa on 2 August 2016, on the basis that he was no longer sponsored. The effect of this decision was that the temporary Partner visa ceased.

29. Mr MF sought a review of this decision at the AAT on 12 August 2016. His Bridging A visa remained in place for the purpose of the appeal. The AAT affirmed the Department's decision, and he sought further reviews of the Tribunal's decision to the Federal Circuit Court, on appeal to the Federal Court, and by way of a special leave application to the High Court. Each of these applications was unsuccessful.

30. On 17 August 2016 Mr MF, was convicted of recklessly causing injury on the basis of offending which took place on 5 March 2014, and received a 12 month good behaviour bond as a sentence.

31. The Bridging A visa held by Mr MF was cancelled under section 116 of the Migration Act on 21 September 2016. He was, however, granted Bridging E visas on 5 and 13 October 2016.

32. On 16 March 2017, Mr MF was charged with making a threat to kill and contravening a family violence intervention order. As a result, his Bridging E visa was cancelled pursuant to section 116 of the Migration Act on 17 March 2017.

33. On 10 May 2017, a court convicted and sentenced Mr MF to 3 months imprisonment.

34. At the finalisation of his sentence of imprisonment, Mr MF was detained pursuant to section 189(1) of the Migration Act and taken to the Maribyrnong Immigration Detention Centre (IDC).

35. Mr MF attempted to apply for a Bridging E visa on 16 June and 20 July 2017, but those applications were deemed invalid by operation of item 1305(3)(g) of Schedule 1 to the *Migration Regulations 1994* (Cth) (Migration Regulations), due to the cancellation of his previous Bridging A and E visas.

36. On 30 June 2017, Mr MF was transferred to the Yongah Hill IDC (YHIDC).

37. Mr MF was referred for involuntary removal on 11 July 2017.

38. On 8 August 2017, Mr MF was further transferred to Christmas Island (North West Point IDC).

39. While detained on Christmas Island, on 17 December 2017, Mr MF slipped and fell down stairs that had been recently mopped. He states that he fell heavily on the edge of a stair, and that the injury exacerbated a pre-existing condition in his lower back.

40. On 4 January 2018, Mr MF was transferred to Perth IDC. He spent time in various hospitals which were designated as alternative places of detention (APODs) for medical treatment, including between 30 September and 19 October 2020 and 21 June to 18 August 2021.

41. On 4 November 2019, Mr MF applied for a Medical Treatment visa. The application was refused on 21 November 2019, and Mr MF sought review from the AAT. The AAT affirmed the decision on 17 March 2020.

42. A report from the Department to the Commonwealth Ombudsman, dated 19 June 2020, reported that:

> The Removals Section have advised that Fijian travel documents take approximately two weeks to be issued, however due to COVID-19 there are no flights to Fiji at this time. It is unknown when flights will resume.

43. He was again referred for involuntary removal on 23 June 2020.

44. On 26 August 2021, Mr MF was transferred to a hotel designated as an APOD. He resided in 2 hotels during this time – the Aloft Perth Riverdale and the Perth Ascot Central Apartment Hotel, apart from 2 occasions where he was detained at the Sir Charles Gardiner Hospital.

45. From 26 August 2021 onwards, Mr MF was also provided with a 24/7 carer to assist him with day-to-day living activities such as personal hygiene, moving around the APODs (in addition to his wheelchair) and accompanying him to medical appointments.

46. On 15 February 2022, Mr MF applied for a Protection visa. The Department refused his application on 28 February 2022 and he applied for a review of the decision at the AAT on 2 March 2022.

47. Mr MF was returned to the Perth IDC for one further period between 8 August 2022 and 9 December 2022.

48. On 9 December 2022 the Minister intervened to make a residence determination with respect to Mr MF.

49. The Department conducted regular case reviews throughout Mr MF's time in held detention. The Department also used its Community Protection Assessment Tool (CPAT) to assess the suitability of Mr MF's ongoing detention. A selection of the CPATs were provided to the Commission as part of this inquiry.

50. At the time of Mr MF's initial detention, the CPAT conducted resulted in a rating of 3.1, recommending held detention. This rating appears to have been due to Mr MF's criminal charges and convictions, and his visa cancellation.

51. All other CPATs conducted throughout his term of detention led to the same result, apart from one conducted on 21 June 2019, which has a substituted recommendation of Tier 1 – Bridging Visa. The reason for the alternative assessment given is due to the fact that Mr MF's criminal conviction only resulted in a 3 month sentence. The officer completing the CPAT on this occasion noted that Mr MF 'demonstrated co-operation with Status Resolution and other departmental officers whilst in detention'.

52. The final CPAT conducted for Mr MF prior to his placement in community detention recommended held detention again. Under the heading 'behaviour impacting others', the following notes appear:

> Detainee [MF] is the subject of 29 Recorded Incidents and 24 SIRs during his time in detention. Behaviour incidents – 6 x Abusive/Aggressive behaviour & 1 minor assult [sic], which none have resulted in any charges or convictions. I believe these incidents could be attributed to frustration & his back injury …

53. On 19 May 2023, the AAT determined in Mr MF's favour that he met the criteria for a Protection visa on the basis of the complementary protection criteria, and remitted his matter back to the Department for reconsideration.

3.3 Medical history

54. Mr MF self-reported an injury to his back for which he underwent surgery in Fiji around 2003 from playing rugby. He stated that he recovered well and was able to work and return to rugby.

55. While in detention he reported back pain to the IHMS GP on 22 November 2017.

56. It is not in dispute that Mr MF fell as claimed on 17 December 2017 (the fall incident).

57. He underwent surgeries to his back on 6 July 2018, 2 October 2020, and 21 July 2021.

58. Prior to the first surgery, Mr MF used a wheelchair but was able to walk independently and/or with the assistance of a crutch, and received rehabilitation and physiotherapy to assist with this.

59. Following the initial surgery, a registrar at the Sir Charles Gairdner Hospital reviewing Mr MF identified that he continued to be in pain, and recommended a review in 6 months. Evidently, further surgery was required, but in light of the scope of Mr MF's complaint, the information obtained by the Commission has focused more on his chronic pain and mental health, than on the surgeries themselves.

60. With his complaint, Mr MF provided a list of medications he had been prescribed at various times over his history. In particular, he was prescribed Buprenorphine and Tramadol, both of which were to be taken every 4 hours as necessary to manage his pain.

61. In December 2018, IHMS referred him to the pain medicine clinic of the Royal Perth Hospital for management of continued pain in his left lower limb which had become persistent.

62. In March 2019, a pain medicine specialist at the Royal Perth Hospital recommended:

> extensive and ongoing physiotherapy for his lumbosacral spinal musculature and given his current predicament I am not sure how best this could be provided for him.

63. He was reviewed by the Neurosurgery Department Clinic at the Sir Charles Gairdner Hospital in August 2019, which reported that he had undergone an epidural injection at the Royal Perth Hospital but that he continued to report pain. The specialist recommended allowing the epidural further time to work, and for him to be reviewed again in 3 months time.

64. A note appears on a departmental report to the Commonwealth Ombudsman required by section 486N of the Migration Act, dated 19 June 2020, when Mr MF had been detained for 3 years:

> In November 2019 and December 2019 IHMS psychiatrist mentioned that Mr [MF]'s mood symptoms and difficulty coping with his chronic pain were being exacerbated by being in detention.

65. Departmental records state that Mr MF threatened self-harm in September 2020, and followed through with this threat by cutting his left wrist with a phone charger, receiving superficial cuts that did not require any treatment.

66. On 21 February 2021, an IHMS mental health nurse administered the Kessler Psychological Distress Scale on Mr MF and obtained a score of 42 – indicating severe distress.

67. On 3 March 2021, an IHMS psychiatrist reported that Mr MF was suffering low mood as a result of uncontrolled pain and chronic detention. Mr MF was again given a score of 42 (severe distress) on the K10 Kessler Psychological Distress Scale. The psychiatrist noted:

> It appears that the current timing of medication rounds in detention centre ;is [sic] incompatible with optimal timing of medication to adequately control patient's severe, chronic pain.

68. On 28 April 2021, the IHMS psychiatrist further reported that Mr MF was suffering distress and low mood as a result of chronic pain, and complained particularly of the lack of access to strong pain relief during the night. I understand this to be as a result of the application of IHMS

policy which does not allow restricted medications to be provided via blister packs or takeaway doses, but must be administered by 2 nurses.[3] Immigration detention facilities do not have medical staff available 24 hours a day,[4] and so it was not possible for IHMS to administer Mr MF's pain relief overnight.

69. On 10 June 2021, a doctor at the Department of Pain Management at the Sir Charles Gairdner Hospital recommended that Mr MF commence weaning off the immediate release medications and move to slow release instead. Physiotherapy, hydrotherapy and weight loss were also recommended.

70. On 20 June 2021, Mr MF requested IHMS provide him with an orthopaedic mattress to better accommodate his back pain. He also requested the assistance of a carer to assist with mobility and personal care, alteration to his laundry and cleaning tasks, and access to a more accessible toilet and shower.

71. In a discharge summary dated 9 July 2021 from the Royal Perth Hospital, the following notes appear:

> - Discussed with dentention center [sic] for pain medication on discharge. Advised cannot facilitate prn schedule 8 meds after hours (2000 – 0800). Nil self PRN medication is allowed (likely risk to self/from others).
>
> - Complex interplay between his reported pain, and ongoing detention/immigration issues
>
> …
>
> - Patients [sic] management has been discussed with pain fellow from SCGH who knows the patient well. Suggested pain is largely psychogenic and pain medications should be weaned. He suggests that this should be completed in an inpatient setting with input from psychology and psychiatry.

72. On 23 August 2021, Mr MF was taken to the emergency department of the Royal Perth Hospital with respect to the same complaint (unable to take medication overnight). A medical officer on discharge provided a letter to the Perth IDC with the following notes:

> Discussed with detention facility re dispensing of PRN tramadol overnight.
>
> Advised it is essential that Mr [MF] has access to PRN analgesia, in particular PRN tramadol as prescribed, at all hours of day, including overnight.

Medical staff will take action to have this facilitated.

73. On 28 May 2022, Mr MF advised the Commission through his representative that he had contracted COVID-19, and that a surgery scheduled for 12 May 2022 had been cancelled accordingly.

74. Mental health records from IHMS show Mr MF's low mood and anxiety persisting throughout 2022 as he awaited further surgery and continued to suffer from chronic pain.

75. In a ministerial submission, it is noted that a psychiatrist had recorded that Mr MF had 'chronic low mood and intermittent thoughts of wanting to die', due to his back pain.

4 Legal framework

4.1 Functions of the Commission

76. 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.

77. 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.

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

4.2 Scope of 'act' and 'practice'

79. The terms 'act' and 'practice' are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.

80. 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.

81. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or those acting on its behalf.[5]

4.3 What is a human right?

82. The rights and freedoms recognised by the ICCPR are 'human rights' within the meaning of the AHRC Act.[6]

5 Arbitrary detention

5.1 Law on article 9 of the ICCPR

83. 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.

84. 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;[7]
- 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;[8]
- 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;[9] and
- detention should not continue beyond the period for which a State party can provide appropriate justification.[10]

85. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee (UN HR 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.[11] Similarly, the UN HR 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'.[12]

86. The UN HR 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.[13]

87. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the UN HR 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.[14]

88. 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'.[15]

89. It will be necessary to consider whether the detention of Mr MF 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

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

91. By way of regulation 2.25 of the Migration Regulations, the Department was able to grant a visa to Mr MF. While Mr MF was barred from making a valid application for a visa himself by operation of item 1305(3)(g) of Schedule 1 to the Migration Regulations, regulation 2.25 allows the Department to grant a Bridging E visa without an application.

> (1) This regulation applies to:
>
> (a) a non-citizen who is in criminal detention; or
>
> (b) a non-citizen who:
>
> (i) is unwilling or unable to make a valid application for a Bridging E (Class WE) visa; and
>
> (ii) is not barred from making a valid application for a Bridging E (Class WE) visa by a provision in the Act or these Regulations, other than in item 1305 of Schedule 1.

92. In assessing Mr MF for a Bridging E visa, the Department would have been required to consider his eligibility for the visa based on various grounds set out in clause 050.212 of Schedule 2 to the Migration Regulations.

93. In addition, 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.

94. Section 197AB of the Migration Act permits the Minister, where the Minister thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. The residence determination may be made subject to other conditions such as reporting requirements.

95. 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.

96. 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)*.[16]

97. The Minister also had the power pursuant to section 351 of the Migration Act to substitute a decision for the one made by the AAT on 17 March 2020, which affirmed the decision of the Department to refuse a Medical Treatment visa to Mr MF. Such substitution could have involved granting a visa to Mr MF, even in circumstances where the AAT did not have the power to do so. This power is discretionary and non-compellable.

98. I consider 2 acts of the Commonwealth as relevant to this inquiry:

- the failure of the Department to consider the grant of a Bridging E visa
- the failure of the Department to refer the case to the Minister in order for the Minister to assess whether to exercise the discretionary powers under sections 195A, 197AB or 351 of the Migration Act.

5.3 Assessment

(a) Failure of the Department to consider a Bridging E visa

99. Mr MF's initial detention occurred as a direct result of a criminal conviction for making a threat to kill and contravening a family violence intervention order. He was sentenced to 3 months imprisonment, and served that sentence in a custodial facility. Upon release, and as a result of being an unlawful non-citizen, he was detained pursuant to section 189(1) of the Migration Act.

100. It does not appear on the materials before me that Mr MF exercised any review right in relation to the cancellation of his Bridging E visa on 17 March 2017.

101. After that time, he became unable to make an application for a valid Bridging E visa, and he was liable to be detained.

102. I find that his initial period of detention was not arbitrary, because of the sequence of events outlined above. A brief period of administrative detention to allow the Department to regularise his status was likely warranted.

103. However, Mr MF did at that time have an application to the AAT pending, and that decision was not made until August 2017. Options for judicial review existed after that time, which Mr MF utilised. The Department should have been aware that removal of Mr MF would not occur in the short term.

104. On 24 June 2019, the Department referred Mr MF to Western Australian Community Status Resolution (WACSR) for consideration of the grant of a Bridging E visa pursuant to regulation 2.25 of the Migration Regulations. An email chain, which was heavily redacted, was provided to the Commission in evidence of the events relevant to this request.

105. From the email chain, I can see that Mr MF was referred to WACSR because Mr MF's criminal matters were finalised with 'a fairly short sentence of 3 months' and because he had made an application for special leave to the High Court with respect to his Partner visa refusal.

106. The email chain between 24 June and 19 July seems focused on whether Mr MF could be progressed for involuntary removal. On 19 July 2019, a question is asked, 'Can you wait until High Court decide whether they will accept this case. They have a high bar.'

107. On 22 July 2019, a further email is sent indicating 'WACSR will no longer be progressing this case for a possible reg 2.25 grant as per [redacted] recommendation'.

108. On 5 November 2020, Mr MF was considered by the Department for grant of a Bridging E visa. Two emails were provided to the Commission recording the reasons why the Department did not consider Mr MF for the grant of a visa on this occasion. The first, dated 4 November 2020, indicates that Mr MF should not be referred at all, 'due to the nature of his criminality. Domestic violence or family violence in the criminality is the reason he doesn't meet the criteria.'

109. The second email sets out the Department's policy about considering a Bridging E visa following a visa cancellation pursuant to regulation 2.43(1)(p) or (q), which relate to the laying of criminal charges against bridging visa holders:

> Policy would generally support the grant of a BVE using reg 2.25 if there had been a change of circumstances such that community placement, while their on-going immigration matters are resolved, is the preferable status resolution outcome. Such changes in circumstances could include situations where:
>
> - The charges have subsequently been dropped or successfully contested at court; or
> - The charges have resulted in a conviction but no custodial sentence was imposed; or

- The charges have resulted in a conviction with the imposition of a short custodial sentence, and which has been served, without further incident; or
- The Minister has subsequently intervened under s 195A to grant a BVE.

> In Mr [MF]'s case, while he did receive a relatively short custodial sentence, the nature of the offending is serious and in relation to family violence…. As a result I am of the opinion that he does not fall within the policy position to consider grant without application. I have also turned my mind to whether a delegate would be satisfied Mr [MF] would abide by conditions… As Mr [MF] has breached a family violence order and has a history of repeat offending, it would be difficult for the delegate to be satisfied he meets condition 8564. Mr [MF] has no intention of returning to Fiji therefore the delegate may also not be satisfied that he will comply with voluntary departure conditions.

110. Again on 18 March 2021, the Department considered Mr MF under regulation 2.25. Instead of a decision record, the reasoning applied by the Department at this time was recorded in their system akin to a file note. The systems excerpt provided by the Department identifies the following basis for not progressing the consideration of the grant of a visa:

> Due to the nature of Mr [MF]'s criminal convictions which involve 2 x threats to kill, 5 x contravene family violence order/persist family violence order, 2 x commit indictable bail and 2 x unlawful assault, and in line with the expectations laid out by the Minister in Direction 90, WACSR are not minded to consider Mr [MF] under reg 2.25 at this time.

111. I note that Mr MF may have met grounds of eligibility for a Bridging E visa as set out in clause 050.212 of schedule 2 to the Migration Regulations during periods of time that he was in held and community detention. These include:

- from 15 June 2017 to 24 August 2017, while he was pursuing merits review at the AAT of the refusal of his Partner visa (050.212(3))
- from 28 September 2017 to 11 September 2019, while he was seeking judicial review of the decision of the AAT with respect to his refused Partner visa application (050.212(3A))
- from 4 November 2019 to 17 March 2020, while he had made a valid application for a Medical Treatment visa, being a kind of visa that could have been granted while he was in Australia, and the associated merits review to the AAT (050.212(3))
- from 19 March 2020 to 18 June 2020, while he was subject of a decision for which the Minister had the power to substitute a more

favourable decision, and he (or rather the AAT, see discussion at paragraph 128) had made such a request (050.212(6))

- from 15 February 2022 to present, while he had made a valid application for a Protection visa, including the associated merits review to the AAT (050.212(3)).

112. I make this observation, not to pre-empt the decision which ultimately may have been made by the Department, had they decided to consider Mr MF for the grant of a Bridging E visa, but rather to demonstrate that for the majority of his time in both held and community detention, he could be considered as meeting one of the grounds for a positive decision, and still does at the time of this notice.

113. It is also relevant to my assessment of Mr MF's complaint that he could not be removed from Australia during those dates.

114. The reason for not considering Mr MF for a Bridging E visa in July 2019, namely that the High Court might refuse special leave, does not in my view hold sufficient weight for the Department to refuse to consider him. The Department also does not disclose any basis for failing to consider him at all during the 2 years prior, while he was pursuing merits review at the AAT.

115. The consideration of Mr MF on 5 November 2020 does demonstrate the Department grappling with the discretion conferred upon it by regulation 2.25, and reaching a conclusion that, in my view, is not an unreasonable one. However, on reaching that conclusion, the Department should have identified that, with Mr MF's detention having become prolonged, a referral to the Minister should have taken place instead. This did not occur, which is the subject of my consideration and recommendation below.

116. Finally, the Department's assessment in March 2021 refers to Direction No. 90 – a direction relating to decisions to refuse or cancel visas on character grounds. It would seem that the officer who conducted the assessment on that occasion pre-empted a decision which would ordinarily have been made by the Visa Applicant Character Consideration Unit (VACCU). Had Mr MF been considered for a Bridging E visa, and had his case been referred to VACCU, a far more nuanced assessment of the factors for and against refusal would have taken place than is demonstrated in this systems excerpt.

117. In response to my preliminary view, the Department stated:

The Department does not accept the preliminary view of the Commission that there was a failure of the department to consider Mr [MF] for the grant of a Bridging E visa (BVE) during those two periods. Mr [MF]'s BVE was cancelled on 17 March 2017 under section 116(1)(g) of the *Migration Act 1958* (the Act), relying on the provision in regulation 2.43(1)(p)(ii). This regulation relates to Ministerial Direction 63 regarding BVE holders who have been charged with a criminal offence, have been convicted of a criminal offence or who have breached their visa conditions. …

While there is a discretion to grant a BVE to a person who is unable to meet the validity requirements of a BVE, by using regulation 2.25, as a matter of policy this is used in limited circumstances. In the context of a previous visa cancellation on the basis of regulation 2.43(1)(p) or (q), the grant of a BVE using regulation 2.25 could be considered if there has been a change of circumstances such that community placement of the non-citizen, while their ongoing immigration matters are resolved or they organise their departure from Australia, is the preferable status resolution outcome.

If there has been no change in circumstance, the next BVE grant will similarly be subject to Direction 63 and there needs to be a clear basis to differentiate why (i) cancellation was initially appropriate but (ii) cancellation is no longer appropriate.

This could include situations where:

- The charges have subsequently been dropped or successfully contested at court, or
- The charges have resulted in a conviction but no custodial sentence was imposed, or
- The charges have resulted in a conviction with the imposition of a short custodial sentence, and which has been served, without further incident, or
- The Minister has subsequently intervened under s195A to grant a BVE.

As Mr [MF] was convicted on 10 May 2017 of further offences of making a threat to kill, contravening a family violence intervention order, and committing an indictable offence of making a threat to kill, the abovementioned change in circumstances was not applicable.

118. This response is incorrect in suggesting that the convictions against Mr MF on 10 May 2017 were additional to those which led to the cancellation of his Bridging E visa in March 2017. On the basis of the information previously provided by the Department to the Commission, Mr MF's convictions on 10 May 2017 were for the same charges laid on 16 March 2017, and which led to the cancellation of his visa on 17 March 2017.

Previous convictions had led to the cancellation of Mr MF's Bridging A visa on 21 September 2016.

119. Accordingly, the third scenario listed in the Department's response to my preliminary view would apply to Mr MF's situation. He received a sentence of 3 months which was served without further incident.

120. Furthermore, Direction No 63 does not in any way refer to the discretion to consider a person for the grant of a Bridging E visa – only the decision to cancel one.

121. Accordingly, the Department's response does not alter my view with respect to their discretion to consider Mr MF for the grant of a Bridging E visa.

122. For the reasons above, I find that the following acts of the Department resulted in Mr MF's detention becoming arbitrary, contrary to article 9 of the ICCPR:

- the failure of the Department to consider Mr MF for the grant of a Bridging E visa prior to 5 November 2020
- the failure of the Department to consider Mr MF for the grant of a Bridging E visa from March 2021 to 9 December 2022.

(b) Failure of the Department to refer to the Minister

123. At the time of the Department's response to the Commission of September 2020, the Department stated with respect to possible intervention by the Minister to release Mr MF from held detention:

> The Department notes generally, cases will not be referred to a Minister for consideration under section 195A or 197AB of the Act where an individual can be granted a visa by a departmental delegate.

124. As can be seen from my analysis of the Department's discretion to grant a Bridging E visa pursuant to regulation 2.25, this rationale left Mr MF in a cycle where the Department did not consider granting him a visa, but also did not refer him to the Minister for consideration.

125. The guidelines on the Minister's residence determination power, issued 10 October 2017, do not say that a person able to be granted a visa by a delegate should not be referred to the Minister. Cases to be referred to the Minister according to the guidelines include:

single adults if they have any of the following circumstances:

- disabilities or congenital illnesses requiring ongoing intervention …
- ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention; …[17]

126. The first time that Mr MF was considered for referral to the Minister was not for consideration under the section 195A or section 197AB guidelines, but rather under section 351 of the Migration Act. This section allows the Minister to substitute a decision in an applicant's favour for the one decided by the Tribunal, when the Minister considers it to be in the public interest to do so.

127. The *Minister's guidelines on ministerial powers (s351, s417 and s501J)* include as an example of unique or exceptional circumstances warranting referral to the Minister:

- compassionate circumstances regarding the age and/or health and/or psychological state of the person that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to the person.[18]

128. On 17 March 2020, the AAT affirmed the decision of the Department to refuse Mr MF's application for a Medical Treatment visa. It elected, however, to make a referral of Mr MF's case to the Minister for consideration. It did so in line with the President's Direction on *Conducting Migration and Refugee Reviews* of 1 August 2018.[19]

129. The transcript of the AAT member's oral reasons show the following exchange between the member and Mr MF's representative:

> MEMBER: Now I'm satisfied that your client does need the surgery for the condition, and I am satisfied that the surgery and that treatment requires a specialist degree of knowledge and experience. So what I intend doing is refer this matter to the Department for consideration of ministerial intervention.
>
> [REDACTED]: Thank you, Member. I think that will be very helpful.
>
> MEMBER: Obviously that's a discretion for the Minister. I can't say to you or your client the success or likely success of that, but I am satisfied that there are good reasons to refer it for consideration.

130. As a result of this referral, on 19 March 2020 the Department initiated an assessment against the *Minister's guidelines on ministerial powers (s351, s417 and s501J)*.[20] On 17 June 2020, the Department assessed Mr MF as not meeting the guidelines for referral to the Minister.

131. In the Department's schedule containing their assessment of Mr MF against the guidelines it is stated:

> The Department acknowledges the reasons for referring the case however, considers that although he has medical concerns following an injury while in detention, neurosurgery, physiotherapy, pain management and mental health support is available in Fiji, and he is fit to travel. It is also noted he has his next appointment with [redacted], his treating surgeon, on 7 September 2020. The Department considers given current restrictions on international travel/movements, there may be delay in any potential return to Fiji thus allowing for his treatment/surgery.

132. With respect to his health, the Department reports:

> In December 2017, Mr [MF] had a fall on Christmas Island, exacerbating his pain for which he required laminectomy and discectomy surgery in July 2018. He was reviewed by a neurosurgeon in August 2019 for ongoing bilateral leg and lower back pain, where he received an epidural injection for pain management and was referred for a pain specialist review. A neurosurgical review is outstanding, as he was booked initially for June 2020, however, this has been postponed due to the COVID-19 pandemic until September 2020.
>
> Mr [MF] has been attending physiotherapy sessions which have reportedly maintained pain levels, mobility and strength, with the ongoing aim to prevent him becoming wheel chair bound. Mr [MF] has further bookings throughout May and June 2020. Electrotherapy and heat therapy have been utilised for pain relief as well as prescribed analgesia as advised by the pain specialist. Mr [MF] is currently ambulant with one elbow crutch, though range of movement is limited and he continues to have back and leg pain.
>
> Mr [MF] is receiving medication for depressive symptoms relating to his chronic pain and poor sleep, prescribed by the IHMS psychiatrist. He denied any thoughts of self-harm or suicide when last reviewed by the psychiatrist in March 2020, and reported that the medication has been beneficial for his sleep issues and depressive symptoms. Mr [MF] will need ongoing medical management for these conditions.

133. Regarding his relationship status, the schedule states:

> Mr [MF] is noted to have been living with [redacted] in Melbourne with whom he claimed to be in a de-facto relationship, prior to being remanded and later paced [sic] in immigration detention. On 25 June 2019 he advised his case manager that he was no longer in a relationship with [redacted] and that they remained friends.

134. In conclusion, the Department assessed Mr MF as having no unique or exceptional circumstances, and did not refer the case to the Minister. This

decision must now be viewed in light of the High Court's assessment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs*,[21] that the Ministerial Instructions used by the Department 'purported to entrust the dispositive evaluation of the public interest to departmental officers', and that the Department's decision may have 'exceeded the statutory limit on executive power imposed by s 351(3)'.[22]

135. The Department accepted, in response to my preliminary view, that the decision not to refer Mr MF to the Minister was made in excess of the executive power of the Commonwealth. In addition, they stated:

> The Minister is currently considering the implications of *Davis* on requests for him to exercise his personal intervention powers, including in relation to requests that have already been made. Further information about the Department's approach will be made available in due course.

136. On 9 March 2021, a systems excerpt provided by the Department records the following note:

> At this time [Mr MF] will not be referred for MI consideration on the basis he is able to be granted by a delegate without application under reg 2.25. Mr [MF] is in the process of lodging a Medical Treatment visa application and will be assessed for a BVE.

137. The follow up action from this note, as recorded above at paragraph 110, was that Mr MF was not considered for the grant of a Bridging E visa by WACSR on the basis of his criminal convictions.

138. On 4 August 2021, the Department assessed Mr MF's case against the section 195A and 197AB guidelines, and found that he did not meet the criteria for referral.

139. The assessment identifies no health conditions relevant to either set of guidelines. The recommendation of the officer completing the assessment states:

> In balancing Mr [MF]'s guidelines assessment, I have considered a number of factors including; Mr [MF]'s finally determined immigration status; potential for ongoing and continued detention; his physical and mental health status; family ties in Australia and potential removal barriers.
>
> Furthermore, I have also considered Mr [MF]'s current CPAT which records he is of high risk of harm to the community should he be released from immigration detention, however, recommends a *Tier 1 – Bridging visa* with conditions substituted placement.

> In light of the fact that Mr [MF] has no significant health issues which cannot be managed in a secure immigration detention facility and no compelling or compassionate circumstances that outweigh his criminality. On balance, I find his case does not meet the guidelines for referral to the Minister under sections 195A or 197AB of the Act on this occasion.

140. On 22 December 2021, Mr MF was included on a list of complex intractable health cases from the Chief Medical Officer Branch in the Health Services Division. Based on this referral, another guidelines assessment was conducted, and completed on 22 February 2022.

141. In it, the Department assesses that Mr MF has health needs that cannot be properly cared for in a detention facility. This is based on an IHMS health summary report dated 11 January 2022 to the same effect. It also identifies that:

> In August 2021, the IHMS specialised complex care placements manager sent a referral to ABF for Mr [MF] to be considered for a long-term alternative place of residence. Mr [MF]'s problems are long-standing and there is no evidence from his history that any specific treatments, including surgery, have dramatically improved or can dramatically improve his chronic health conditions. Mr [MF]'s issues are not short-term and are likely to impact on his care and accommodation needs long-term.

142. A balance is struck in the document between Mr MF's criminal history and his complex health needs. Ultimately, the Department considered it appropriate to refer Mr MF under section 197AB (for a residence determination), but not section 195A (for a bridging visa).

143. It took the Department until 6 November 2022 to refer the first stage submission to the Minister for him to indicate whether he would be willing to consider Mr MF for a residence determination. No explanation has been provided as to why it took 9 months for that submission to be prepared and referred, and in light of the advice received from IHMS, I have included that delay in my assessment of whether Mr MF's detention may be considered 'arbitrary'.

144. The Department relied on section 189 of the Migration Act in its response to my preliminary view, and the fact that Mr MF was an unlawful non-citizen who was required to be detained. It informed the Commission that while the Minister has the power to grant a visa to a person in detention, that power is non-compellable and to be determined by the Minister in the public interest. With respect to my view that the Department had failed to

refer Mr MF's case in circumstances where there were grounds to do so, the Department stated:

> It is not a legal requirement that a detention case be considered for Ministerial Intervention, or be referred to the Minister for consideration of their powers. There are no requirements that a case should be referred to the Minister within a certain timeframe or at regular intervals.

145. Detention that is lawful may still be arbitrary where available alternatives have not been properly considered. Mr MF's health needs and the prolonged nature of his detention warranted the Department referring him to the Minister for consideration of an alternative to held detention sooner than they did.

146. I find, therefore, that the Department's failure to refer Mr MF to the Minister for consideration, either to substitute a more favourable decision for that of the AAT, or for an alternative to closed detention before 6 November 2022, resulted in Mr MF's prolonged detention being arbitrary, contrary to article 9(1) of the ICCPR.

(c) Hotel APODs

147. I note that for close to one year of Mr MF's detention (between 28 August 2021 and 8 August 2022), excluding time spent in hospital, Mr MF was detained in two hotels in Perth designated as APODs.

148. Immigration detention is defined within section 5 of the Migration Act as including:

> (b) being held by, or on behalf of, an officer:
>
> (i) in a detention centre established under this Act; or
>
> (ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or
>
> (iii) in a police station or watch house; or
>
> (iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel – on that vessel; or
>
> (v) in another place approved by the Minister in writing;

149. An APOD falls within the last of these limbs – a place approved by the Minister in writing.

150. Despite Mr MF not being detained in an immigration detention centre during that period of time, the hotels in which he was detained are still

considered held detention. A person detained in an APOD is confined to their place of detention other than for escorted appointments, in the same way as in an immigration detention centre.

151. The Commission has recently published the report, *The Use of Hotels as Alternative Places of Detention.*[23] In it, the Commission repeats the view that lengthy periods of detention in hotel APODs is not appropriate, and that their use should be confined to exceptional circumstances and for the shortest time possible.[24]

152. While not the subject of a specific complaint or finding, for this reason I have included the period of time Mr MF spent in hotel APODs in my findings with respect to the Department's acts outlined above.

(d) Community detention

153. From 9 December 2022, Mr MF has been in community detention. On 3 March 2023, he advised the Commission that his arbitrary detention complaint was also against the decision to keep him in community detention, because he was still 'detained' and wished to be released.

154. Mr MF did not specify what it was about his community detention he considered to be in breach of his human rights. The Department provided to the Commission a copy of the residence determination made in Mr MF's favour, which identifies that he must live at a particular address. Mr MF is free to come and go from that address, subject to a series of conditions. These conditions include the requirement for Mr MF to obey all State and Commonwealth laws, not to cause property damage, to comply with reasonable directions and rules imposed by the Department, not to work or study, to comply with instructions and requests from the Department with respect to resolving his immigration status, and report to the Department at times specified in writing. No specific reporting requirements are included in the residence determination.

155. Community detention, while still 'detention' according to the Migration Act, is a positive alternative to held detention that is included among the recommendations made by the Commission for unlawful non-citizens. In the Commission's report, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'*, issues with long-term placements in community detention were raised, and the Commission recommended that people in long-term community detention have their placements reviewed.[25] However, it concluded that as a community-based option, it was preferable to closed detention, as long as basic needs are met.[26]

156. While in community detention, Mr MF continued to receive medical care under the Department's contract with IHMS. This may have given him a higher level of care than would otherwise have been provided to him if he was on a Bridging E visa. On 21 March 2023, in response to questions posed to Mr MF by the Commission, he stated that he was seeing a psychologist every 2 weeks, and he went to remedial massage, physiotherapy and hydro pool therapy appointments weekly. He confirmed that he retained a 24/7 carer, and was visited 8 times per day by a nurse for administration of medication. This information tends to confirm that community detention was, and continues to be, better than other alternatives available to the Minister and Department.

157. In light of the fact that the Minister did approve an alternative to held detention for Mr MF, and in the absence of any particular factor which he says infringes on his human rights, I do not consider that Mr MF was arbitrarily detained after 9 December 2022, nor that any other of the human rights complaints raised by him relates to his detention from that date.

6 Inhuman treatment

6.1 Law on articles 7 and 10 of the ICCPR

158. Article 7 of the ICCPR states:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

159. Article 10(1) of the ICCPR states:

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

160. In *C v Australia*,[27] the UN HR Committee found that the continued detention of C when the State party was aware of the deterioration of C's mental health constituted a breach of article 7 of the ICCPR. The UN HR Committee stated:

> the State party was aware, at least from August 1992 when he was prescribed the use of tranquilisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt) it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he

> remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow.[28]

161. More recently, in *F.K.A.G. v Australia* and *M.M.M. v Australia*, the UN HR Committee expressly considered claims of violations of article 7 of the ICCPR by a number of asylum seekers detained in Australia as a result of receiving adverse security assessments, who, in consequence, suffered psychological harm. The UN HR Committee stated:

> the combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.[29]

162. The relevant question for the purposes of article 7 of the ICCPR is whether the complainant's detention caused a level of psychological harm such that it amounted to cruel, inhuman or degrading treatment or punishment.

163. The UN HR Committee has provided the following general comments regarding the acts prohibited by article 7:

> The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual.[30]
>
> The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.[31]
>
> The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers.[32]

164. All people, including those held in immigration detention centres,[33] whether that facility is operated privately or by a State,[34] have the right to be treated with humanity and respect for the inherent dignity of the human person pursuant to article 10(1) of the ICCPR. Article 10(1) requires Australia to ensure that people held in immigration detention are treated fairly and reasonably, and in a manner that upholds their dignity.

165. Australia's common law imposes similar obligations on immigration detention centre owners and operators, and the Department and its service providers legally owe a 'duty of care' to people held in immigration detention.

166. With reference to article 10(1) of the ICCPR, the UN HR Committee stated in General Comment 21 that:

> Article 10(1) imposes on State parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the [ICCPR]. Thus, not only may persons deprived of their liberty not be subjected to treatment which is contrary to article 7 … but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons.[35]

167. The UN HR Committee's comment recognises that detained persons are particularly vulnerable. This vulnerability arises because detained persons are wholly reliant on the authority responsible for their detention, or that authority's service providers, to provide for their basic needs,[36] and that provision is central to their humanity and dignity. This, together with the positive obligation imposed by article 10(1), has been echoed in the UN HR Committee's jurisprudence,[37] and by internationally recognised human rights lawyer Professor Manfred Nowak, who stated:

> In contrast to article 7, article 10 relates only to the treatment of persons who have been deprived of their liberty. Whereas article 7 primarily is directed at specific, usually violent attacks on personal integrity, article 10 relates more to the general state of a detention facility or some other closed institution and to the specific conditions of detention. As a result, article 10 primarily imposes on States parties a positive obligation to ensure human dignity. Regardless of economic difficulties, the State must establish a minimum standard for humane conditions of detention (requirement of humane treatment). In other words, it must provide detainees and prisoners with a minimum of services to satisfy their basic needs and human rights (food, clothing, medical care, sanitary facilities, education, work, recreation, communication, light, opportunity to move about, privacy, etc). … Finally it is again stressed that the requirement of humane treatment pursuant to article 10 goes beyond the mere prohibition of inhuman treatment under article 7 with regard to the extent of the necessary 'respect for the inherent dignity of the human person'.[38]

6.2 Act or practice of the Commonwealth

168. Mr MF has filed a writ of summons in the Western Australian District Court against Serco alleging negligence with respect to the events of December 2017 which caused his injuries.

169. I do not understand his human rights complaint against the Department to extend to the conditions of detention which led to that incident itself.

Rather, his complaint is that, in the circumstances whereby Mr MF had suffered a very serious injury while in detention, the continuation of that detention, and the difficulties that being detained presented for him and his medical treatment, aggravated the harm for him.

170. On that basis, I will consider whether the continued placement of Mr MF in held detention from his fall on 17 December 2017 until his release into community detention on 9 December 2022 amounted to cruel, inhuman or degrading treatment contrary to article 7 of the ICCPR, or whether the conditions of his detention deprived him of his dignity contrary to article 10.

171. As outlined above, this assessment will only cover the period of time in which Mr MF was in held detention, as I am of the view that the placement of Mr MF in community detention after 9 December 2022 does not amount to a contravention of article 7 or 10 of the ICCPR.

172. The acts or practices of the Commonwealth outlined in section 5.2 are therefore the same acts or practices considered in this section against articles 7 and 10 of the ICCPR.

6.3 Assessment

173. In response to communication from the Commission enquiring into the Department's position regarding Mr MF's complaint, the Department responded on 6 August 2021 with the following:

> The access to general and specialist medical care by Mr [MF] has been comprehensive. Since his fall on 17 December 2017, Mr [MF] has received extensive primary, specialist, mental, and allied health reviews, as well as multiple investigations and treatments, with regard to his chronic back pain; including CT and MRI scans, epidural injections, two spinal surgeries, extensive rehabilitation physiotherapy, pain management, nurse assistance with exercise treatment plans, and mental health support. Mr [MF]'s treatment has been managed by Mr [MF]'s IHMS GPs, in consultation with his treating neurosurgery and pain medicine specialists, and as per his IHMS care plans.
>
> Since his fall in 17 December 2017, Mr [MF] has attended 150 appointments with IHMS GPs, 90 physiotherapy sessions (in addition to intensive inpatient physiotherapy at the Osbourne Park hospital rehabilitation unit in July 2018) and 11 appointments with IHMS psychiatrists.
>
> While IHMS acknowledges Mr [MF]'s frustration at perceived delays in treatment, his external specialist and allied health care appointments have

been scheduled by the respective service providers in line with the Australian public healthcare system wait list regime.

...

During reviews with IHMS psychiatrists, it has been noted that Mr [MF]'s mental health has been impacted by his chronic pain condition, resulting in poor sleep, low mood and depressive symptoms, and by his ongoing detention. During his most recent review with the IHMS psychiatrist on 28 April 2021 it was noted that his '*sleep and mood are unlikely to improve until his pain is better controlled'.*

174. As identified by the Commission in the delegate's decision to decline to inquire into the second, fifth and sixth issues raised by Mr MF, the Commission lacks the particular expertise to properly review Mr MF's medical records and make any findings about his condition or treatment received. However, on the basis of the materials before me, I am satisfied of the following facts:

- Mr MF experienced pain following the fall incident
- he was prescribed strong pain relief to manage that pain
- it was not possible for him to be administered pain relief overnight
- as a consequence of his pain and injuries, he underwent 3 surgeries which did not alleviate his chronic pain
- the sedentary nature of detention was disadvantageous to his recovery and rehabilitation
- Mr MF's ongoing detention in the circumstances of his chronic pain was injurious to his mental health.

175. These factors were known to the Department, and had been included in records made by IHMS and external providers which were held by it, such as those outlined at paragraphs 64, 67, 71 and 75, above.

176. These facts are not considered as separate complaints but rather as factors which are relevant to my view as to whether or not the continued detention of Mr MF after the fall incident amounted to cruel, inhuman or degrading treatment, or deprived him of his dignity.

177. The UN HR Committee has not provided exhaustive definitions of what conditions amount to breaches of both articles 7 and 10 of the ICCPR. I am guided by previous decisions of the UN HR Committee as outlined above, and previous decisions of the Commission including *CR and CS v Commonwealth of Australia (DIBP).*[39]

178. The United Nations Human Rights Committee has found article 7 breaches to occur where a detainee has developed a severe psychiatric illness as a result of protracted immigration detention,[40] and where detainees' protracted detention and difficult conditions of detention inflicted serious psychological harm.[41]

179. The information before me indicates that Mr MF's physical and mental conditions were worsened as a direct result of his being in held detention, in combination with the arbitrary and prolonged nature of that detention. In my view, Mr MF suffered serious harm as a result of his detention. The Department had been informed by its medical provider, IHMS, that by August 2021, Mr MF's needs could not be met in a closed detention environment, and recommended him for a community placement.

180. The Department instead placed Mr MF into hotel APODs from the end of August 2021 for close to 12 months, excluding the time spent in hospital. Following that, Mr MF was again returned to the Perth IDC for another 4 months.

181. The Department waited until November 2022 to refer Mr MF to the Minister.

182. In response to my preliminary view, the Department stated:

> The Department is committed to the health and welfare of all detainees within the Immigration Detention Network and recognise the possible impact of immigration detention on detainee's mental health and the risks of deteriorating mental health where extended periods of detention apply, noting it has been open to Mr [MF] to end his detention at any time by voluntarily departing Australia.
>
> The Department maintains its position, as provided in its response to the Commission of 6 August 2021, that the general and specialist medical care Mr [MF] was provided whilst in held immigration detention was been [sic] extensive and in line with his (health) care plan. Further, Mr [MF]'s detention placement has at all times been appropriate and informed by a thorough assessment of risk and Mr [MF]'s personal circumstances.

183. I have outlined above at paragraph 111 the periods of time in which Mr MF either had active visa applications on foot, or was pursuing merits review or ministerial intervention. During those times, Mr MF should not have been expected to depart from Australia in order to avoid what would otherwise be arbitrary detention. This response also fails to recognise the fact that international travel restrictions prohibited Mr MF's departure from Australia from March 2020. Ultimately, the AAT found in Mr MF's

favour that he is owed complementary protection obligations. The Department, and the Commonwealth more generally, have acknowledged that (despite section 197C(3)(c)(iii) of the Migration Act) people should not be expected to return to countries where they have a well-founded fear of persecution or serious harm.[42]

184. Based on all the information before me, I find that the Department's failure to refer Mr MF's case to the Minister prior to November 2022, either to substitute a more favourable decision for that of the AAT, or to consider alternatives to detention, resulted in the prolonged detention of Mr MF that inflicted serious harm and amounted to cruel, inhuman or degrading treatment within the meaning of article 7 of the ICCPR.

185. The Department did not accept my preliminary view in this respect, relying on the same response provided above with respect to the arbitrary detention complaint.

186. The focus of Mr MF's article 10 complaint is on the actual conditions of the detention in which Mr MF found himself. I am of the view that the Department did make every attempt to ensure that Mr MF was able to access modifications (such as a wheelchair or crutches) as needed, and provided with him appointments with specialist medical practitioners. They also provided him with a 24/7 carer. As I have already formed a view that his detention itself (as opposed to any particular conditions of his detention) may have been contrary to article 7, it is unnecessary for me to consider that complaint under article 10.

187. Within the scope of the complaints accepted by the Commission for this inquiry, on the basis of the materials before me, I have not been satisfied as to a breach of article 10.

7 Interference with family

188. The fourth issue raised by Mr MF is that his placement in Western Australia arbitrarily separated him from his family. At the time of his placement, Mr MF states that he had a de facto partner in Melbourne. Mr MF also had a sister in Sydney, but did not reside with her prior to his detention.

189. This complaint raises the question of whether the Commonwealth has engaged in acts which are inconsistent with or contrary to Mr MF's rights under articles 17 and 23 of the ICCPR.

7.1 Law on arbitrary interference

190. 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.

191. 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.

192. To make out a breach of article 17 of the ICCPR, complainants must be identifiable as a 'family'.

193. In its General Comment 16, the UN HR Committee states:

> Regarding the term 'family', the objectives of the Covenant require that for the purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.

194. The UN HR Committee has confirmed that, while the term 'family' is to be interpreted broadly,[43] an effective family life or family connection must still be shown to exist.[44] More than a formal familial relationship (ie father/son) is required to demonstrate a family for the purposes of article 17(1). For example, in *Balaguer Santacana v Spain*, after acknowledging that the term 'family' must be interpreted broadly, the UN HR Committee went on to say that 'some minimal requirements for the existence of a family are however necessary, such as life together, economic ties, a regular and intense relationship, etc'.[45]

195. Mr MF has informed the Commission that he was in a de facto relationship with a woman in Melbourne; that the relationship commenced on 2 October 2016 and it ceased on 20 November 2020 as a result of his detention.

196. The Department materials confirm that Mr MF stated that he was in a relationship at the time that he was detained in 2017.

197. However, on request, Mr MF did not provide to the Commission any further information in support of his complaint of arbitrary interference with family. I do not have sufficient evidence before me to substantiate Mr MF's claim that he was in a de facto relationship, nor that it was his

detention that caused its cessation. No evidence from the woman identified by Mr MF regarding the impact on her of Mr MF's detention was provided with the complaint.

198. Mr MF's initial detention occurred as a direct result of a criminal conviction for making threat to kill and contravening a family violence intervention order made against Mr MF's former spouse. He was sentenced to 3 months imprisonment, and served that sentence in a custodial facility commencing on 10 May 2017. Upon release, and as a result of being an unlawful non-citizen, he was detained pursuant to section 189(1) of the Migration Act.

199. At most therefore, Mr MF may have resided with the woman he identified for up to 5 months before he was imprisoned.

200. In the absence of sufficient evidence of a de facto relationship or evidence of ties as described in paragraph 194 above, Mr MF has not substantiated his complaint of arbitrary interference with his family with respect to this relationship.

201. While not specifically mentioned by Mr MF in his initial complaint to the Commission, at various points on the material before me, his relationship to his sister who resided in Sydney is also mentioned.

202. In March 2020 a guidelines assessment was conducted by the Department for consideration against a possible referral to the Minister pursuant to section 351 of the Migration Act. This assessment specifically considered the Australian Government's obligations under the ICCPR with respect to arbitrary interference with the family. It is useful to set out that consideration in full:

> Australia has obligations under the ICCPR to not arbitrarily interfere with the family. The Covenant does not provide a person with absolute rights to enter or remain in a country of which they are not a national. State Parties to the Covenant may lawfully require non-citizens within their territory to leave.
>
> Interference with family unit is permissible where it is not arbitrary and where it is lawful at domestic law.
>
> In this context, 'arbitrary' means that any interference with family must have a legitimate purpose within the framework of the ICCPR in its entirety (which includes reasons of public order, national security, public health or morals or the rights and freedoms of others). Such an interference must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

> The appropriateness of measures to maintain family unity can be balanced against other rights and interests, including the integrity of the migration program and the protection of the Australian community.
>
> Mr [MF] has failed to obtain a permanent visa in Australia and his immigration matters have been affirmed at merits review and through the Courts. The expectation that he depart Australia is the lawful and predictable outcome of the application of domestic laws. This does not represent a breach of the relevant obligations and is not an arbitrary interference with the family unit.
>
> While his departure may lead to separation from his sister and his family, there is no evidence of any reliance on him by his sister or that his departure would have a significant detrimental impact on his Australian family members. There is no indication the family could not maintain contact through visits or other means like many families separated by their migration choices, or that his family are unable to visit him in Fiji.

203. Mr MF did not reside with his sister at the time of his detention and I do not understand him to have resided with her at any time while in Australia. I accept that she has generally been supportive of him throughout his visa and intervention requests, but I am not satisfied that this relationship gave rise to sufficient family connection such that any interference with it was in breach of articles 17 and 23.

204. If I am wrong about that, then in any event, I do not find that there was interference as a result of his detention, given Mr MF already resided in a different state to his sister at the time of his detention.

8 Recommendations

205. 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.[46] The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.[47] The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.[48]

8.1 Compensation

206. I consider that it is appropriate to make a recommendation for the payment of compensation to Mr MF, in order to reduce the loss and damage suffered by him as a result of the cruel, inhuman and/or

degrading treatment he received while in held detention, contrary to article 7 of the ICCPR. Such recommendations for compensation are expressly contemplated in the AHRC Act.[49] This recommendation takes into account the gravity of continuing to detain Mr MF despite his injuries and chronic pain which gave rise to findings of a more serious nature than inquiries conducted by the Commission into arbitrary detention alone.

207. While the loss and damage suffered by Mr MF will not be able to be fully addressed by the payment of money, I consider that it is important that he be provided compensation to acknowledge the impact that the treatment by the Commonwealth has had on him.

208. 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.[50] 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.[51]

209. The Commission has set out in other inquiries the jurisdictional basis for the Commission to make recommendations for the payment of compensation and the available administrative avenues for the payment of such compensation by the Commonwealth.[52] I do not repeat those matters again here.

210. As I am not aware of the outcome of the civil proceedings initiated by Mr MF in the Western Australian District Court, any compensation paid to Mr MF should take into account the amount that he may receive in that cause of action (if any).

Recommendation 1

The Commission recommends that the Commonwealth pay to Mr MF an appropriate amount of compensation to reflect the loss and damage he has suffered as a result of the breaches of his human rights under article 7 of the ICCPR identified in the course of this inquiry.

8.2 Regulation 2.25

211. Mr MF's detention could have been ended by the grant of a Bridging E visa through the application of regulation 2.25 of the Migration Regulations. It is not within the scope of the Commission's inquiry powers to conclude that a visa should have been granted – merely that, as a discretionary 'act'

available to the Department, the failure to consider doing so contributed to Mr MF's detention becoming arbitrary.

212. It would have been helpful to the Commission to have access to the Department's policy on how regulation 2.25 is applied. The Department twice referred the Commission to policy in the following terms:

> Policy would generally support the grant of a BVE using reg 2.25 if there had been a change of circumstances such that community placement, while their on-going immigration matters are resolved, is the preferable status resolution outcome. Such changes in circumstances could include situations where:
>
> - The charges have subsequently been dropped or successfully contested at court; or
> - The charges have resulted in a conviction but no custodial sentence was imposed; or
> - The charges have resulted in a conviction with the imposition of a short custodial sentence, and which has been served, without further incident; or
> - The Minister has subsequently intervened under s 195A to grant a BVE.

213. No policy document to this effect was provided to the Commission, and nor was it able to be located on LEGENDcom – the Department's publicly available electronic database of migration and citizenship legislation and policy documents. No mention of this policy is made within the policy on Bridging E visas,[53] which contains a brief description of regulation 2.25.

214. The Department, in its response to the Commission's preliminary view, indicated that Direction No. 63 (see paragraph 117 above) was relevant to the exercise of the discretion. Elsewhere, a delegate also referred to Direction No. 90[54] (see paragraph 110 above) as being relevant. Neither direction refers to being applied in these circumstances.

215. The Commission considers that it would be preferable for the policy being applied by the Department to be made available on LEGENDcom so that detainees and their representatives may have the benefit of understanding the circumstances in which the discretion to grant a Bridging E visa might be applied to them. Given that Direction No. 63 does not refer to the discretion to grant a Bridging E visa, if departmental officers are applying that ministerial direction in their consideration of regulation 2.25, this needs to be made plain. Direction No. 63 is binding upon decision makers, and it would be concerning if departmental officers are applying it as mandatory in their consideration of regulation 2.25, in

circumstances where it is not intended on its face to be applied to such decisions.

Recommendation 2

The Department's written policy on the exercise of the discretion available to grant a Bridging E visa pursuant to regulation 2.25 should be made available on LEGENDcom.

8.3 Referrals for ministerial consideration

216. The Commission acknowledges that the Department has already indicated that a review of ministerial guidelines for referral is underway in light of the High Court's decision in *Davis*.

217. Mr MF's case at paragraphs 123 and 124 above highlights a conundrum in which he was not referred to the Minister for the reason that he was able to be granted a Bridging E visa by a delegate, but the delegate was unwilling to consider him for a grant because of his criminal offending. The result was that Mr MF was not considered for any alternative to detention until 6 November 2022, after he had been detained for almost 5 years and 5 months.

218. If a delegate, considering their discretion under regulation 2.25, is of the view that a detainee is not suitable for a grant, it should be incumbent on the delegate to automatically consider whether a referral to the Minister should instead be made. This should be set out in both the policy with respect to regulation 2.25 and the guidelines for ministerial intervention, when drafted.

Recommendation 3

The Department's policy on regulation 2.25 and the guidelines for ministerial intervention under section 195A and/or section 197AB should be updated to make clear that if a delegate decides not to consider exercising their discretion to grant a Bridging E visa pursuant to regulation 2.25, they should automatically consider referring the detainee for consideration by the Minister for intervention, and reasons for both sets of decisions should be recorded.

219. Furthermore, it is concerning that the AAT identified grounds on which it considered that Mr MF's case should have been referred to the Minister for consideration of the Minister's intervention power under section 351 of the Migration Act (discussed at paragraph 128 above), but the Department decided not to do so, based on its misunderstanding of its powers. The

AAT made this recommendation after a hearing of all the relevant evidence.

220. It should be expressly stated in any future guidelines that, if the AAT considers referral to the Minister appropriate, then the Department is to do so without undertaking its own assessment of the merits of referral.

Recommendation 4

In the guidelines for referral to the Minister for consideration under sections 351, 417 or 501J, it should be noted that, if the AAT considers referral to the Minister appropriate, then the Department is to do so without undertaking its own assessment of the merits of referral.

8.4 IHMS Practice Guideline

221. The sixth issue raised by Mr MF in his complaint, namely that he was unable to be administered prescribed pain medication overnight, was referred by the Commission to Health and Disability Services Complaints Office (HaDSCO) in Western Australia, as a more appropriate body able to consider complaints of a medical nature. The Commission does not have the necessary expertise to properly analyse the appropriateness of the policy documents which led to IHMS being unable or unwilling to administer pain medication to Mr MF overnight. The issue was however considered in a limited way in the article 7 complaint, as a factor which led to the ongoing detention of Mr MF following his injuries becoming cruel, inhuman and/or degrading.

222. It would appear from the IHMS Practice Guideline that the times in which medication may be administered in each facility varies, based on:

- changing patients within the AIDF, RPC or POM accommodation and their changing health profiles and needs
- changing medication regimes for patients within the AIDF, RPC or POM accommodation

Schedule of medication administration times should consider the following:

- frequency of current medication schedules for patients
- suitability of medications to be distributed via blister pack (this is based on pharmacy advice)

- staffing resources available[55]

223. Mr MF's case is unlikely to be an isolated one. The Commission considers that it would be prudent for the Department and IHMS to conduct a review of IHMS policies and procedures in light of the particular circumstances raised by Mr MF's complaint, and identify suitable contingencies for the provision of prescription medications overnight where medically necessary.

Recommendation 5

The Department and IHMS should conduct a review of IHMS policies and procedures in light of the particular circumstances raised by Mr MF's complaint, and identify suitable contingencies for the provision of prescription medications overnight where medically necessary.

8.5 Expectation on detainees to submit to voluntary removal

224. In response to similar concerns raised by the Commission in a recent inquiry, the Department said that it had updated operating procedures and training manuals for staff in the Ministerial Intervention section to emphasise that a person who has been found to engage Australia's protection obligations is not expected to voluntarily return to the country in respect of which the protection finding was made. In light of the submission from the Department quoted at paragraph 182 above, the Commission considers that it is important for this point to be emphasised more broadly to other staff, including those responsible for decision making under regulation 2.25 and those responsible for responding to human rights inquiries conducted by the Commission.

Recommendation 6

The Department should review all of its operating procedures and training manuals to emphasise to all officers that a person who has been found to engage Australia's protection obligations, and those who have an active Protection visa application on foot (including merits and judicial review of negative decisions), is not expected to voluntarily return to the country in respect of which the protection finding or protection application is made.

9 The Department's response to my findings and recommendations

225. On 15 December 2023, I provided the Department with a notice of my findings and recommendations.

226. On 4 June 2024, the Department provided the following response to my 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 does not agree that the Commonwealth engaged in acts that were inconsistent with, or contrary to, articles 7 and 9(1) of the International Covenant on Civil and Political Rights (ICCPR).
>
> **Recommendation 1 – Disagree**
>
> *The Commission recommends that the Commonwealth pay to Mr MF an appropriate amount of compensation to reflect the loss and damage he has suffered as a result of the breaches of his human rights under article 7 of the ICCPR identified in the course of this inquiry.*
>
> The Department disagrees with recommendation one. The Commonwealth can only pay compensation to settle a monetary claim against the Department if there is a meaningful prospect of legal liability within the meaning of the *Legal Services Directions 2017* and it would be within legal principle and practice to resolve this matter on those terms. Based on the current evidence, the Department is not in a position to pay compensation.
>
> **Recommendation 2 – Agree**
>
> *The Department's written policy on the exercise of the discretion available to grant a Bridging E visa pursuant to regulation 2.25 should be made available on LEGENDcom.*
>
> The Department agrees with recommendation two. The Department's Bridging E (WE-050) visa (BVE) Procedural Advice Manual is published on LEGENDcom but is currently under review to be updated as a Procedural Instruction (PI). Furthermore, the Department's Policy and Procedure Control Framework (PPCF) mandates a standardised approach, and outlines the key principles and guidelines for development and maintenance of policy and procedural advice documents across the Department. The Department's Policy and Procedure Control Register (PPCR) is the central register of all PPCF documents. The updated BVE PI will be published on the PPCR and LEGENDcom once the review is complete. The updated document will include guidance to officers on the exercise of the power contained in regulation 2.25.
>
> In addition, a current Standard Operating Procedure (SOP) is being developed for all Status Resolution Officers (SRO)s. The SOP establishes the process for

Detention SROs and Status Resolution BVE delegates when considering schedule 2 criteria relevant to a BVE and exercising discretion to grant a BVE under subregulation 2.25(1)(b) of the Migration Regulations 1994 (the Regulations). This framework outlines the decision making process necessary to adopt a nationally consistent methodology to consider BVE delegate manageable cases in particular where there are character concerns. Once finalised, the SOP will be published on the PPCR.

Recommendation 3 - Partially Agree

The Department's policy on regulation 2.25 and the guidelines for ministerial intervention under section 195A and/or section 197AB should be updated to make clear that if a delegate decides not to consider exercising their discretion to grant a Bridging E visa pursuant to regulation 2.25, they should automatically consider referring the detainee for consideration by the Minister for intervention, and reasons for both sets of decisions should be recorded.

The Department partially agrees to recommendation three, as the Department is not able to amend the Ministerial Intervention instructions. It is at the discretion of the Minister as to what criteria they determine should be included in any new Ministerial Intervention instructions.

The Department will provide the Commission's recommendations for the Minister's consideration when briefing the Minister on options to review the sections 195A and 197AB Ministerial Intervention instructions.

The Department has developed a SOP for all SROs which outlines the decision making process for departmental delegates considering exercising discretion to grant a BVE under subregulation 2.25(1)(b) of the Regulations.

Where SROs identify an individual in immigration detention is eligible to be considered for a BVE grant by a delegate, they must escalate the case for consideration. This ensures that decisions are made in a timely manner at the earliest point in the status resolution continuum. Where the delegate has decided not to consider a BVE grant and there has been a change in circumstances since that decision, the SRO must either re-escalate the case for consideration for a BVE grant by a delegate or consider whether initiating a Ministerial Intervention process is appropriate.

The Department is currently considering the implications of the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 for ministerial intervention powers.

Recommendation 4 - Partially Agree

In the guidelines for referral to the Minister for consideration under sections 351, 417 or 501J of the Migration Act, it should be noted that, if the AAT considers referral to the Minister appropriate, then the Department is to do so without undertaking its own assessment of the merits of referral.

The Department partially agrees to recommendation four, as the Department is not able to amend the Ministerial Intervention instructions. It is at the discretion of the Minister what criteria they determine should be included in any new Ministerial Intervention instructions. The Department will provide the Commission's recommendations for the Minister's consideration when briefing the Minister on options to review the sections 351, 417 and 501J Ministerial Intervention instructions. The Minister is currently considering the implications of the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 for ministerial intervention powers.

Recommendation 5 – Accept and has already addressed

The Department and IHMS should conduct a review of IHMS policies and procedures in light of the particular circumstances raised by Mr MF's complaint and identify suitable contingencies for the provision of prescription medications overnight where medically necessary.

The Department accepts and has already addressed recommendation five.

The Department conducts yearly reviews of the Detention Health Service Provider (DHSP) policies and procedures, as required under the contract. The Department last reviewed and updated the applicable policy relating to the prescribing and administering of medications in August 2023.

The DHSP is contracted to provide onsite primary health services between the hours of 9am and 5pm, Monday to Friday. However, medications are administered to detainees' seven days per week, until 9pm. The prescribing of all medications to detainees by the DHSP is done in accordance and compliance with the *Australian Regulatory Guidelines for the Prescription of Medicines*, governed by the Therapeutic Goods Administration.

The Department and DHSP consider contingency arrangements for the provision of prescription medications, including where medication is required overnight, on a case-by-case basis. These may include self-administration, adjustment to medication regimes as clinically indicated, specialised care placements or in exceptional circumstances night nurses or carers, as approved by the Department.

Recommendation 6 - Accept and has already addressed

The Department should review all of its operating procedures and training manuals to emphasise to all officers that a person who has been found to engage Australia's protection obligations, and those who have an active Protection visa application on foot (including merits and judicial review of negative decisions), is not expected to voluntarily return to the country in respect of which the protection finding or protection application is made.

The Department accepts and has already addressed this recommendation, noting not all procedural documents are relevant to this issue and many will not need to be reviewed.

The Department notes the *SROs – Engagement with and referral to Removals Procedural Instruction* (VM-5149) specifically addresses when a case, including those who are undergoing a substantive visa application (such as a Protection visa), those who have been found to engage Australia's protection obligations, and those who enliven any of Australia's other international obligations, should be referred for removal consideration. This Procedural Instruction is being reviewed and updated as appropriate.

Cases referred for removal are then considered in line with Removal Operations Policies, based on their individual circumstances. Removal Operational Policy documents already contain instructions to removal officers not to remove detainees to a country where this would contravene Australia's non-refoulement obligations under relevant international treaties to which Australia is a party. Additionally, Removal Operational Policy documents instruct removal officers that detainees with an active Protection visa application (including at merits review) are not subject to involuntary removal under the *Migration Act 1958*. Notwithstanding this, regardless of a detainee's ongoing processes or protection-related status, the Department will provide them with information regarding all of their options to resolve their immigration status, including through requesting removal from Australia. The Department does not consider further review of Removal Operational Policy documents is required in respect of this issue.

227. I report accordingly to the Attorney-General.

Emeritus Professor Rosalind Croucher AM FAAL
President
Australian Human Rights Commission
July 2024

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 & Anor* [2023] HCA 37.

[3] International Health and Medical Services Practice Guideline, 'Administration and Documentation of Medication' Number 3.12.2.1, [3.11].

[4] International Health and Medical Services Practice Guideline, 'Management of Non Prescription Medications outside of IHMS clinic hours' Number 3.12.1.2, [2].

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

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

[7] Human Rights Committee, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons),* 60th sess, UN Doc HRI/GEN/1/Rev.1 (1982) [4]. See also UN Human Rights Committee, *Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*'); UN Human Rights Committee, Communication No 1014/2001, 78th sess, CCPR/C/78/D/1014/2001 (2003) ('*Baban v Australia*').

[8] Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]. See also Sarah Joseph et al, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2004), 308 at [11.10].

[9] *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the 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, Communication No. 560/1993, UN Doc CCPR/C/76/D/900/1993 (1997); UN Human Rights Committee, *Communication No 631/1995,* 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) ('*Spakmo v Norway*').

[10] *A v Australia*, Communication No. 560/1993, 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).

[11] *Van Alphen v the Netherlands*, No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).

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

[13] *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); 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 v Australia*').

[14] Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014). at [18].

[15] United Nations Human Rights Committee, General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6].

[16] Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, 21-24.

[17] Department of Home Affairs, 'Minister's residence determination power', 10 October 2017, accessed through LEGENDcom on 20 March 2023.
[18] Department of Home Affairs, 'Minister's guidelines on ministerial powers (s351, s417 and s501J), 11 March 2016, accessed through LEGENDcom on 27 July 2023.
[19] Available at https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/conducting-migration-and-refugee-reviews-president.
[20] Department of Home Affairs, 'Minister's guidelines on ministerial powers (s351, s417 and s501J)', 11 March 2016, accessed through LEGENDcom on 10 March 2023.
[21] [2023] HCA 10.
[22] *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs* [2023] HCA 10, [38].
[23] Australian Human Rights Commission, *The Use of Hotels as Alternative Places of Detention* (Report, June 2023).
[24] Ibid, 17.
[25] Australian Human Rights Commission, *Lives on hold: Refugees and Asylum seekers in the 'Legacy Caseload'* (Report, July 2019) 103.
[26] Ibid, 101.
[27] C v Australia, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
[28] C v Australia, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
[29] Human Rights Committee, Communication No. 2094/2011, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (2013) ('*F.K.A.G v Australia*'). [9.8]
[30] United Nations Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 30 (1994) [2].
[31] United Nations Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 30 (1994) [5].
[32] Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 30 (1994) [11].
[33] Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [2].
[34] Human Rights Committee, *Views: Communication No. 1020/2001*, 78th sess, UN Doc CCPR/C/78/D/1020/2001 (7 August 2003) 15 [7.2] ('*Cabal and Bertran v Australia*').
[35] United Nations Human Rights Committee, *General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)* 44th sess, UN Doc HRI/GEN/1/Rev.1 (10 April 1992) [3].
[36] Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992) [3].
[37] Human Rights Committee, *Views: Communication No. 639/1995*, 60th sess, UN Doc CCPR/C/60/D/639/1995 (28 July 1997) ('*Walker and Richards v Jamaica')*; Human Rights Committee, *Views: Communication No 845/1998*, 74th sess, UN Doc CCPR/C/74/D/845/1998 (26 March 2002) ('*Kennedy v Trinidad and Tobago*'); Human Rights Committee, *Views: Communication No 684/1996*, 74th sess, UN Doc CCPR/C/74/D/684/1996 (2 April 2002) ('*R.S. v Trinidad and Tobago*').
[38] Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel, 2nd ed, 2005) 250.
[39] [2017] AusHRC 116.
[40] C v Australia, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
[41] F.K.A.G v Australia, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (2013).

[42] See for example the Commonwealth's submissions in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, https://www.hcourt.gov.au/assets/cases/08-Sydney/s28-2023/NZYQ-MICMA-Def.pdf, [38].

[43] Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy) The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 32nd sess, UN Doc HRI/GEN/1/Rev.1 (8 April 1988) 1–2 [5]; UN Human Rights Committee, *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses,* 39th sess, UN Doc HRI/GEN/1/Rev.1 (27 July 1990) 1 [2]; UN Human Rights Committee, *Views: Communication No 201/1985*, 33rd sess, UN Doc CCPR/C/33/D/201/1985 (27 July 1988) [10.3] ('*Hendriks v Netherlands*').

[44] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, Oxford University Press, 2013) 670.

[45] Human Rights Committee, *Views: Communication No. 417/1990*, 51st sess, UN Doc CCPR/C/51/D/417/1990 (27 July 1994) [10.2] ('*Balaguer Santacana v Spain*').

[46] Australian Human Rights Commission Act ('AHRC Act'), s 29(2)(a).

[47] AHRC Act, s 29(2)(b).

[48] AHRC Act, s 29(2)(c).

[49] AHRC Act, s 29(2)(c).

[50] *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).

[51] *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).

[52] For example, see *Ms AR on behalf of Mr AS, Master AT and Miss AU v Commonwealth of Australia (DIBP)* [2016] AusHRC 110 at [196]-[205].

[53] Department of Home Affairs, 'PAM3: Act – Compliance and Case Resolution – Program visas – Bridging E visas', reissued 19 November 2016, accessed through LEGENDcom on 5 December 2023.

[54] Replaced by Direction No 99, and Direction No 110.

[55] International Health and Medical Services Practice Guideline, 'Administration and Documentation of Medication' Number 3.12.2.1, [3.2].