



Australian
Human Rights
Commission

Ms RC
v Commonwealth
(Department
of Home Affairs)

[2022] AUSHRC 144

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Affairs)

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Report into arbitrary detention

Australian Human Rights Commission 2022



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The Hon Michaelia Cash 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 a complaint by Ms RC, alleging a breach of her human rights by the Department of Home Affairs (Department).

Ms RC arrived at Christmas Island on 23 July 2013 as an Unauthorised Maritime Arrival and was held in immigration detention for almost 45 months. For more than 19 months, she was detained in Nauru, before being transferred to Australia where she was held in immigration detention for almost 2 years. She complains that her detention was arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR), and that her detention caused her 'immense physical and mental suffering' in contravention of article 7 of the ICCPR.

As a result of this inquiry, I have found that the following acts of the Commonwealth are inconsistent with, or contrary to, article 9(1) of the ICCPR:

- the Department's failure, for more than a year until 10 June 2016, to refer Ms RC's case to the Minister for consideration of the exercise of his powers under ss 195A and 197AB of the *Migration Act 1958* (Cth)
- the Minister's failure to consider exercising his power under s 197AB of the *Migration Act* to make a residence determination in respect of Ms RC when her case was first referred to him on 23 June 2016
- the Department's failure to refer Ms RC's case for a second time to the Minister for consideration of the exercise of his power under s 197AB of the *Migration Act* until 7 March 2017, more than 8 months after the Minister first declined to consider exercising this power.

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I have not, however, found that the impact of Ms RC's detention on her physical and mental health rises to the level of impairment amounting to a contravention of article 7 of the ICCPR.

On 15 September 2021, 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 23 December 2021. That response can be found in Part 10 of this report.

I enclose a copy of my report.

Yours sincerely,

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

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

March 2022

1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Ms RC against the Commonwealth of Australia — Department of Home Affairs (Department) alleging a breach of her human rights.
2. This is a complaint of arbitrary detention contrary to article 9(1) of the International Covenant on Civil and Political Rights (ICCPR)¹ and that the detention constituted cruel, inhuman or degrading treatment contrary to article 7 of the ICCPR.
3. The right to liberty and freedom from arbitrary detention is not protected in the Australian Constitution. The High Court has upheld the legality of indefinite detention under the *Migration Act 1958* (Cth) (Migration Act). As a result, there are limited avenues for an individual to challenge their detention.
4. The Commission's ability to inquire into human rights complaints under the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), 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 as set out, for example, in the ICCPR.
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. Furthermore, there is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than detention to achieve the ends of the immigration policy, for example through the imposition of reporting obligations, sureties or other conditions, in order to avoid the conclusion that detention was 'arbitrary'.
6. The approach under current Government policy is contrary to what is required under human rights obligations Australia has committed to by ratifying the ICCPR. The Department conducts monthly case reviews that consider if a person's placement in detention is justified. However, these reviews focus on whether there is any need for an individual to be released from detention, rather than whether it is necessary to continue to detain the individual for reasons specific to them, such as a risk of absconding or a threat to national security.
7. In this case, Ms RC arrived at Christmas Island on 23 July 2013 as an 'Unauthorised Maritime Arrival' and was held in immigration detention for almost 45 months. For more than 19 months, she was detained in Nauru, before being transferred to Australia where she was held in immigration detention for almost 2 years.
8. Ms RC complains that her detention was arbitrary, contrary to article 9 of the ICCPR, and that her detention caused her 'immense physical and mental suffering' in contravention of article 7 of the ICCPR.
9. This inquiry has been undertaken pursuant to s 11(1)(f) of the AHRC Act.
10. This report is issued pursuant to s 29(2) of the AHRC Act setting out the findings of the Commission in relation to Ms RC's complaint.

11. Ms RC has requested that her name not be published in connection with this inquiry. I consider that the preservation of her anonymity is necessary to protect her human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and refer to the complainant as Ms 'RC' and to her husband as Mr 'RD' in this document.

2 Summary of findings and recommendations

12. As a result of the inquiry, I find that the following acts of the Commonwealth are inconsistent with, or contrary to, article 9(1) of the ICCPR:
 - the Department's failure, for more than a year until 10 June 2016, to refer Ms RC's case to the Minister for consideration of the exercise of his powers under ss 195A and 197AB of the Migration Act
 - the Minister's failure to consider exercising his power under s 197AB of the Migration Act to make a residence determination in respect of Ms RC when her case was first referred to him on 23 June 2016
 - the Department's failure to refer Ms RC's case for a second time to the Minister for consideration of the exercise of his power under s 197AB of the Migration Act until 7 March 2017, more than 8 months after the Minister first declined to consider exercising this power.
13. While the impact of Ms RC's detention on her physical and mental health is concerning and was well known to the Department and the Minister, I do not consider that it rises to the level of impairment amounting to a contravention of article 7 of the ICCPR.
14. I make the following recommendations:

Recommendation 1

The Department should regularly conduct periodic reviews of the necessity of detention for people in immigration detention centres. The reviews should focus on whether detention in an immigration detention centre is necessary in the specific case and, if detention is not considered necessary, the identification of alternate means of detention or the grant of a visa should be promptly considered.

Recommendation 2

The Commonwealth provide a written apology to Ms RC for the delay in releasing her from closed detention in view of the clear evidence of her compelling circumstances.

3 Background

15. Ms RC is a national of Iran. She arrived at Christmas Island on 23 July 2013 as an Unauthorised Maritime Arrival with her husband, Mr RD, and was immediately detained under s 189(3) of the Migration Act.
16. On 10 September 2013, Ms RC and Mr RD were transferred to Nauru under s 198AD of the Migration Act. Ms RC alleges that, while detained in Nauru, she was verbally harassed by officers when she used the bathroom facilities at night. As a result, she said she felt too uncomfortable to use the facilities during the night, causing her to develop renal and urinary tract infections. She says that she then began to experience sustained vaginal bleeding and abdominal pain.
17. Throughout her detention, Ms RC was treated by International Health and Medical Services (IHMS) and medical specialists for a number of physical and mental health concerns, including:
 - neutropenia, being abnormal blood cell levels
 - gynaecological issues, including complex cystic lesions in her right ovary, persistent and heavy vaginal bleeding, abdominal pain, and endometriosis
 - ongoing short-term memory loss, sustained hair loss and sleeping difficulties, progressing to insomnia
 - self-harm ideation and picking at her skin to cope with anxiety, progressing to engagement in self-harm
 - an adjustment disorder, being Cluster B personality disorder, and anxiety
 - poor appetite, and significant weight loss, provisionally diagnosed as anorexia.
18. On 17 April 2015, Ms RC was transferred with Mr RD to the Melbourne Immigration Transit Accommodation (MITA) pursuant to s 198B of the Migration Act, as an accompanying person for the medical treatment of her husband.
19. On 28 April 2015, Ms RC was transferred with her husband to Wickham Point Alternative Place of Detention.
20. On 9 March 2016, Ms RC was raised as a 'detainee of concern' at an internal management meeting.
21. On 11 March 2016, at a case conference, Ms RC's case was escalated to be flagged for community detention referral to the Minister, under s 197AB of the Migration Act.
22. On 11 May 2016, Ms RC was transferred to MITA with her husband.
23. On 10 June 2016, the Department referred Mr RD and Ms RC's case to the Minister for consideration for a residence determination under s 197AB of the Migration Act, primarily on the grounds of Ms RC's mental health vulnerabilities (First Department Submission).

24. On 23 June 2016, the Minister responded to the First Department Submission, and indicated that he declined to consider exercising his powers under s 197AB of the Migration Act.
25. On 7 March 2017, the Department again referred Mr RD and Ms RC's case to the Minister for consideration for a residence determination under s 197AB of the Migration Act on the grounds of Ms RC's mental health vulnerabilities (Second Department Submission).
26. On 10 April 2017, the Minister intervened and exercised his residence determination powers under s 197AB of the Migration Act in respect of Mr RD and Ms RC.
27. On 13 April 2017, Mr RD and Ms RC were released into community detention.

4 Conciliation

28. The complaint did not proceed to a conciliation and was not able to be resolved informally.

5 Procedural history of this inquiry

29. On 21 December 2020, I issued a preliminary view in this matter and gave Ms RC, the Department and the Minister an opportunity to respond to my preliminary findings.
30. On 5 February 2021, the Department responded to my preliminary view. No response was received from the Minister.
31. On 23 March 2021, Ms RC responded to my preliminary view.

6 Legislative framework

6.1 Functions of the Commission

32. 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.
33. 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.
34. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

6.2 What is an 'act' or 'practice'

35. 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.
36. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
37. 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.²

6.3 What is a human right?

38. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
39. 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.

40. Article 7 of the ICCPR relevantly provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

7 Arbitrary detention

41. Ms RC complains that her detention in immigration detention facilities from 23 July 2013 until 13 April 2017 was 'arbitrary', contrary to article 9(1) of the ICCPR.

7.1 Law

42. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
 - (a) 'detention' includes immigration detention³
 - (b) lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances⁴
 - (c) 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability⁵

(d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁶

43. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two months to be 'arbitrary' because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁷
44. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'.⁸
45. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention, in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.⁹

46. 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'.¹⁰
47. It is therefore necessary to consider whether the detention of Ms RC in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to her, and in light of the available alternatives to closed detention. If her detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

7.2 Act or practice of the Commonwealth

48. Ms RC was an unlawful non-citizen, meaning the Migration Act required that she be detained. However, there are a number of powers that the Minister could have exercised, including to grant Ms RC a visa, or to allow detention in a less restrictive manner than in an immigration detention centre.
49. Under s 195A of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under s 189 of the Migration Act. Notwithstanding the Minister's guidelines providing from April 2016 that unlawful maritime arrivals in Australia after 19 July 2013 are not expected to be referred to the Minister for a Bridging Visa E (BVE), the guidelines are not binding and the Minister can exercise the power to grant a BVE at any time to a person in immigration detention. The Department did not refer Ms RC's case to the Minister to consider exercising the powers to grant her a BVE under s 195A of the Migration Act.
50. Under s 197AB of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may make a residence determination to allow a person to reside at a specified place, as opposed to being detained in immigration detention. The Department did not refer Ms RC's case to the Minister to consider exercising the power to make a residence determination under s 197AB until 10 June 2016, almost three years after Ms RC first arrived in Australia and more than a year after she was transferred back to Australia with her husband for his medical treatment.
51. On 23 June 2016, the Minister declined to consider exercising his power under s 197AB of the Migration Act in respect of Ms RC.
52. The Department did not refer Ms RC's case again to the Minister for consideration of the exercise of his power under s 197AB of the Migration Act until 7 March 2017, more than eight months after the Minister declined to consider her case.
53. I consider that the following matters constitute 'acts' for the purposes of the AHRC Act:
 - the Department's failure to refer Ms RC's case to the Minister for consideration of the exercise of his power to grant her a visa under s 195A of the Migration Act and, prior to 10 June 2016, to exercise the power to make a residence determination under s 197AB of the Migration Act
 - the Minister's failure to consider exercising his power under s 197AB of the Migration Act to make a residence determination in respect of Ms RC when her case was first referred to him on 23 June 2016
 - the Department's delay in referring Ms RC's case to the Minister for the second time for consideration of the exercise of the power under s 197AB of the Migration Act.

7.3 Department's response

54. Ms RC was held in immigration detention for 1,360 days between 23 July 2013 and 13 April 2017, of which she spent more than one year and seven months in detention in Nauru before being detained in Australia for almost two years.

55. The Department did not provide a reason for Ms RC's continued detention in closed immigration detention facilities, other than to state:

At the time of her arrival, Ms RC was reasonably suspected to be an unlawful non-citizen and did not hold a visa to enter Australia. Under section 189(3) of the Act, if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

56. During its inquiry, the Commission asked the Department whether Ms RC's detention had been reviewed at regular intervals. The Department responded saying that:

Ms RC's detention has been formally reviewed on thirteen occasions under Case Management processes by Case Management.

57. The Department provided 22 documents labelled case reviews, commencing with a case review numbered '1', dated 23 May 2015, and ending with a case review numbered '22', dated 10 April 2017. No case reviews were provided for the period of Ms RC's detention in Nauru.

58. The Department's response to the Commission's request for information confirms that it was aware of Ms RC's significant mental health issues from the time of her initial detention:

IHMS can confirm that Ms [RC] has had significant mental health support since being detained. This support has been provided by all members of the mental health team, but is primarily provided every fortnight by a Psychologist and supplemented by a Psychiatrist as required.

59. In response to the Commission's queries concerning Ms RC's medical treatment for her physical health issues, in particular her gynaecological issues, the Department:

- stated that Ms RC was recorded as consulting with a General Practitioner (GP) for a number of health issues upon her transfer to Australia from Nauru
- noted that, on 28 July 2015, Ms RC advised an IHMS GP that she had 'a seven month history of a prolonged and heavy period for three out of four weeks per month'
- set out a history of Ms RC's regular and ongoing medical treatment for her gynaecological issues from July 2015 to 30 March 2017.

The Department did not provide information with respect to Ms RC's medical treatment for these issues during her detention in Nauru.

60. In response to the Commission's request for information concerning the medical services in place in Nauru to address the medical conditions Ms RC complains of, the Department stated:

The Department believes that matters concerning the medical services at the Nauru RPC are not within the Commission's jurisdiction.

Accordingly, questions about the medical services available at the Nauru RPC are matters for the Government of Nauru not the Australian Government.

61. The Department also failed to provide information and records concerning Ms RC's medical concerns and treatment for the period during which she was detained in Nauru.
62. The Commission has previously reported about complaints from families and children who had been taken to Nauru for the processing of their claims for asylum, including complaints about the quality of health care available to people detained at the Nauru regional processing centre.¹¹

7.4 Findings

63. As set out above, the Minister has discretionary powers under ss 195A and 197AB of the Migration Act that would have allowed Ms RC to be granted a visa or be held in a less restrictive form of detention.
64. On 30 May 2013, the Hon Brendan O'Connor MP, then Minister for Immigration and Citizenship, published guidelines to explain the circumstances in which he might wish to consider exercising his 'residence determination' power under s 197AB of the Migration Act.
65. New guidelines were issued on 18 February 2014 by the Hon Scott Morrison MP, then Minister for Immigration and Border Protection.¹² These guidelines provided that the Minister would consider exercising this power for single adults who had 'ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention'. They also provided that the Minister did not expect cases involving people who had arrived after 19 July 2013 to be referred to him, unless there were exceptional reasons.
66. On 29 March 2015, the Hon Peter Dutton MP, then Minister for Home Affairs, issued replacement guidelines.¹³ These guidelines also provided that the Minister would consider exercising this power for single adults who had 'ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention'. However, they provided that the Minister would not expect cases to be referred to him where a person had been transferred from an offshore processing centre to Australia for medical treatment or any other reason, unless there were exceptional circumstances.
67. Both the 2014 and 2015 guidelines also stated that the Minister would consider cases where there were 'unique or exceptional circumstances'.

68. The phrase ‘unique or exceptional circumstances’ is not defined in any of the guidelines, however it is defined in similar guidelines relating to the Minister’s power to grant visas in the public interest.¹⁴ In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
- circumstances that may bring Australia’s obligations as a party to the ICCPR into consideration
 - the length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community
 - compassionate circumstances regarding the age and/or health and/or psychological state of the person, such that a failure to recognise them would result in irreparable harm and continuing hardship to the person
 - where the Department has determined that the person, through circumstances outside their control, is unable to be returned to their country/countries of citizenship or usual residence.
69. Similarly, guidelines have been published in relation to the exercise of the power under s 195A of the Migration Act to grant a visa to a person in immigration detention. The Hon Chris Bowen MP, then Minister for Immigration and Citizenship, published guidelines on s 195A in March 2012. These guidelines did not explicitly exclude for referral individuals who had been transferred to Australia from an offshore processing facility or who arrived in Australia after a certain date and also provided for the referral of cases where ‘unique and exceptional circumstances’ arise.
70. In April 2016, Minister Dutton re-issued s 195A guidelines, which are the current guidelines in use by the Department. These guidelines provide that the Minister will consider the exercise of this power where a person has individual needs that cannot properly be cared for in a secured immigration detention facility, as confirmed by a treating professional. However, they also provide that the Minister does not expect referral of ‘transitory persons’, defined under s 5(1) of the Migration Act to include a person who was taken to a regional processing country under s 198AD, who had been brought to Australia for temporary processes, including medical treatment and legal proceedings. Although there is no exception for unique and exceptional circumstances—unlike the other ministerial intervention guidelines referred to above—under these guidelines, the Minister will consider cases where there are compelling or compassionate circumstances.
- (a) Failure to refer case to the Minister for intervention prior to 10 June 2016**
71. Ms RC told the Commission that, during the period of her detention in Nauru, she:
- faced constant harassment when she used the bathroom facilities at night, which made her too uncomfortable to use the toilet at night and caused her to develop renal and urinary tract infections
 - began to experience sustained vaginal bleeding and abdominal pain

- recorded a score of 40 on the Kessler Psychological Distress Scale (K10 Distress Scale) on 9 March 2014, which is indicative of a severe mental disorder
- reported ongoing short-term memory loss, sleeping difficulties and a poor appetite
- had begun picking at her skin to relieve her anxiety
- was recorded as having self-harm ideation
- was recorded as a 'client of concern' by a psychologist who also noted her concerns about Ms RC's capacity to cope.

72. After being transferred to Australia on 17 April 2015 as an accompanying person for the medical treatment of her husband, Ms RC:

- was placed on high Supportive Monitoring and Engagement (SME) on 19 April 2015, two days after being transferred, after disclosing to IHMS staff that she wanted to die. Her psychiatrist recorded her as being 'angry and defiant' while discussing situational issues in the detention centre. The high SME was subsequently discontinued by the psychiatrist because the SME monitoring caused Ms RC's anxiety to increase
- was reported on 29 April 2015 as having developed insomnia and an adjustment disorder, later diagnosed as Cluster B personality disorder and anxiety
- was treated for a number of physical ailments from May 2015, including complex cystic lesions in her right ovary, ongoing vaginal bleeding, abdominal pain, hair loss, neutropenia and possible endometriosis, which was not formally diagnosed until 19 September 2016 after a series of ultrasounds and a laparoscopic procedure
- recorded two further scores on the K10 Distress Scale indicative of a severe mental disorder, with a score of 32 on 21 May 2015 and a score of 34 on 22 July 2015
- was recorded from 20 October 2015 as having started to engage in self-harm as a relief from what was on her mind and reporting that she no longer believed a future exists for her
- was recorded from 3 November 2015 to be experiencing sustained hair loss from her scalp
- was recorded by her psychiatrist on 6 February 2016 as experiencing sleep issues and having longstanding psychiatric issues, including controlling her anger and temper, self-harm by scratching and not eating
- was recorded on 17 February 2016 as weighing 45.1kg compared to 51kg in August 2015, indicating significant weight loss and causing an IHMS psychiatrist to require her weight to be monitored regularly, with hospitalisation to be considered if her weight fell below 40kg or her Body Mass Index fell below 15
- weighed 44.5kg by 7 March 2016
- was raised as a detainee of concern at an internal management meeting on 9 March 2016.

- was escalated to be flagged for community detention referral to the Minister under s 197AB of the Migration Act at a Case Conference on 11 March 2016
- was reported on 25 April 2016 by an IHMS psychologist to have:
 - i. disclosed that she felt irritated and did not feel hungry due to her anxiety, weighing 45.5kg at that time
 - ii. 'long standing psychological issues that are unlikely to improve in detention and noted that with a history of impulsive selfharm when irritable/angry, ongoing monitoring is deemed necessary given her presentation'
 - iii. anxiety, Cluster B personality Disorder and eating disorder
- was reported in an IHMS Special Needs Health Assessment dated 29 April 2016 to have neutropenia (abnormal blood cell levels), gynaecological issues (including a complex cystic lesion suspicious for endometriosis), anxiety, Cluster B personality disorder and underweight (a provisional diagnosis of anorexia)
- was recorded to have her community detention referral initiated due to her mental health vulnerabilities on:
 - i. 20 May 2016 in a case review numbered 10, dated 20 May 2016
 - ii. 23 May 2016 in a case review numbered 11, dated 15 June 2016.

73. The Department's response to the Commission's inquiry does not explain the reason for its delay in referring Ms RC's case to the Minister for consideration of the exercise of his discretionary powers to implement an alternative arrangement to detention in an immigration detention facility.
74. By the Minister's guidelines, Ms RC's arrival in Australia after 19 July 2013 and transfer from an offshore processing centre to Australia for her husband's medical treatment meant that the Minister would not expect her case to be referred to him for consideration of his power:
- under s 197AB of the Migration Act, unless there were 'exceptional reasons'
 - from April 2016, under s 195A of the Migration Act.

Those guidelines also provide, however, that the Minister would expect a case to be referred to him for consideration of those powers where:

- a person has an ongoing illness, including mental health illness, requiring ongoing intervention or has individual needs that cannot be properly cared for in a secured immigration detention facility, or
- there are 'unique or exceptional' or 'compelling or compassionate' circumstances.

75. The Department was aware of Ms RC's significant physical and mental health issues from the time of her detention and that she was identified as a 'client of concern' by a psychologist from at least 15 February 2015, which would clearly have met the criteria of a person with an ongoing illness and individual needs that cannot properly be cared for in a security immigration detention facility. These matters would also have clearly established 'exceptional reasons' and would have met the criteria of 'unique or exceptional' and 'compelling or compassionate' circumstances warranting referral of Ms RC's case to the Minister. In addition, the Commission is not aware of any behavioural incidents in detention or any character or security concerns with respect to placing Ms RC in the community.
76. In response to my preliminary view, the Department maintained that Ms RC's placement was appropriate, reasonable and justified in the individual circumstances of her case. It stated in its response that:
- Ministerial Intervention policy does not provide for automatic assessment, or assessment at certain intervals, against the Minister's Intervention guidelines, or referral of cases under Ministerial Intervention powers for detainees in immigration detention. Cases are regularly reviewed by the Department, and where it is identified it may be appropriate to manage a detainee in the community, they are either considered for the grant of a Bridging visa by a departmental delegate or are referred for assessment against the Minister's guidelines under sections 195A and/ or 197AB of the *Migration Act 1958* (the Act). The Department notes that the Minister's powers under sections 195A and 197AB are personal and noncompellable. The Minister is under no obligation to consider a case or to make a decision on a case. The Minister is also not required to provide an explanation for the decision and is not bound by any timeframes.
- The Minister's guidelines under sections 195A and 197AB of the Act direct that generally, 'transitory persons', as defined under section 5(1) of the Act, who have been brought to Australia for a temporary purpose, including but not limited to medical treatment, legal proceedings or transit through Australia to a third country, should not be referred to the Minister for consideration. The Department only refers cases to the Minister where it is determined a case meets the Ministerial Intervention guidelines. It is not a legal requirement that a detention case be considered against the guidelines, or be referred to the Minister.
77. Despite these generalised claims of regular review and referral when appropriate, no referral was made to the Minister in this case for more than a year after Ms RC returned to Australia for her husband's medical treatment. This failure continued throughout a long period during which Ms RC was experiencing the range of serious health conditions identified above that were unlikely to improve while she continued to be held in closed detention.
78. In my view, the failure of the Department to invite the Minister to consider exercising his discretion under s 195A of the Migration Act, and, prior to 10 June 2016, under s 197AB of the Migration Act, contributed to the continued detention of Ms RC without proper consideration of whether that detention was justified in the particular circumstances of her case. I consider that Ms RC's continued detention from 17 April 2015 was not reasonable, necessary or proportionate to any legitimate purpose in the context of her particular circumstances and, as a result, her detention was arbitrary for the purposes of article 9(1) of the ICCPR.

79. For the reasons set out in the Commission's report, *Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128, it is my view that the detention of Ms RC in Nauru was not an act done by or on behalf of the Commonwealth.¹⁵ Accordingly, I express no view on Ms RC's allegations of arbitrary detention during the period of her detention in Nauru.

(b) Failure by the Minister to exercise intervention powers

80. In the First Department Submission, the Department identified the following factors as potentially relevant to the Minister's consideration of whether to exercise his powers under s 197AB of the Migration Act:

- [IHMS] has raised Ms [RC]'s case as 'a detainee of concern'. They have advised that Ms [RC] has long standing psychological issues which are unlikely to improve in detention and that she is currently clinically inappropriate for transfer to an RPC.
- The primary concern for Ms [RC]'s wellbeing at present relates to a provisional diagnosis of anorexia which has manifested in significant weight loss. IHMS has advised that if her weight drops below 40 kilograms she will be considered for admission to hospital.
- The [RC] family have undergone a Refugee Status Determination assessment by the Government of Nauru however a determination will not be made until the family has returned to Nauru.
- Ms [RC] has been diagnosed with physical health concerns including Neutropenia (abnormal blood cell levels) and gynaecological issues (complex cystic lesion suspicious for endometriosis). These conditions are being monitored and treated as required.
- Ms [RC] has also been diagnosed with mental health issues including anxiety, Cluster B personality disorder and has a provisional diagnosis of anorexia. She has a history of impulsive self-harm. She has been engaging with the IHMS mental health team, psychologist and psychiatrist.
- IHMS has advised that Ms [RC] reported a history of physical abuse at the hands of her father, which led to numerous broken bones and subsequent emotional issues. While living in Iran, at the age of 18 she attempted to overdose and at 27 she attempted self-harm by cutting. Ms [RC] has advised that she had engagement with a psychologist in Iran.
- Ms [RC]'s weight on induction on 15 August 2013 was 51kgs. On 17 February 2016 she weighed 45.1kgs and 44.5kgs on 7 March 2016. Her weight is now currently being monitored on a weekly basis and is currently 45kgs ... [Ms RC] has reported purging at times and going two to three days without eating.
- Ms [RC] is currently engaging with the psychologist on a weekly basis. It has been recommended that she continue with psychoeducation and supportive psychotherapy. IHMS has advised that the risk to her and others is low and that she is compliant with her prescribed medications.

- IHMS advises that Ms [RC] has long-standing psychological issues that are unlikely to improve in detention and that as she has a history of impulsive self-harm when irritable/angry. Ongoing monitoring is deemed necessary given her presentation.
- Departmental records indicate that the family has not been involved in any significant behavioural incidents while in held detention in Australia.
- The external agency has not advised the Department that there are any security concerns regarding the family's placement in community detention. There is no information currently before the Department that suggests this family would pose a threat to the Australian community if placed in community detention.

81. The Minister communicated his refusal to consider exercising his powers under s 197AB of the Migration Act by circling the words 'not agreed' and signing and dating the cover page of the First Department Submission. No comments or written reasons for the Minister's decision appear to have been given.
82. Although the Minister is not required to give reasons, without written reasons it is difficult to understand the factors that the Minister considered weighed against exercising his powers in respect of Ms RC. Significantly, the Department informed the Minister that it had not identified any security concerns or threats to the community in releasing Ms RC and Mr RD into community detention. If the Minister had any such concerns, he could have asked the Department to conduct a risk assessment to consider whether any risks could be mitigated. It does not appear that he did so.
83. It is also notable that the Second Department Submission, which was agreed to by the Minister when he eventually decided to intervene in Ms RC's case, is not materially different from the First Department Submission, with the exception of Ms RC's continued physical and mental health issues in the eight months that had passed by that time.
84. The First Department Submission clearly communicated to the Minister the concerns with Ms RC's significant physical and mental health issues, which were well known to the Department and had been deemed by an IHMS psychologist as unlikely to improve in detention.
85. In light of the available alternatives to closed detention within the Minister's powers and Ms RC's circumstances, in my view, the Minister's failure to exercise his power under s 197AB of the Migration Act contributed to the continued detention of Ms RC without proper justification in the particular circumstances of her case. I consider that Ms RC's continued detention was not reasonable, necessary or proportionate to any legitimate purpose and, accordingly, was 'arbitrary' for the purposes of article 9(1) of the ICCPR.

(c) Failure to refer case to the Minister for intervention again until 7 March 2017

86. After the Minister declined to consider exercising his powers under s 197AB of the Migration Act in respect of Ms RC on 23 June 2016:
- her case was escalated for review for a second time to the Community Detention team by her Case Manager on 8 August 2016 — a case review dated 10 August 2016 records that the response to that escalation was that Ms RC’s case would be reviewed three months after the last submission to the Minister
 - she continued to receive treatment for her gynaecological issues and mental health issues
 - she underwent a laparoscopic ovarian cystectomy on 19 September 2016 and was formally diagnosed with endometriosis
 - her case was escalated for review for a third time to the Community Detention team by her Case Manager on 12 October 2016
 - she was recorded by 30 November 2016 as continuing to report gynaecological issues and present with anxiety, sleep issues and personality disorder traits
 - the Department’s Community Protection Assessment Tool (CPAT) was recorded in a case review dated 12 December 2016 as having assessed Ms RC as a candidate for a BVE and that this was overridden to community detention as Ms RC and Mr RD were part of the Regional Processing Centre cohort, having arrived in Australia after 19 July 2013
 - she continued to receive treatment for her gynaecological issues and mental health issues through to March 2017.
87. It was not until 7 March 2017, more than eight months after the Minister failed to act based on the First Department Submission, that the Department again referred Ms RC’s case to the Minister for consideration for a residence determination under s 197AB of the Migration Act.
88. The Department’s response to the Commission’s inquiry does not explain the reason for this delay. From the case reviews provided by the Department:
- as at 10 August 2016, it was recorded that Ms RC’s case would be reviewed three months after the last submission to the Minister
 - the start date for ‘Ministerial Intervention – Community Det 197AB’ was recorded as 3 November 2016
 - as at 11 January 2017, the Community Detention team had advised that the Residence Determination submission for Mr RD and Ms RC was waiting for clearance
 - as at 16 February 2017, the Referrals, Submissions and Behaviour team had advised that the submission was still in clearance stage.

89. A report to the Ombudsman under s 486N of the Migration Act dated 27 February 2017 states that:

On 2 November 2016, Mr [RD] and Ms [RC]'s case was referred for assessment against the guidelines under s197AB of the Act, for a possible referral to the Minister for his consideration for a CD placement.

90. The reason for the Department's delay of a further five months beyond the three-month waiting period from the First Department Submission is unclear, particularly given the significant health issues faced by Ms RC and the escalation of her case by her Case Manager twice during this period. As set out above, the Second Department Submission is not materially different from the First Department Submission.

91. Given the Department's knowledge of Ms RC's significant and ongoing physical and mental health issues from the time of her detention, it is my view that the failure of the Department to promptly invite the Minister to again consider exercising his discretion under s 197AB of the Migration Act prior to 7 March 2017, contributed to the continued detention of Ms RC without consideration of whether that detention was justified in the particular circumstances of her case. In my view, Ms RC's continued detention was not reasonable, necessary or proportionate to any legitimate purpose in the circumstances and, accordingly, was 'arbitrary' for the purposes of article 9(1) of the ICCPR.

8 Detention and conditions of detention

92. Ms RC complains that her detention caused her 'immense physical and mental suffering' amounting to a breach of her human rights by contravening article 7 of the ICCPR. Article 7 of the ICCPR prohibits cruel, inhuman or degrading treatment.

93. In *C v Australia*,¹⁶ 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 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.¹⁷

94. The relevant question for the purposes of article 7 of the ICCPR is whether Ms RC's detention has caused her to sustain a level of psychological impairment such that it amounts to cruel, inhuman or degrading treatment.

95. The Department confirmed in its response that it was aware of Ms RC's significant mental health issues from the time she was detained. The physical and mental conditions experienced by Ms RC during the time of her detention are set out at paragraphs 71, 72, 80 and 86 above. She was regularly treated for these issues by IHMS and medical specialists throughout her detention.
96. Significantly, an IHMS psychologist reported on 25 April 2016 that Ms RC had:
long standing psychological issues that are unlikely to improve in detention and noted that with a history of impulsive self harm when irritable/angry, ongoing monitoring is deemed necessary given her presentation.
97. The Department's response to the Commission and the First Department Submission record that Ms RC experienced, and was treated for, mental health issues in Iran, prior to her arrival in Australia.
98. The First Department Submission informed the Minister that:
IHMS has advised that Ms [RC] reported a history of physical abuse at the hands of her father, which led to numerous broken bones and subsequent emotional issues. While living in Iran, at the age of 18 she attempted to overdose and at 27 she attempted self-harm by cutting. Ms [RC] has advised that she had engagement with a psychologist in Iran.
99. The Department's response to the Commission's request for information states that:
On 6 February 2016, Ms [RC]'s Psychiatrist documented that Ms [RC] has longstanding psychiatric issues including controlling her anger and temper, self-harm by scratching and not eating, as well as sleep issues. This is consistent with Ms [RC]'s own account of her mental health as she is recorded as advising her Psychiatrist numerous times that she has received treatment for mental health issues in Iran, including inpatient treatment for a deliberate drug overdose and other episodes of self-harm. On the basis of past mental health concerns, it is unclear as to whether or not her prolonged detention is the primary cause of her mental health concerns as claimed by Ms [RC] in her complaint.
100. It is clear that Ms RC's detention exacerbated her previous mental health condition, causing her to experience significant mental health concerns and associated physical symptoms which, as identified by her psychologist, were unlikely to improve while she remained in immigration detention. It is also arguable that Ms RC's detention contributed to the severity of her gynaecological issues. However, in my view, while the impact of detention on Ms RC is concerning, I am not satisfied that it rises to the level of impairment amounting to cruel, inhuman or degrading treatment required to establish contravention of article 7 of the ICCPR.

9 Recommendations

101. As a result of this inquiry, I find that the following acts of the Commonwealth are inconsistent with, or contrary to, article 9(1) of the ICCPR:
- the Department's failure, for more than a year until 10 June 2016, to refer Ms RC's case to the Minister for consideration of the exercise of his powers under ss 195A and 197AB of the Migration Act
 - the Minister's failure to consider exercising his power under s 197AB of the Migration Act to make a residence determination in respect of Ms RC when her case was first referred to him on 23 June 2016
 - the Department's failure to refer Ms RC's case for a second time to the Minister for consideration of the exercise of his power under s 197AB of the Migration Act until 7 March 2017, more than 8 months after the Minister first declined to consider exercising this power.
102. While the impact of Ms RC's detention on her physical and mental health is concerning and was well known to the Department and the Minister, I do not consider that it rises to the level of impairment amounting to a contravention of article 7 of the ICCPR.
103. 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.¹⁸ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁹ The Commission may also recommend the payment of compensation to a person who has suffered loss or damage and the taking of other action to remedy or reduce the loss or damage suffered by a person.²⁰
104. The detention review processes conducted by the Department consider whether there are any circumstances that indicate that a detainee cannot be appropriately managed within a detention centre environment. Reviews do not consider whether detention is necessary or proportionate. They focus on whether there is any need for an individual to be released from detention, rather than if there is necessity in continuing to detain the individual. Accordingly, the current review process does not adequately safeguard against arbitrary detention.

Recommendation 1

The Department should regularly conduct periodic reviews of the necessity of detention for people in immigration detention centres. The reviews should focus on whether detention in an immigration detention centre is necessary in the specific case and if detention is not considered necessary, the identification of alternate means of detention or the grant of a visa should be promptly considered.

105. In response to my preliminary view, Ms RC sought a recommendation that the Commonwealth of Australia provide a formal apology and monetary compensation to her for her ongoing detention.

106. In cases dealing with remedies for discrimination, courts have taken different views about whether it is appropriate to order a respondent found to have engaged in discrimination to apologise.²¹ Under the *Legal Services Directions 2017* (Cth), the Commonwealth is expected to behave as a model litigant in the conduct of litigation. This obligation extends to apologising where the Commonwealth is aware that it has acted wrongly or improperly.²² This inquiry is not litigation, and I do not have power to compel an apology by the Commonwealth. But I consider that an apology is a remedy that I may recommend.
107. I consider that the treatment of Ms RC warrants an apology from the Commonwealth for the delay in releasing her from closed detention in view of the clear evidence of her compelling circumstances. I recommend such an apology be made.

Recommendation 2

The Commonwealth provide a written apology to Ms RC for the delay in releasing her from closed detention in view of the clear evidence of her compelling circumstances.

10 The Department's response to my findings and recommendations

108. On 15 September 2021, I provided the Department with a notice of my findings and recommendations.
109. On 23 December 2021, 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 and recommendations made.

The Department does not agree with the finding that Ms RC's detention was not reasonable, necessary or proportionate to any legitimate purpose in the context of her particular circumstances and, does not accept the finding that Ms RC's detention was arbitrary for the purposes of article 9(1) of the International Covenant on Civil and Political Rights (ICCPR). The Department maintains Ms RC's placement in held detention was appropriate, reasonable and justified in the individual circumstances of her case.

The Department has previously advised the Commission that Ministerial Intervention policy does not provide for automatic assessment, or assessment at certain intervals, against the Minister's Intervention guidelines, or referral of cases under Ministerial Intervention powers for detainees in immigration detention. It is also not a legal requirement that a person in detention be considered for assessment against Ministerial Intervention guidelines, or be referred to a Portfolio Minister for consideration.

The Minister's powers under sections 195A and 197AB of the Migration Act 1958 (the Act) are personal and non-compellable. The Minister is under no obligation to consider a case or to make a decision on a case.

The Minister is not required to provide an explanation for a decision made under sections 195A or 197AB of the Act and is not bound by any timeframes.

Between 17 April 2015 (when Ms RC was transferred from Nauru to Australia) and 10 June 2016 (when Ms RC was first referred to the Minister), Ms RC's case was regularly reviewed by a Status Resolution Officer (SRO). At each review, the SRO assessed Ms RC's placement as appropriate and there was no information before the Department to suggest Ms RC could not be managed in immigration detention. In March 2016, Ms RC's case was escalated for consideration for a Residence Determination placement, based on advice received by the Department from the Health Services Provider. In May 2016, the Department initiated a submission for referral to the Minister under section 197AB of the Act, who declined to intervene on 23 June 2016.

On 12 October 2016, Ms RC's case was referred by her SRO to the Ministerial Intervention section for further consideration for a Residence Determination placement. On 11 November 2016, the Department commenced drafting a submission for referral to the Minister. Throughout the drafting stage, the submission was actively progressed with extensive updates and clearance processes undertaken to finalise the submission. On 7 March 2017, The Department again referred Ms RC's case to the Minister to consider intervening under section 197AB of the Act.

On 10 April 2017, the Minister agreed to intervene and Ms RC was transferred to a Residence Determination placement in the community. Throughout this period, the Department maintains that Ms RC's placement in immigration detention was justified.

The Department notes recommendation 1 and has previously advised the Commission the Department has a framework in place of regular reviews, escalations and referral points to ensure that people are detained in the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. Since 2016, when Ms RC was in held detention, the Department has continued to enhance its detention review framework and maintains that current review mechanisms regularly consider the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention.

The Department has also implemented the Community Protection Assessment Tool (CPAT) into standard practice as a decision support tool to assist the Department in assessing the most appropriate placement of a non-citizen while status resolution is pursued. In this context, placement refers to whether the non-citizen should reside in the community or in held immigration detention. The CPAT provides a placement recommendation based on a point in time assessment of the level of risk a person poses to the community, through a set of defined parameters. The CPAT also enables SROs to recommend an alternative placement for a non-citizen on consideration of additional information outside the CPAT parameters.

While the Department acknowledges recommendation 2, the Department does not consider it appropriate to issue an apology at this time.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive style with a large initial 'R'.

Emeritus Professor Rosalind Croucher AM

President

Australian Human Rights Commission

March 2022

Endnotes

- 1 International Covenant on Civil and Political Rights, 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 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212-3 and 214-5.
- 3 UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, *Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); UN Human Rights Committee, *Communication No 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) (*C v Australia*); UN Human Rights Committee, *Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (2003) (*Baban v Australia*).
- 4 UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014) [18]; UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6].
- 5 *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee in *Communication No 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) (*Van Alphen v The Netherlands*); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) (*Spakmo v Norway*).
- 6 UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; UN Human Rights Committee, *General Comment No 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (2014); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- 7 *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- 8 *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communications 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*).
- 9 UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014) [18], footnotes omitted.
- 10 UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- 11 *Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/ms-bk-ms-co-and-mr-de-behalf-themselves-and-their>>.
- 12 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958, 18 February 2014. The guidelines are incorporated into the Department's Procedures Advice Manual.
- 13 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958, 29 March 2015. The guidelines are incorporated into the Department's Procedures Advice Manual.
- 14 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, Minister's guidelines on ministerial powers (s345, s 351, s 417 and s 501j), 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the Department's Procedures Advice Manual.
- 15 *Ms BK, Ms CO and Mr DE on behalf of themselves and their families v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/ms-bk-ms-co-and-mr-de-behalf-themselves-and-their>>.
- 16 *C v Australia*, UN Doc CCPR/C/76/D/900/1999.
- 17 *C v Australia*, UN Doc CCPR/C/76/D/900/1999, [8.4].
- 18 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 19 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 20 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
- 21 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at 360 [34] (Kiefel J), cf *Jones v Toben* [2002] FCA 1150 at [106] (Branson J), referring to *Jones v Scully* (2002) 120 FCR 243 at 308 [245] (Hely J).
- 22 *Legal Services Directions 2017* (Cth), Appendix B, clause 2(i).

Further Information

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